

Volume 99 Lead Piece

The Stein Lecture

A Conversation Between Justice Ruth Bader Ginsburg and Professor Robert A. Stein[†]

RS: Thank you, President Kaler, for your welcome, and thank you, Dean Wippman, for your very kind introduction. Good afternoon, Justice Ginsburg.

RBG: Happy birthday.

RS: Welcome back to the University of Minnesota. I think the last time you were here, you were our speaker for commencement.

RBG: During a heat wave. The students didn't anticipate it. They elected to wear cap and gown. It was sweltering. Understanding their discomfort, I cut ten minutes out of my speech.

RS: Well, it was a wonderful speech, even without the ten minutes. But you've continued to be very generous to this law school. You've published articles in our *Law Review*, and, in fact, this conversation will be published in the *Minnesota Law Review*, and you continually, regularly send me speeches that you give about the rule of law. You care very much about human rights and the rule of law, and send these works to be added to teaching materials for my class on the rule of law. So thank you for your generosity.

So let's begin the conversation. You have a really important job, you know that, as a Supreme Court Justice. It's really prestigious. But I've heard you say it's not your dream job. What would be your dream job?

[†] Supreme Court Justice and Everett Fraser Professor of Law, University of Minnesota Law School. This conversation occurred at the University of Minnesota Law School on Tuesday, September 16, 2014. Copyright © 2014 by Justice Ruth Bader Ginsburg and Robert A. Stein.

RBG: If I had any talent God could give me, I would be a great diva. I would be Renata Tebaldi, Beverly Sills, or Marilyn Horne. But in grade school, the music teacher ranked me a sparrow, not a robin. I was told never to sing, only to mouth the words. So I sing in only two places. One is the shower, and the other, my dreams.

RS: Well, I think being a Justice is probably a close second. Isn't that a fair statement?

RBG: It is the best and the hardest job I've ever had.

RS: Indeed. Now, you love opera. Let's talk about that for just a minute. What are some of your favorite operas? I know you care very much about opera.

RBG: I love all operas, but most of all Mozart. One day I will tell you *Don Giovanni* is my favorite; the next day, *The Marriage of Figaro*. But I also love Verdi, Puccini, Rossini, Bellini, many others, and contemporary operas as well.

RS: Modern also.

RBG: This year in D.C. the Washington National Opera staged a stunning production of *Moby Dick* by Jake Heggie, who also composed *Dead Man Walking*. And this summer at the Glimmerglass Festival in Cooperstown, New York, I attended a performance of *An American Tragedy*, based on the Theodore Dreiser novel. Tobias Picker, another fine U.S. composer, created the work with librettist Gene Scheer.

RS: That's a wide area of interest.

RBG: My next opera outside D.C. will be the Metropolitan Opera's production of *The Death of Klinghoffer*.

RS: I'm going to come back to an opera—an unusual opera—in just a minute, but let me first ask you about your son, James, who shares your great love of music. Can you tell us what he does?

RBG: James runs an organization called Cedille Chicago. It makes exquisite compact discs. Cedille features great artists from the Chicago area who have not yet made it to the very top. Cedille gives them a boost to help them get there. Such a career choice for James might have been predicted when he was very young. James was what his teachers called—I called him lively. They called him hyperactive. But when I took him to concerts, even when he was kindergarten age, he was rapt attention, so I knew he had a passion for music. Then I made a bad mistake. His piano teacher was a woman named Miss Czerny. She was a descendant of Carl Czerny, who wrote the Czerny exercises. James resisted her discipline. James grew up with a mother, a

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big sister, a housekeeper. Too many women! I was, and am to this day, an ardent feminist, but I called the Juilliard School and asked, "Do you have a young man who teaches piano?" It worked like a charm. James continued to take lessons through college. James has no talent as a performing artist, but he has a great ear for music. The artists he records love him because he is so sensitive to their needs and appreciates their strengths.

RS: I know you're very proud of him, and I wanted to give you a chance to talk about that. And your daughter is a law professor at Columbia, and she also has a music connection, doesn't she, in her work?

RBG: Jane is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law School. She is a world-respected copyright expert.

RS: Your husband, Marty Ginsburg, sadly, passed away recently. I don't know if Marty was a great music lover, but I know he was a great cook, and I thought it would be interesting to the audience for you to share with them what the spouses of the Justices have done to honor Marty Ginsburg.

RBG: When Marty died, the spouses of the Supreme Court justices, who lunched together quarterly, decided that the most fitting tribute to Marty would be a cookbook containing some 30 of his recipes. The book is called *Supreme Chef*. It is the best-selling book in the Supreme Court's gift shop. Every section is introduced by a different spouse. Each recalls her memories of Marty. Maureen Scalia appears first. The book was the idea of Martha-Ann Alito, who, like Marty, loves food and is a very good cook. Marty had about 150 recipes on a disc. Martha-Ann made the first selection. I showed her choices to my daughter, who learned from an expert and is a very good cook herself. "Mother," she said, "those are not the recipes Daddy would have picked." I replied, "Jane, you choose which of the 150 Daddy would have chosen." She did. Under appetizers, there is a recipe for "Jane's Caesar Salad." Jane made fine choices, but she also made a place for herself in the book.

RS: Well, we'll start moving toward law, but one more question about music. When I visited with you in your chambers a couple months ago and asked you whether there any questions you wanted me to ask or any questions you didn't want me to ask, you said, "Ask me anything." But then you said, "Ask about *Scalia/Ginsburg*." What is *Scalia/Ginsburg*?

RBG: It is a comic opera.

