

Scalia/Ginsburg:

A (Gentle) Parody of Operatic Proportions

an American comic opera in one act by DERRICK WANG^{*}
Libretto by the composer

inspired by the opinions of U.S. Supreme Court Justices
RUTH BADER GINSBURG and ANTONIN SCALIA

and by the operatic precedent of
HÄNDEL, MOZART, VERDI, BIZET, SULLIVAN, PUCCINI, STRAUSS, et al.

Characters

Justice Ruth Bader Ginsburg	soprano
Justice Antonin Scalia	tenor
The Commentator, <i>a celestial bureaucrat</i>	bass

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LIBRETTO

TIME: The present.

SCENE: A chamber, somewhere in the Supreme Court of the United States. A statue is noticeable.

1. Opening (Orchestra)

2. Aria: “The Justices are blind!” (Scalia)

Rage aria, after Händel et al.: Furioso (ma non castrato).

Opening alarum.¹ Enter JUSTICE SCALIA, in a power suit and high Händelian dudgeon.

SCALIA:

This court’s so changeable²—

As if it’s never, ever known the law!³

1. Cf. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 512 (1993) (“Only one unfamiliar with our case law will be upset by the dissent’s alarum that we are today setting aside ‘settled precedent.’ . . .”); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 (2009) (“[W]e must assure the reader of the falsity of the dissent’s opening alarum . . .”).

2. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40 (Amy Gutmann ed., 1997) [hereinafter *SCALIA, A MATTER OF INTERPRETATION*] (“It certainly cannot be said that a constitution naturally suggests *changeability*; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.” (emphasis added)); see also *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (“Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the *changeable* philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” (emphasis added)). Changeability is the subject of one particularly well-known operatic aria. See GIUSEPPE VERDI & FRANCESCO MARIA PIAVE, *La donna è mobile* [*Woman is changeable*], in *RIGOLETTO* act 1, sc. 11 (1851), available at <http://perma.cc/3KX-ZCBG>.

3. Cf. GEORGES BIZET, HENRI MEILHAC & LUDOVIC HALÉVY, *Habañera* [*L’amour est un oiseau rebelle*] [*Habañera* (*Love is a rebellious bird*)], in *CARMEN* act 1, sc. 5 (1875), available at <http://perma.cc/6LTM-YJAH> (“L’amour est enfant de Bohême, / il n’a jamais, jamais connu de loi”

SCALIA (cont'd):*(Rage aria)*⁴

The Justices are blind!

How can they possibly spout this—?

The Constitution says absolutely nothing about this,⁵This right that they've enshrined⁶—

When did the document sprout this?

The Framers wrote and signed

Words that endured⁷ without this;

The Constitution says absolutely nothing about this!

(Reverent)

We all know well what the Framers did say,

And (with certain amendments) their wording will stay,⁸

And these words of our Fathers limit us,

For we are unelected,⁹

[“Love is a gypsy’s child, / It has never, ever known the law”].

4. See, e.g., GEORGE FRIDERIC HANDEL & NICOLA FRANCESCO HAYM, *Empio, dirò, più sei* [*I say, you are a villain*], in GIULIO CESARE IN EGITTO [JULIUS CAESAR IN EGYPT] act 1, sc. 3 (1724) (HWV 17), available at <http://perma.cc/CWU7-4GGU>.

5. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring) (stating that “the Constitution says absolutely nothing about” whether the power of a woman to abort her unborn child is a liberty protected by the Constitution).

6. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“Today [this Court] enshrines the notion that no substantial educational value is to be served by an all-men’s military academy” (emphasis added)); *id.* at 597 (“The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.” (emphasis added)). *Contra* *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) (“The Establishment Clause, upon which Justice Stevens would rely, was enshrined in the Constitution’s text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?” (emphasis in original)); *Dist. of Columbia v. Heller*, 554 U.S. 570, 584–85 (2008) (“Nine state constitutional provisions written in the 18th century or the first two decades of the 19th . . . enshrined a right of citizens to ‘bear arms in defense of themselves and the state’ or ‘bear arms in defense of himself and the state.’” (emphasis added) (citations omitted)); *id.* at 634–36 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.” (emphasis added)).