[Applause]

RBG: It came about this way. A very talented musician, Derrick Wang—he has a music degree from Harvard and an advanced degree from Yale—wrote *Scalia/Ginsburg*. After concentrating on music, he decided it would be good to know a little bit about the law. Living in Baltimore, he enrolled in the University of Maryland Law School. In his Constitutional Law class, he read opinions, dueling opinions, by Scalia and Ginsburg. This could make an amusing opera, he thought, but also one with a serious theme. Shall I give the audience a sample—

RS: Maybe you can give us a little—why don't you tell the theme? There is a very funny theme.

RBG: The opera opens with Scalia's rage aria, Handelian in style. Justice Scalia sings, "The Justices are blind. How can they possibly spout this? The Constitution says absolutely nothing about this." I answer, telling him he is "searching for bright-line solutions to problems that don't have easy answers, but the great thing about our Constitution is that, like our society, it can evolve."

[Applause]

RBG: Halfway through, there is a scene in which Justice Scalia is confined to a dark room as punishment for excessive dissenting. I come to rescue him, entering through a glass ceiling.

[Applause]

RBG: The final duet is, "We are different, we are one. Different in our views on constitutional interpretation, but one in our reverence for the federal judiciary, for the institution that employs us, for the constitutional system the Court guards."

RS: Well, I think we should all look forward to seeing that. It is going to be performed, I believe.

RBG: It may have its first fully staged production next June at The Castleton Festival in Virginia.

RS: Well, you and Justice Scalia share a love for opera, and you also have a very strong friendship. Justice Scalia has a different judicial philosophy than you do, and yet you each have this friendship for each other. Can you talk a little bit about collegiality on the Court?

RBG: It is the most collegial place I have ever worked, beyond any law faculty, beyond the Court of Appeals for the D.C. Circuit. We're in some respects like family. And we have some customs that remind us of our mission, traditions that help keep us together. Every time we confer, and each morning before we are seated on the bench for argument, each Justice

shakes hands with every other. For the mathematically inclined, that amounts to thirty-six handshakes. And the idea is you look at your colleague as if to say, yes, you circulated a nasty dissent yesterday, but we are all in this together; we revere the Court, and we want to make sure that none of us do it any harm.

There's a good deal of togetherness among the Justices. We take part in judicial exchanges with judges in other lands. There's a famous photograph of Justice Scalia and me on a very elegant elephant in Jaipur, India. We were part of a delegation invited to visit India's Supreme Court and other courts in that country. Last September, four of us went to Ottawa for an exchange with the Supreme Court of Canada. Last winter, four of us went to Luxembourg. It's the seat of the highest court for the European Union, the European Court of Justice. We also celebrate birthdays. If you were at the Court today, Bob, the Chief would have purchased some wine, and we would have toasted you on your birthday.

RS: Well, I'm glad you and I are here, as nice as that would be, Justice Ginsburg. Now, let me ask you, do relationships ever get strained after a particularly divided decision? What about after *Bush v. Gore*,¹ where the country was strongly divided about the outcome of that case, and you and three other dissenters wrote some very strong dissents? What was the relationship between the Justices right after that case?

RBG: First, we were all exhausted. The Court agreed to take the case on a Saturday, briefs were filed on Sunday, oral argument was heard on Monday, and opinions were released Tuesday evening. Things were, I might say, tense. But I told my law clerks, "Go to Justice Kennedy's chambers and watch what was said of the decision on TV news." I chose Justice Kennedy because he was in the majority. I was in my chambers, it was quite late, when Justice Scalia called. He also voted with the majority. And he said, "Ruth, what are you doing still at the Court? You should go home and take a hot bath." Well, as I said, things were tense, but the January sitting was fast upon us, and we knew we had to work together on that upcoming sitting. So if there was tension, it was short-lived. There's never been a case like *Bush v. Gore* before or since. From the day of that decision continuing to this day, the Court has never

1. 531 U.S. 98 (2000).

cited it as precedent in any other case, and I think it will remain that way.

RS: You made an interesting comment to me earlier today, when you talked about how everything was happening so fast and that it was necessary to write opinions and get the case out quickly. And then you said that the dissenters might have been able to join in one dissent had there been more time. Could you expand on that a little bit?

RBG: Yes. We make an effort not to foist too many opinions on the public. We couldn't do it in *Bush v. Gore* because the time was so short. But if we had a few days more, there likely would have been one dissent instead of four, and the press would not have been confused, as some were, thinking that Justices Souter and Breyer were part of the majority. They were not.

RS: When Chief Justice Roberts was appointed, one of the things he said is that he wanted to develop greater consensus among the Justices. The last term of the Court that ended in June was quite remarkable, in that sixty percent of the opinions were unanimous opinions, the greatest percentage of unanimous opinions, one commentator said, since 1953—over fifty years ago only fourteen percent of your decisions were by a five-to-four vote, and in the immediate preceding year, twice as many cases were decided by five to four. Can you talk a little bit about this greater degree of unanimity? Were the cases less controversial last year? Were the decisions achieved by finding a narrower ground for the decision? What was going on in the last term?

RBG: It's true that there were fewer five-to-four decisions. Out of some seventy cases, only ten divided five-to-four. The sixty percent agreement figure is somewhat deceptive. That number includes decisions in which we all agreed on the bottom line, but in some of those cases, the Court divided deeply on how you arrived at the bottom line. So, for example, in the recess appointment case—

RS: *NLRB v. Noel Canning*.²

RBG: Yes. There were three questions. The first question, is a recess appointment permissible when Congress breaks within a session, an intra- as opposed to an inter-session recess? That was the first question. The next question, if the vacancy arises before the recess, can the President constitutional-

2. 134 S. Ct. 2550 (2014).

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ly make the appointment, or must the vacancy arise during the recess itself? Finally, the third question, if the Senate is meeting pro forma every three days, can that count as a recess?

The first two questions, I think, were, by far, the more important: Does an intra-session recess count, and can the vacancy exist before the recess? Those questions sharply divided the Court. We agreed only on the answer to the last question: When the Senate convenes every three days in pro forma sessions, does that count as a recess? On that question, all agreed that it was proper to defer to the Senate. When Congress makes rules about how it will operate internally, the Court ordinarily recognizes its prerogative to do so. We all agreed that the Senate's rule about meeting pro forma was within bounds. Therefore, because the President made the appointments to the NLRB while the Senate was meeting pro forma every three days and in theory could have conducted business, there was no recess, hence the appointments were invalid.

But the disagreement on the first two questions was so strong that Justice Scalia did something most unusual. Usually, when decisions of the Court are announced, only the majority opinion is summarized. If there is a dissent, the author of the majority opinion will announce, "Justice so-and-so filed a dissenting opinion." If one cares deeply about the dissent and wants the public to take note of the disagreement, the dissenter will summarize the dissent from the bench, as I did in the *Hobby Lobby* case.³

RS: Yes.

RBG: There may be one or two dissenting opinions summarized from the bench each term. But never before had I heard a concurring opinion summarized from the bench.

RS: His opinion announced his own view on those first two questions that you described.

RBG: Yes.

RS: Let's turn to something I know many in the audience are very interested in having us talk about. You've been such a source of inspiration and pride for many, especially women, because of your work and scholarship advancing the constitutional principle against gender-based discrimination, during the years you were a leading attorney advocate for the Women's Rights Project of the ACLU and then during the last twenty-one years on the Supreme Court. Several of the cases you ar-

3. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

gued before the Supreme Court. How many times did you argue before the Court?

RBG: Six times.

RS: Six times.

RBG: I petitioned for review many more times than that, but six times the Court granted review.

RS: Well, many of your cases are landmark cases in terms of the development of constitutional rights for women in this country. Can you talk about one or two of those cases of which you are particularly proud and the experience you had as an advocate for women's rights?

RBG: Bob, maybe as a preface I should tell the people in the audience what the world was like before that litigation.

RS: Yes.

RBG: The Equal Protection Clause says no state shall deny to any person the equal protection of the laws. That provision was added to the Constitution in 1868. A woman named Virginia Minor said, "Isn't this grand? I am a person, so I am entitled to the equal protection of the laws, and that must mean I have the right to exercise the most fundamental right and obligation of a citizen. I should be allowed to vote." The Court answer in that case, "Of course you are a person and a citizen, we understand that. But so too are children, and no one would suggest that children should have the right to vote."⁴ Until 1971, the Supreme Court never judged a differential based on gender incompatible with the Equal Protection principle. The justices believed that sex-based lines drawn by the law operated benignly in women's favor.

For example, consider a case decided in 1961, when Earl Warren was the Chief Justice.⁵ A woman, Gwendolyn Hoyt, was charged with the murder of her abusive, philandering husband. It came about this way. They had had a fight. He humiliated her to the breaking point. She spied her son's baseball bat in the corner of the room, and with all her might, seized it, hit her husband over the head, and he fell against the hard floor. That was the end of their fight, and the beginning of the murder prosecution. Gwendolyn Hoyt lived in Hillsborough County, Florida. Florida, in those days, didn't put women on the jury rolls. Gwendolyn Hoyt had this thought. "If there were women on the jury, they might better understand my state of mind.

4. *Minor v. Happersett*, 88 U.S. 162 (1875).

5. *Hoyt v. Florida*, 368 U.S. 57 (1961).

While they might not acquit me, perhaps they would convict me not of murder, but of the lesser offense of manslaughter.”

She was convicted of murder by an all-male jury. The Supreme Court agreed to consider the constitutionality of Florida’s jury service scheme. The decision went something like this: “We don’t understand what this woman is complaining about. Women have the best of both worlds. If they go to the clerk’s office and add their names to the list, they will be on the jury service roster. But if they don’t want to serve, they don’t have to.” Now, imagine how many men, if they had the option not to serve on juries, would go to the clerk’s office and sign up.

Gwendolyn Hoyt must have been nonplussed by the Court’s thinking. The Court didn’t grasp the basic point in 1961: If you are a citizen, you have obligations as well as rights, and one of those obligations is to participate in the administration of justice by serving on a jury. That’s where the “liberal” Court was in 1961. Ten years later, with Chief Justice Burger at the helm, the Court was typed “conservative.” Yet, in a succession of decisions, the 1970s Court struck down one law after another, state and federal, for differentiating impermissibly on the basis of gender. You asked for examples. Let’s start with the turning point case.

RS: Why don’t we take just one, because I want to get to the Supreme Court before too long.

RBG: Okay.

RS: Do you want to start with—which would be the turning point? *Reed*?

RBG: Yes, *Reed* was the turning point case.⁶

RS: Why don’t you talk about *Reed*?

RBG: Sally Reed was a woman who made her living by taking care of elderly or infirm people in her home. She was not—well, she probably didn’t even know what the word “feminist” meant. She had a son. She and her husband divorced. When the boy was “of tender years,” she was given custody. When the boy reached his teens, the father applied to the family court and said, “Now the boy needs to be prepared to live in a man’s world, so I should be his custodian.” The court so ordered. Sally thought that was a dreadful mistake, and she turned out to be right. The boy got into trouble, spent time in a youth detention facility. When released, he suffered from de-

6. *Reed v. Reed*, 404 U.S. 71 (1971).

pression. One day he used one of his father's many guns to commit suicide.

Sally wanted to be appointed administrator of his estate, not for any economic reason—the estate consisted of a small bank account, a guitar, a record collection, that was about it. Her former husband applied to be appointed administrator a couple of weeks later. Sally's application was first in time, so she expected to get the appointment. The probate judge told her, "Sally, I'm really sorry, but the Idaho Code leaves me no choice. It says, 'As between persons equally entitled to administer a decedent's estate, males must be preferred to females.'" On her own dime, Sally Reed took this case through three levels of courts in Idaho. When the Idaho Supreme Court upheld the law, one of my colleagues at the ACLU said, "This is the case that will wake them up. This will be the turning point case." He was right. A unanimous Burger Court held Idaho's male-preference law unconstitutional.