7. See, e.g., Ushma Patel, *Scalia Favors “Enduring,” Not Living, Constitution*, PRINCETON UNIV. (Dec. 11, 2012, 1:00 PM), <http://perma.cc/M7R2-3G9H> (“I have classes of little kids who come to the court, and they recite very proudly what they’ve been taught, ‘The Constitution is a living document.’ It isn’t a living document! It’s dead. Dead, dead, dead! Scalia said, drawing laughs from the crowd. ‘No, I don’t say that. . . . I call it the enduring Constitution. That’s what I tell them.’”).

8. Cf. *The First Nowell*, in CHRISTMAS CAROLS NEW & OLD (Henry Ramsden Bramley & John Stainer eds., ca. 1878) (“The First Nowell the Angel did say, / Was to certain poor shepherds in fields as they lay . . .”).

9. See *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010) (Scalia, J., concurring) (“Justice Stevens abhors a system in which ‘majorities or powerful interest groups always get their way’ . . . but replaces it with a system in which unelected and life-tenured judges always get their way.” (citation omitted)); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring) (“We can now look forward to at least another Term with carts full of mail from the public, and streets

SCALIA (cont'd):

And thus, when we interpret them,
Rigor is expected.¹⁰

(Bewildered)

Oh, Ruth, can you read? You're aware of the text,
Yet so proudly you've failed to derive its true meaning,¹¹
And never were so few
Rights made so numerous—
It's almost humorous
What you construe!¹²

(With increasing fervor)

Oh, well; oh, well; oh, well; oh, well:
You are the reason I have to rebel!¹³

(Aria da capo, with vocal ornamentation)

Though you are all aligned
In your decision to flout this,
The Constitution says absolutely nothing about this—
So, though you have combined,
You would do well not to doubt this:
Since I have not resigned,¹⁴

full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.”).

10. Cf. HÄNDEL & HAYM, *Svegliatevi nel core* [Awaken in my heart], in GIULIO CESARE IN EGITTO, *supra* note 4, at act 1, sc. 5 (“L’ombra del genitore / accorre a mia difesa / e dice: a te rigor, / Figlio, si aspetta.” [“The specter of [my] father / Rushes to my defense / And says: from you, severity, / [My] son, is expected.”]).

11. Cf. FRANCIS SCOTT KEY & JOHN STAFFORD SMITH, *The Star-Spangled Banner* (1814) (“O! say can you see by the dawn’s early light, / What so proudly we hailed at the twilight’s last gleaming”).

12. Cf. GEORGE FRIDERIC HÄNDEL, *Ombra mai fu*, in SERSE [XERXES] act 1, sc. 1 (1738) (HWV 40), available at <http://perma.cc/6XRJ-AUK5> (Händel’s “Largo”) (“Ombra mai fu / Di vegetabile, / Cara ed amabile / Soave più.” [“Never was a shade / Of any plant / Dearer and lovelier, / [Or] sweeter.”]).

13. Cf. *The First Nowell*, *supra* note 8 (“Nowell, Nowell, Nowell, Nowell, / Born is the King of Israel.”).

14. See *60 Minutes: Justice Scalia on the Record, Both Online and Off* (CBS television broadcast Apr. 27, 2008) [hereinafter *60 Minutes: Justice Scalia on the Record*] (transcript available at <http://perma.cc/A64C-QNBB>) (“‘When I first came on the court I thought I would for sure get off as soon as I could which would have been when I turned 65. Because you know, justices retire at full salary. So there’s no reason not to leave and go off and do something else. So you know, essentially I’ve been working for free, which probably means I’m too stupid to be on the Supreme Court,’ Scalia says, laughing. ‘You should get somebody with more sense. But I cannot—what happened is, simply I cannot think of what I would do for an encore. I can’t think of any other job that I would find as interesting and as satisfying.’”).