Sally Reed was an everyday woman. She thought she had suffered an injustice. She also believed our judicial system could redress her grievance.

RS: Well, this is Ruth Bader Ginsburg, Attorney Advocate, before the Supreme Court in a case holding the Equal Protection Clause applies to women—

RBG: And men, because we—

RS: And men.

RBG: I think we should describe Stephen Wiesenfeld's case.⁷ It followed a few years after Sally Reed's case. Stephen's wife was a public school teacher. She became pregnant. It was a healthy pregnancy. She taught into the ninth month. She went to the hospital to deliver. The doctor came to the waiting room and told Stephen, "You have a healthy baby boy, but your wife died of an embolism." Stephen vowed that he would not work full-time until his child was going to school full-time. There were Social Security benefits, he heard, for the sole surviving parent of a child under the age of twelve, so he applied for those benefits. The Social Security office employee said, "I'm sorry, Stephen, these are mothers' benefits. They are not available to fathers."

Stephen sent a letter to the editor to his local newspaper in Edison, New Jersey. It read to this effect. "I've heard so much about women's lib. Let me tell you my story." And the tagline

7. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

was, “Tell that to Gloria Steinem.” It happened that a woman I knew on the Rutgers faculty, the Romance language faculty, lived in the same town, read the letter, called me and said, “That isn’t right, is it?” I replied, “Suggest to Mr. Wiesenfeld that he get in touch with the New Jersey affiliate of the ACLU.”

The Supreme Court reached a unanimous judgment declaring that the benefits in question had to be available for caring fathers just as they are for caring mothers. In stating why they reached that judgment, the justices split three ways. The majority, in an opinion by Justice Brennan, said, “Of course we understand where this discrimination begins. It begins with the woman as wage earner. She pays the same Social Security taxes as a wage earning man, but they don’t yield her family the same protection.” A few justices thought the discrimination worked against men as parents because they did not have the opportunity women have to care personally for their children when they were left the sole surviving parent. And one justice, who later became my Chief, he was then Justice Rehnquist, said, “This is totally arbitrary from the point of view of the baby. Why should the baby gain the personal care of a widowed parent when that parent is female but not when the parent is male?”

The *Wiesenfeld* case vividly illustrated how gender lines in the law can be bad for everyone—bad for women, bad for men, and bad for children.

RS: Well, let me move us to the Supreme Court. I would like you to talk about some of the landmark cases that you have been involved with, and the one that comes first to mind is the Virginia Military Institute case, the VMI case, in 1996.⁸ You had been on the Court only about three years at that point, and you wrote the majority opinion in a seven-to-one decision, in which you said, “The longstanding male-only admission policy of Virginia Military Institute violated the Equal Protection Clause of the Constitution.” You wrote that a proposed parallel program for women, to be called the Virginia Women’s Institute for Leadership at Mary Baldwin College, would not provide women with the same type of rigorous military training, facilities, courses, and so forth. And so this is one of the landmark cases in Supreme Court history on gender discrimination. Can you talk a little bit about that landmark case and how you, a

8. *United States v. Virginia*, 518 U.S. 515 (1996).

relatively new member of the Court, led the Court to that decision?

RBG: Seniority really counts at the Court, and the most senior person, the one most likely to be assigned the opinion, was Justice O'Connor. But Justice O'Connor thought I should write the opinion, and that's how I got the assignment. Many people asked me, "Why would you want young women to go to that harsh military academy?" I replied, "Well, I wouldn't want to go there, my daughter wouldn't want to go there. You probably would not want to go there, although you're male."

But there are some women who do want to go there, and are qualified academically and are physically fit. The whole point was that the State shouldn't put artificial barriers in the way of people who are ready, willing, and able to take advantage of an opportunity. I must say, most of the faculty at VMI were on the side of change. They saw the admission of women as a way to upgrade the school's applicant pool.

RS: Let's talk about the Lilly Ledbetter case.⁹ This was a 2007 opinion, where the majority held that the employers can't be sued under Title VII of the Civil Rights Act of 1964 over gender pay discrimination if the claims are based on decisions the employers made more than six months before the complaint was brought. And you wrote a very strong dissent. I think that's one of the cases where you read your dissent from the bench.

RBG: I summarized the dissent from the bench. I didn't read all thirty or so pages.

RS: Yes, read the summary, right. But why did you dissent? And then, interestingly, this became an issue in the presidential campaign in 2008. There was an act introduced in Congress, the Lilly Ledbetter Act.

RBG: Fair Pay Act.

RS: Fair Pay Act. And Congress eventually passed the Lilly Ledbetter Fair Pay Act.¹⁰

Talk a little bit about the case. And did you derive some special satisfaction from Congress interpreting the law the way you did in your opinion?

RBG: Let's provide some background. Title VII prohibits discrimination on the basis of race, religion, national origin, and sex. It also requires a complainant to file her complaint

9. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

10. 42 U.S.C. § 2000a, *et seq.* (2012).

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with the Equal Employment Opportunity Commission within 180 days of the discriminatory incident.

Lilly Ledbetter was working as an area manager in a Goodyear Tire plant. She was the first woman ever to have held such a job in the company's Alabama plant. Lilly wasn't told what the male area managers were paid. One day, after she had been working at the Goodyear plant a dozen or so years, she found a slip of paper with a series of numbers in her mailbox. The numbers were the pay of every other area manager, with Lilly at the very bottom. She earned less than the newest man on the job. So she got up her courage, and brought a Title VII lawsuit. The argument that the Court accepted, the argument made by the Goodyear Tire Company, was "Lilly sued much too late. Title VII gave her only 180 days to file a charge against Goodyear."

The Court had a blindspot. When a woman holds a job that previously had been done only by men, she doesn't want to be seen as a troublemaker. She doesn't want to rock the boat. And besides, suppose she had sued very early on. We know what the defense would have been. The defense would have been, "It has nothing to do with Lilly being a woman; she just doesn't do the job as well." Then, after she's been working there year after year receiving good performance ratings, that defense, that she's not as competent as the men, vanishes. So she has a winnable case. But the Court said she sued too late. Her view was, "How could it be too late? Every time I get a paycheck, the discrimination is renewed, so I should have 180 days from any paycheck to begin my case."

RS: Yes.

RBG: "I thought that that's what Congress meant in Title VII." But if there was any doubt about it, my tagline was, "The ball is now in Congress's court to correct the error into which my colleagues have fallen." With record speed, Congress passed the Lilly Ledbetter Fair Pay Act. Large majorities on both sides of the aisle voted for it. The Act became one of the first pieces of legislation that President Obama signed when he took office.

[Applause]

RS: The time is fleeting, so I'd like to ask you to talk about a case even more recently. The last case decided in the last term of the Court, on the very last day, was the *Hobby Lobby* case, and in that case, a five-to-four majority of the Court held that a closely held not-for-profit corporation could be exempt from a law that its owners sincerely religiously objected to if

there was a less restrictive means of furthering the law's purpose. And in this particular case, Hobby Lobby argued for exemption from the contraceptive mandate in the Affordable Health Care Act, which required employers to cover certain contraceptives for their female employees, and the owners said to do so would violate their sincerely held religious beliefs.

You wrote a very strong dissent in that case, in which you began with these words. "In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law, saving only tax laws, they judge incompatible with their sincerely held religious beliefs." And then you went on to say—you warned the majority, "The Court, I fear, has ventured into a minefield."

Why do you feel that the opinion of the majority is of startling breadth, and what is the minefield you're warning your colleagues about?

RBG: Until the *Hobby Lobby* case, it was understood that if you are engaged in commerce, you must be subject to the rules applicable to everyone else engaged in the same trade. I compared the exemption the government had provided for religious corporations and said that exemption is right and proper because it applies to people who share the same faith, the same belief. But a corporation in business for profit employs hundreds, thousands of people who do not share the genuinely held belief of the business owners, and it is those people that the law aims to protect. I borrowed the expression of a highly regarded law professor. Explaining the limits on our freedoms, he said, "I have a right to swing my arm, until it hits the other fellow's nose." The idea was that an employer in business for profit should not be able to impose the employer's religious belief on a workforce that does not share that belief.

As to the minefield, well, let's see. Some religions reject blood transfusions, some vaccinations, some any medication that comes from any part of a pig. Suppose employers with a genuinely held religious belief against that medical device or practice said, "I'm going to leave that out of the health coverage I provide." I took this further example from a real case. There is a sect that believes women should be subservient to men, in particular, a woman should not work without her father's permission, or if she's married, her husband's permission. Must there be an exemption from Title VII for an employer who holds that belief?

Or to take one more, another actual case, one I sat on when I was on the U.S. Court of Appeals for the D.C. Circuit. It involved a religion, the Ethiopian Zion Coptic Church, that has as its sacrament marijuana. But unlike peyote and the Native American Church, where the peyote is ingested only at religious ceremonies and in limited amounts, members of this sect believe that marijuana must be smoked all day every day. They wanted the government to respect and accommodate that belief. That's what I meant by the minefield.

RS: Only three days after the *Hobby Lobby* case—the last case of the term—the Supreme Court issued an unsigned order in a case involving Wheaton College, an evangelical college in Illinois. In this unsigned Order, the Court said that pending a full review of the case, Wheaton College, which objected to paying for contraceptives in its healthcare plan because of its beliefs, did not have to fill out the form that the Court in *Hobby Lobby* had said three days earlier was a less restrictive way to recognize an employer's sincerely held religious views because filling out the form would violate their religious views.

Now, the reason I'm bringing this case up, is that it is noteworthy in that a dissent was filed to this Order by all three women on the Court. You were the senior judge in the minority, and you assigned that dissenting opinion to Justice Sotomayor, and she wrote a strong dissent in which she said, "Those who are bound by our decisions usually believe they can take us at our word," as in *Hobby Lobby*, and she went on to say, "Not so today."

Now, I read some commentary about that Order that suggested that the male Justices just didn't understand the issue, but I want to hear what you have to say. Does that case raise an issue in which the gender of the Justices affect the way the Justices saw the issue?

RBG: We all come to the craft of judging with our life experience. Part of my life experience is growing up female. And perhaps there's something to what you suggest, Bob, but as long as we live, we can learn. My best example of that is my old Chief, Chief Justice Rehnquist, who, apart from Stephen Wiesenfeld's case, dissented in every case in which I prevailed in the 1970s.

The Family Medical and Leave Act,¹¹ a very important piece of legislation, was written to home in on the needs of a

11. 29 U.S.C. § 2601, *et seq.* (2012).

woman as wage earner. What does she need to be able to hold her job? When her child gets sick, she needs leave time, so too, when her husband gets sick, or her elderly parent, or the woman herself. That law was argued to be beyond the power of Congress to pass, an invasion into the State's domain. Chief Justice Rehnquist upheld the Act in an opinion recognizing that what Congress had done was something new. Congress had focused on the woman as worker, but of course Congress gave the same benefits to men who care for a sick wife or elderly parent. The opinion was so strong, so well-reasoned, when I took it home and showed it to my husband, he said, "Ruth, did you write that?"