SCALIA (cont'd):

I will proceed to shout this:¹⁵

“The Constitution says absolutely nothing about this!”

3. Scene: “Antonin! Antonin Scalia!” (Commentator, Scalia)

Suddenly, the statue springs to life: it is the COMMENTATOR.

COMMENTATOR:

Antonin!¹⁶

Antonin Scalia!

I come to judge you.¹⁷

SCALIA:

And who are you, sir? Speak!¹⁸

COMMENTATOR:

I am the Commentator!

I come from a powerful administration,

And I am here to conduct an investigation

Into why you have managed to be so unrelenting

In spending so much of the past eight-and-twenty years in substantial, and possibly excessive, dissenting.

SCALIA:

Pure vendetta,

All a vendetta!¹⁹

15. *See id.* (“‘I mean after a while, you know, I’m saying the same things in today’s dissent that I said in a dissent 20 years ago,’ Scalia explains.”).

16. *Cf.* GIACOMO PUCCINI, LUIGI ILLICA & GIUSEPPE GIACOSA, *MADAMA BUTTERFLY* act 2, sc. 2 (1907), available at <http://perma.cc/T8TT-CR5U> (“Butterfly! Butterfly!”); GIUSEPPE VERDI & ANTONIO GHISLANZONI, *AIDA* act 4, sc. 1 (1871), available at <http://perma.cc/PPN8-3YUP> (“Radamès . . .”).

17. *Cf.* WOLFGANG AMADEUS MOZART & LORENZO DA PONTE, *DON GIOVANNI* act 2, sc. 14 (1787) (K. 527), available at <http://perma.cc/GG5V-3QCR> (“Don Giovanni, A cenar teco m’invitasti” [“Don Juan! You invited me to dine with you”]).

18. *Cf.* W. S. GILBERT & ARTHUR SULLIVAN, *THE PIRATES OF PENZANCE* act 1 (1879), available at <http://perma.cc/SED3-LBQH> (“But who are you, sir? Speak!”).

19. *Cf.* WOLFGANG AMADEUS MOZART & LORENZO DA PONTE, *La vendetta* [*Vengeance*], in *LE NOZZE DI FIGARO* [THE MARRIAGE OF FIGARO] act 1, sc. 4 (1786) (K. 492), available at <http://perma.cc/32JK-Q3PR> (“La vendetta, oh, la vendetta!” [“Vengeance, oh, vengeance!”]).

COMMENTATOR:

Oh, really?

Hand me the U.S. Reporter.²⁰

(*As he pages through legal volumes*)²¹

For example,

Though your originalist heart might once have been “faint,”²²

You’ve since reproached your Court for “faux judicial restraint,”²³

Which shows that you write too imperiously,

As in phrases such as “[This] assertion cannot be taken seriously.”²⁴

We combed through your voluminous files

’Til we could no longer bear it,

And decided instead, for administrative convenience, to have you undergo three trials

As a test of your merit.

SCALIA:

Sheer applesauce!²⁵

“[U]nder federal law a federal judge is protected by an absolute privilege against civil liability” for his written opinions.²⁶

I am quoting, of course, the case of *Palmieri*.²⁷

20. Cf. MOZART & DA PONTE, *Là ci darem la mano* [There we will give each other our hands], in DON GIOVANNI, *supra* note 17, at act 1, sc. 7.

21. Cf. MOZART & DA PONTE, *Madamina, il catalogo è questo* [Little lady, this is the catalogue], in DON GIOVANNI, *supra* note 17, at act 1, sc. 2 (“Catalogue Aria”).

22. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”). But see Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, available at <http://perma.cc/Q9ZW-ZFYN> (“I repudiate [my description of myself as a fainthearted originalist]. . . . I try to be [a stouthearted originalist]. I try to be an honest originalist! I will take the bitter with the sweet!”).

23. Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 499 n.7 (Scalia, J., concurring) (“The claim that § 203 on its face does not reach a substantial amount of speech protected under the principal opinion’s test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion’s attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. . . . This faux judicial restraint is judicial obfuscation.”).

24. Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (“Justice O’Connor’s assertion . . . that a ‘fundamental rule of judicial restraint’ requires us to avoid reconsidering *Roe*, cannot be taken seriously. By finessing *Roe* we do not, as she suggests, . . . adhere to the strict and venerable rule that we should avoid ‘decid[ing] questions of a constitutional nature.’”).

25. Zuni Pub. Sch. Dist. v. Dep’t of Educ., 550 U.S. 81, 113 (2007) (Scalia, J., dissenting) (“The sheer applesauce of this statutory interpretation should be obvious.”).

26. Garfield v. Palmieri, 297 F.2d 527 (1962) (“[U]nder federal law a federal judge is protected by an absolute privilege against civil liability for statements made by him in an opinion written by him.”).

27. See *id.*; cf. GIACOMO PUCCINI, LUIGI ILLICA & GIUSEPPE GIACOSA, *TOSCA* act 2, sc. 5 (1900), available at <http://perma.cc/XLX9-5ZYV> (“Attendi . . . / Come facemmo col Conte Palmieri . . . / [Un’uccisione] simulata! . . . Come / avvenne del Palmieri!” [“Wait . . . / As we did with Count Palmieri . . . / [An execution] simulated! . . . / As occurred with Palmieri.”]).

COMMENTATOR:

Ah, but I represent a Higher Power.
Thus, our case is not in your earthly jurisdiction—
Though that will not stop me from hearing your testimony here . . .
Much like Judge Palmieri.²⁸

SCALIA:

(*Warily*)
Yes. Just like Palmieri . . .²⁹

Well, how wonderful for you to be so anointed:
Congratulations on obtaining clearance to rifle your way through my spiritual
file.
And how flattering for me to have *you* appointed,
With nothing else to do but to investigate me until investigation is no longer
worthwhile.³⁰

COMMENTATOR:

It doesn't have to be so painful.
You could invite me to dine with you—
Perhaps at one of D.C.'s finer establishments?³¹
(*Indicating SCALIA's attire*)
Using your name, wearing that suit—no doubt
You could get us a table in under an hour.
Isn't that what your suit is about?
Power?³²

COMMENTATOR (cont'd):

Come now, we have no time to waste.
We'll make it quick. Shall we have a burger?³³
Or perhaps a frankfurter is more to your taste³⁴—

28. See, e.g., Glenn Fowler, *E.L. Palmieri, Federal Judge, Is Dead at 82*, N.Y. TIMES, June 16, 1989, at A28 (“In 1985, Judge Palmieri was one of the first judges to make use of treaties between the United States and several other countries that allow the taking of depositions overseas in criminal cases pending in Federal courts.”); *United States v. Casamento*, 887 F.2d 1141, 1174–75 (1989) (“[A] special master from the United States, Honorable Edmund L. Palmieri . . . asked each deponent the following question . . .”).

29. Cf. PUCCINI, ILLICA & GIACOSA, *TOSCA*, *supra* note 27, at act 2, sc. 5 (“Si. Come Palmieri . . .” [“Yes. Like Palmieri . . .”]).

30. Cf. *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting) (“How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile . . .”).

31. Cf. MOZART & DA PONTE, *O statua gentilissima [O most noble statue]*, in DON GIOVANNI, *supra* note 17, at act 2, sc. 11 (“Signor, il padron mio, / badate ben, non io, / vorria con voi cenar.” [“Sir, my master, / mind you well, not I, / would like to dine with you.”]).

32. Cf. *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting) (“That is what this suit is about. Power.”).

33. Warren Earl Burger was Chief Justice of the Supreme Court of the United States from June 23, 1939 to September 26, 1986. *Members of the Supreme Court of the United States*, U.S. SUP. CT., <http://perma.cc/59AB-8A8L> (last visited Nov. 11, 2014).