As I just said, as you live, you can learn. Chief Justice Rehnquist's elder daughter had two girls. Rehnquist's daughter was divorced, and the Chief paid special attention to the grandchildren. He spent quality time with them, loved them dearly as they loved him. I think that Chief Justice Rehnquist had learned something in the process. When writing the decision upholding the Family Medical and Leave Act, he may have been thinking about how he would like the world to be for his granddaughters.

RS: Dean Wippman touched on this in the opening introduction. You've become something of a social media rock star. All of you, after this lecture, should go out and look at the blog, *The Notorious*—

RBG: Tumblr.

RS: *The Notorious RBG*. You'll see T-shirts, hoodies, Notorious RBG—I think there's even a rap song, "Notorious RBG." Also others seen via the internet, "You Can't Spell Truth Without Ruth," and "What would Ruth do?"

[Applause]

RS: How do you feel about this new notoriety that you suddenly have?

RBG: My grandchildren love it. I confess that when Notorious RBG first aired, my law clerks had to tell me where Notorious RBG came from. But now I know. I have a supply of Notorious RBG T-shirts. I would have brought one for you if I knew it was your birthday, Bob.

[Applause]

RBG: The first T-shirt I received was from the National Association of Women Judges. When I was appointed to the Court, the NAWJ held a reception for Justice O'Connor and me. They gave her a T-shirt that reads, "I'm Sandra, not Ruth," and

one to me, “I’m Ruth, not Sandra.” They were quite right in anticipating confusion. While the two of us served on the Court together, invariably one lawyer or another would call me Justice O’Connor. They knew there was a woman on the Court. For twelve years, Justice O’Connor was the lone woman. So when they heard a woman’s voice, they assumed it must be Justice O’Connor, although we don’t look alike and we don’t speak alike.

The next T-shirt appeared after *Bush v. Gore*. It showed my face with “I Dissent” written beneath. Well, people remarked about that because most justices use the tagline, “I respectfully dissent,” or, “With respect, I dissent.” They didn’t notice that I never used “respectfully dissent.” Take a dissenting opinion—I won’t disclose the name of the author—stating, “The Court’s opinion is profoundly misguided.” Is that a respectful dissent? Or consider another comment by a dissenter, “The Court’s opinion is not to be taken seriously.” How can you respectfully dissent after saying that? What I do, if the lower court is reversed but I think that court got it right, is to write—“For these reasons, I would affirm the decision of the such-and-such” court.” Or, if the Court upholds the decision and I think it should have been reversed, I write, “For these reasons, I would reverse the decision.”

RS: Time is fleeting, but I want to raise a couple of future issues here, if you would comment on it. In the last year, there have been decisions in many state and federal courts on the constitutionality of bans on same-sex marriage, and these decisions have not been all consistent, although the vast majority have struck down the ban. And I think there are now seven cert petitions pending in the Supreme Court asking the Court to take up a case. I know you can’t talk about how you would rule in a future case, but can you comment on the issue generally? Do you think this issue will be coming before the Court in the near future? And do you think it’s desirable for it to come as soon as possible?

RBG: The term before last, the Court held the Defense of Marriage Act, a federal law, unconstitutional. Paired with that case was one asking the Court to hold that California’s ban on same-sex marriage was unconstitutional. We didn’t decide that case, we returned it on a procedural ground, so the constitutionality of same sex marriage bans remains an open question.

So far, the Federal Courts of Appeals have answered the question the same way, holding bans on same-sex marriage un-

constitutional. There is a case presenting the question still pending before the Court of Appeals for the Sixth Circuit. If that court should disagree with the others, there will be greater cause for the Supreme Court to take up the question. But when all of the Courts of Appeals are in agreement, there's no similarly urgent need to decide the matter at once. It remains to be seen what the Sixth Circuit will rule and when it will rule. Sooner or later, yes, the question will come to the Supreme Court.

The remarkable thing is how attitudes in this country have changed on that issue. I attribute the change to gay people standing up and saying who they are. When they did that, people looked around, it was their next-door neighbor, of whom they were very fond, it was their child's best friend, even their child. So people began to understand and realize their own prejudices and the irrationality of those prejudices. I think people close to us saying who they are made a huge difference.

RS: Let me ask you about another future issue, or at least an issue that periodically has come up. Several Justices in recent years, after they have served on the Court for many years, offered some comments about capital punishment, and I'm thinking of comments made by Justice Blackmun and also Justice Stevens in an opinion. Again, you're not in a position to comment on how you would handle a specific case, but having served on the Court for many years and having had many capital cases come before the Court, can you share your thoughts about capital punishment?

RBG: Justice Stevens presented his current view in a book called *Six Amendments*, published just this year. In it, he discusses six changes he would make in our Constitution. Number one, he would permit control of money spent in political campaigns. The death penalty chapter is of special interest. Justice Stevens, like Justice Blackmun, had voted to restore the death penalty after there was a hiatus with no executions for some years. He now holds a different view. Justices Brennan and Marshall, in their later years, said, "We don't want to participate in this process. We think the death penalty is unconstitutional under any and all circumstances." That position disabled them from participating in death penalty decisions case by case. They couldn't influence the outcomes reached by the Court.

When I became a member of the Court, death penalty cases were new to me. I had been a judge of the Court of Appeals for

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the D.C. Circuit for thirteen years, during which the District had no death penalty. I had to make a decision whether to participate in these cases. I chose to participate, which means respect the precedent until it is overruled, while trying to prevent expansion of existing tolerance of death sentences. I've said many times—and I think this is true for all of my colleagues. If I were queen, there would be no death penalty. But in our system, that decision has been left, so far, to the individual states.

RS: We're getting right to the end, but I think we should address the fact of your presence on the Court, and Justice O'Connor's. When you came on the Court, you served with Justice O'Connor until her retirement, and then I recall you saying, at a time when I was present, after she retired, "I miss Sandra terribly." I think those were your words. And now you have two colleagues who are women Justices, Justice Sonia Sotomayor and Justice Elena Kagan. How, if at all, is the Court different with three women Justices than it was when you were the only woman Justice on the Court? And to tag a question on, do you foresee a time when there will be a majority of women Justices on the Court?