SCALIA:

No!

Oh, you are eager—*hungry*³⁵—to stuff yourself with any dish or confection,
But *I* am not so eager to open *my* mouth for *your* inspection.³⁶
You may try to force me to take part in your ridiculous charade,
But I will not let you have *both* laws *and* sausages made.³⁷

COMMENTATOR:

(Assuming a threatening pose)

You dare defy me?

SCALIA:

Try me.

The COMMENTATOR gestures, the chamber quakes and darkens, and all the doors are sealed.

COMMENTATOR:

There! I have sealed all the exits.³⁸

No man can leave or enter.

Perhaps that will instill in you the spirit of cooperation.

34. Felix Frankfurter was an Associate Justice of the Supreme Court of the United States from January 30, 1939 to August 28, 1962. *Members of the Supreme Court of the United States*, U.S. SUP. CT., <http://perma.cc/F7L8-WG97> (last visited Nov. 11, 2014); cf. Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1799–1801 (1991) (comparing Justices Scalia and Frankfurter).

35. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting) (“The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case.”).

36. Cf. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (“But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”).

37. Cf. *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984) (“This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck’s aphorism that ‘No man should see how laws or sausages are made.’”).

38. Cf. VERDI & GHISLANZONI, AIDA, *supra* note 16, at act 4, scs. 1, 2 (“[I] Sacerdoti . . . escono dal sotteraneo . . . [D]ue Sacerdoti intenti a chiudere la pietra del sotteraneo.” “[The] priests emerge from the crypt . . . [T]wo priests are in the act of closing the stone that seals the crypt.”).

SCALIA:

Hardly.

*Our system is designed for confrontation.*³⁹

COMMENTATOR:

Oh, how witty. Think you're clever?

Then we shall wait here. We shall wait forever.

Let's see how long you can play the dissenter

With no one to find you.⁴⁰

I have sealed all the exits.

No man can leave or enter!

4. Scene: "Ah, there you are, Nino" (Ginsburg, Commentator, Scalia)

*Suddenly, the floor bursts open, and JUSTICE GINSBURG, elegantly attired, rises into the chamber.*⁴¹

GINSBURG:

Ah, there you are, Nino.

(My, how dark it is,⁴²

And how cold it is in this chamber!⁴³)

I heard a great noise and came to find you.

COMMENTATOR:

Ruth Bader Ginsburg!

But how did you get in?

I have sealed all the exits!

39. See *Windsor*, 133 S. Ct. at 2704 (Scalia, J., dissenting) ("Our system is *designed* for confrontation.").

40. Cf. MOZART & DA PONTE, *Se vuol ballare [If you want to dance]*, in THE MARRIAGE OF FIGARO, *supra* note 19, at act 1, sc. 2 ("Se vuol ballare, signor contino, / il chitarrino le suonerò." ["If you want to dance, [my] little count, / I will play the little guitar."]).

41. Cf. WOLFGANG AMADEUS MOZART & EMANUEL SCHIKANEDER, DIE ZAUBERFLÖTE [THE MAGIC FLUTE] act 2, sc. 8 (1791) (K. 620), available at <http://perma.cc/444R-UDUT> ("Die Königin der Nacht kommt unter Donner aus der mittlern Versenkung und so, dass sie gerade vor Pamina zu stehen kommt." ["The Queen of the Night emerges amid thunder from the central trapdoor so that she stands just in front of Pamina."]); RICHARD WAGNER, DAS RHEINGOLD [THE RHINE GOLD] sc. 4 (1869), available at <http://perma.cc/U6VV-PLAL> ("[W]ird plötzlich Erda sichtbar, die . . . aus der Tiefe aufsteigt; sie ist von edler Gestalt . . ." ["Erda is suddenly visible, rising . . . from the depths; she is of noble figure . . ."]).