RBG: When Sandra left the Court and I was the lone woman, altogether the wrong image of the Court was projected to the public. There were eight men, all of a certain size, and one small woman. Now, because of my seniority, I sit toward the middle of the bench, Justice Kagan is on my left, Justice Sotomayor, on my right. We look like we really belong there. We're one-third of the Court. We're not one-at-a-time curiosities. No one has called me Justice Sotomayor or Justice Kagan. And not this year, but last year, Justice Sotomayor prevailed over Justice Scalia as the justice who asked the most questions at oral argument. My newest colleagues are lively women, not shrinking violets.

RS: Yes.

RBG: When will there be enough women on the court? My answer, "When there are nine." And some people find that answer astonishing.

[Applause]

RBG: I remind them that for generations, only men composed the Court. Nobody thought there was anything wrong with that. Our neighbor to the north, Canada, has the same number of justices, nine. Four are women, and their Chief Justice is a woman. So we're moving in the right direction.

QUESTION AND ANSWER SESSION

Q: Justice Ginsburg, now you have an opportunity to be a role model for a lot of people who are considering entering the legal profession, and I would consider myself one. When you were considering becoming a lawyer and also a judge, what sort of things influenced you?

RBG: What kind of things—

Q: Well, when you were considering becoming a lawyer, what made you think, oh, I should do that?

RBG: I was going to college at a bad time for our country. It was the heyday of Senator Joe McCarthy from Wisconsin, who saw a Communist in every corner. There was a Red Scare in the country. People were being hauled before the House Un-American Activities Committee and the Senate Internal Security Committee, and were asked about some socialist organization to which they belonged in the 1930s when they were young. I had a professor for constitutional law who pointed out to me that lawyers were standing up for these people and reminding our Congress that there is a First Amendment and there is a Fifth Amendment and that we were straying far from our basic values.

Then it occurred to me, well, the legal profession gives you a great opportunity. You can work and be paid for the work, but you can also use your skill to make things better for other people. And that turned me on. Law was a profession that enabled one to aid and repair tears in the community law exists or should exist to serve. That realization encouraged me to take the Law School Aptitude Test. My family was not pleased about that career choice because nobody wanted lady lawyers in those days. There was no Title VII. Discrimination against women in occupational endeavors was up front, open, undisguised. But then I married my life's partner the same month I graduated from college. At once, my family's attitude changed. It became, "Well, if Ruth wants to be a lawyer, let her try. If she fails, she will have a man to support her."

RS: Well, thank goodness you made that choice. A question on that aisle.

Q: Thank you. Justice Ginsburg, thank you so much for your tremendous service. I wanted to ask if you could please comment on the *Citizens United*¹² decision and some of the Court's thinking and implications of that.

12. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

RBG: My answer, read Justice Steven's dissent.

[Applause]

RBG: The Bipartisan Campaign Finance Act was passed overwhelmingly by Congress. People in the political arena, I thought, understood better than the justices what money can buy. I thought the Court should have deferred to the political branches that passed that law. I fully expect that someday, we will have sensible campaign finance regulation that the Court will uphold. I hope that will happen in my lifetime. As each year goes by, we see ever more clearly the pernicious effects of huge campaign contributions. Large contributions are bound to give the donor access to a legislator that most of us do not have. And bear in mind that the legislator whose campaign a big donor contributes to today is going to run again two or six years later and look again to the same funders. In between elections, that legislator's door will be open to big money donors. He or she may be unduly influenced by the wishes of top dollar supporters. Eventually, I believe, the pendulum will swing the other way and we will have sensible curbs on spending in elections.

RS: You made a comment earlier today that I thought was really quite interesting, and I wish you'd share with the audience what your husband, Marty, said was a symbol of the country. This is interesting.

RBG: He said, "The true symbol of the United States is not the bald eagle; it is the pendulum. When things swing too far in one direction, the pendulum will start to move in the opposite direction."

RS: Wise words from Marty. Question from this side.

Q: Something I've wondered for years. Why does Justice Thomas not ask any questions, ever?

RBG: Let me compare what it was like in the '70s when I was arguing before the Court. I was able to get out sometimes a whole paragraph before a question emerged. Nowadays, a lawyer will be lucky if she can get out two sentences before the questions start. One reason Justice Thomas doesn't ask any questions is he thinks the rest of us ask far too many questions. He thinks the advocates should have a fair chance to present their case.

RS: You said that Justice Sotomayor got the record for asking the most questions the term before last. Did Justice Scalia regain the honor?

RBG: Yes, he did. He regained the honor, Sonia was in third place, Justice Breyer came in second.

RS: Question on this side.

Q: Justice Ginsburg, thank you so much for being here.

RBG: I like your T-shirt.

Q: I thought that you might, so I wore it today just for this. It's a Notorious RBG T-shirt. So my question for you is I just read a—I believe it was in *The New York Times*—an article analyzing how the justices cite to amicus briefs, and how sometimes the amicus briefs themselves are lacking in citations, or maybe some of the factual statements or studies cited are questionable, and so I'm just wondering, what is your personal philosophy on what makes a persuasive amicus brief and when you choose to cite to amicus briefs in your decisions?

RBG: In the most-watched cases, the Court receives dozens of amici briefs. Most of them are what I call me-too briefs. They largely repeat what is in the briefs of the party they support. My law clerks have the job of reading all of the friend of the court briefs. I read always all of the briefs filed by the parties. The clerks sort the amici briefs into three piles. The largest pile is labeled "Skip." Another, labeled "Skim," will note an interesting argument, say, on pages ten to sixteen of an amicus brief. The smallest pile by far is labeled, "Read." Briefs in that slim pile say something missing from the parties' briefs. I wish we could persuade our friends to join together in filing one brief instead of duplicating each other's filings. But sometimes an amicus brief can be tremendously influential. For example, the amicus brief filed by the top brass of the Armed Forces, leaders of the military academies.

RS: Was that in *Grutter*?¹³

RBG: Yes, in the Michigan Affirmative Action case. They told us it was intolerable when African Americans were overrepresented among enlisted members but rarely seen in the officer corps. We cannot go back to that kind of military, they said. We must have African Americans in numbers in leadership posts. It would be devastating to take away from our military academies the right to continue the highly successful Affirmative Action programs they have maintained for years. That brief was indeed influential.

RS: We've come to the time we were going to adjourn. There's quite a few people lined up, but let me take a question

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

from this side, a question from the other side. And then, young man, did you have a question you want to ask also? Maybe that would be a nice one to finish with. Please go ahead and ask your question. We'll call on him next.

Q: Thank you, Your Honor. I have a question relating to the *Hobby Lobby* decision. What do you think about the developments after the contraception decision? Several religiously affiliated schools and organizations said that on similar sincerely held religious beliefs, they weren't going to hire or educate or promote gay people. What do you think about that?

RBG: You are asking about an employer who maintains, "I will have no gay people in my workforce." That is a question likely to come before the Court sooner or later. Perhaps Congress will be take the lead and enact an explicit ban on discrimination based on sexual orientation. Maybe not. And if the issue comes to the Court, I can't tell you how I think it would be resolved. There's a well-known Ginsburg rule set when I was before the Senate Judiciary Committee at the hearing on my nomination. "You can ask me about anything I have written, any opinion released during my thirteen years serving on the D.C. Circuit, any article I wrote as a law teacher, but you can't ask me a question that will signal how I would decide a case that very well may come before the Court."

RS: I think that's the minefield you were warning people about. Let's take one last question on this side, and then we'll have one more on the other side.

Q: Thank you. First, as President of the Women's Law Student Association, I just want to say thank you again, we're so happy you're here. As a pioneer woman in the legal industry, what is a piece of advice you have for us females in the room just at the beginning of our careers?

RBG: What is the advice I would give to today's women law students? Be as fired up as the students I taught in the '70s. You know, in the '70s, many women in law school joined women's law associations and took part in propelling the social change underway in society. In the '80s and '90s, that activity seemed to recede. Some young women today seem to believe it's not their problem, I can do anything I want. They lose sight of poor women who aren't able to do anything they want.

Consider, for example, restrictions on abortion. There will not be a time again in the United States when a woman of means does not have access to a safe abortion. Some states will never go back to the way it once was. There were, after all, four

states at the time of *Roe v. Wade*¹⁴ that allowed abortion in the first trimester if that's what the woman wanted. So, today, take a worst case. Say *Roe v. Wade* is overruled. For any woman who has the money to buy a plane ticket or bus ticket, it's not a problem. She'll be taken care of. It's the women who don't have the wherewithal to avoid their State's restrictions by going elsewhere who will suffer.

But I am beginning to see signs that women are waking up—perhaps decisions like *Hobby Lobby* are some help in that regard—and organizing to improve women's opportunities as ardently as women did in the '70s. In the '70s, women were striving to end the closed-door era. Women couldn't do this or that, they couldn't be police officers, firefighters, or airline pilots, couldn't work at night. Those restrictions are gone. They no longer hold women back, but what remains is a more subtle form of discrimination. I call it unconscious discrimination.

A telling example is the symphony orchestra. When I was growing up, one never saw a woman in a symphony orchestra, except sometimes as the harpist. Someone had a brilliant idea—let's drop a curtain so the auditioners don't know who is auditioning. Overnight, women gained places in symphony orchestras. People once sure they could tell the difference between a woman playing and a man got it all wrong and confessed error. Even Howard Taubman, who was the *New York Times* music critic, once thought, "You can blindfold me, and I'll know if it's a woman at that piano or a man." He failed the dropped curtain test. For many, unconscious bias remains an obstacle. But the more that women are out there doing things, the more permanently barriers will fall, and all of us will be better off for it.

RS: We have a final question on this side from a young man. What is your question?

Q: Hello, Justice Ginsburg. So I've been very interested in your work on the Court, and I was really wondering what you thought would define—what issues would define the Court going into the future.

RS: I think he wants to know what issues will be the issues of the future when he becomes a lawyer.

RBG: How old are you now?

Q: Twelve.

14. 410 U.S. 113 (1973).

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RBG: The environment will be a major issue. We are learning more and more about the damage we are doing to the planet on which we live. There has been some reluctance on the part of legislators to act in this area. But saving our planet will be an issue of importance in your time.

Technology will also loom large. We decided last spring a case involving a man who was arrested lawfully.¹⁵ The police took his cell phone, searched its contents, and found evidence that he had been doing bad things. The rule had been well established that anything an arrested person carries on his person, in his pocket—say a wallet or a diary—the police can seize and inspect without a warrant. But cell phones are different in kind. They are not like a wallet or a diary. You can have on your cell phone more information than you could pack into any file cabinet. The Court dealt with that new technology and held that the police cannot, without a warrant, inspect an arrestee's cell phone. We will continue to get novel questions as technology develops.

And discrimination cases will still be with us. I'd like to say I could see a future when discrimination will no longer infect economic and social interactions, but we have a way to go in that regard.

In any case, I think the law can be a tremendously fulfilling profession, and I'm glad to know that you aspire to be a lawyer.

RS: What a wonderful note to end on, talking about the future.

[Applause]

RS: Please join me in thanking Justice Ginsburg.

15. *Riley v. California*, 134 S. Ct. 2473 (2014).