42. Cf. LUDWIG VAN BEETHOVEN & JOSEPH SONNLEITHNER, *Gott! welch' Dunkel hier! [God! what darkness here!]*, in FIDELIO act 2, sc. 1 (1814) (Op. 72), available at <http://perma.cc/Y54W-VEPY>.

43. Cf. *id.* at act 2, sc. 2 ("Wie kalt ist es in diesem unterirdischen Gewölbe!" ["How cold it is in this underground chamber!"]).

GINSBURG:

(To the COMMENTATOR)

Then you have no idea with whom you are dealing.
 (It's not the first time I've had to break through a ceiling.⁴⁴)
 I heard you say: "No *man* can leave or enter."
 So—as for any *woman*—what's to prevent her?

(To SCALIA)

Nino, what's going on here?

SCALIA:

Like some ghoul,
 This . . . *statue* . . . stalks me,⁴⁵
 Claiming to represent a Higher Power,
 Trying to put me on trial—
 For apparently it has been rendered his solemn duty to decide What Is Excessive
 Dissenting.⁴⁶

COMMENTATOR:

I assure you, my intentions are the purest.

GINSBURG:

(Unimpressed)

So, *this* is the method of communication between the Creator and the jurist.⁴⁷

44. See, e.g., Nora Frenkiel, *The Up-and-Comers: Bryant Takes Aim at the Settlers-In*, ADWEEK, Mar. 1984; Carol Hymowitz & Timothy Schellhardt, *The Glass Ceiling: Why Women Can't Seem To Break the Invisible Barrier that Blocks Them from Top Jobs*, WALL ST. J., Mar. 24, 1986, at 1R. Note that Thomas Jefferson School of Law's annual Ruth Bader Ginsburg Lecture on Women and the Law has featured two addresses with titles containing the phrase "glass ceiling." See Barbara Palmer & Dennis Simon, *Breaking the Political Glass Ceiling: Incumbency, Redistricting, and the Success of Women Candidates*, 31 T. JEFFERSON L. REV. 29 (2008); Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier To Gender Equality*, 26 T. JEFFERSON L. REV. 1 (2003).

45. Cf. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed test but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.").

46. Cf. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting) ("It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power '[t]o regulate Commerce with foreign Nations, and among the several States,' . . . to decide What Is Golf.").

47. Cf. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 189 (2002) ("[A]lthough the method of communication between the Creator and the jurist is never disclosed, 'divine ordinance' has been a dominant theme in decisions justifying laws establishing sex based classifications." (quoting Amicus Brief of the ACLU, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (on file with the Library of Congress, Ginsburg

GINSBURG (cont'd):

(To the COMMENTATOR)

Let me compliment you on your attire.
I see you've chosen to wear historic drag.⁴⁸

SCALIA:

(To GINSBURG)

You would think an intruder of this sort
Would come before the Court
Clad, so to speak, in sheep's clothing . . .
But this wolf comes as a wolf.⁴⁹
I was not scheduled to meet with him,
Yet he disturbs me—and, even more deplorable,
He then tries to force me to eat with him.

GINSBURG:

Ah, yes, the “broccoli horrible.”⁵⁰
Well, in my view, the situation is of questionable legality:
You are in a tricky spot.
Then again, if you consider the circumstances in their totality,
Unimaginable evil this is not.⁵¹
If you might be a bit more flexible—

SCALIA:

“Flexible!”
Like the constant concessions that judges are always demanding.
“Flexible!”
Which goes to show: it is a Constitution you are *expanding*.⁵²

Collection, ACLU File, Box 3, at 36)).

48. Cf. *id.* at 234 (noting Ginsburg's reference to the Supreme Court's “historic drag” in interpreting the Fourteenth Amendment as applicable to race but not necessarily sex (quoting Notes of Ruth Bader Ginsburg from the League of Women Voters Panel Discussion (1976) (on file with the Library of Congress, Ginsburg Collection, Accession 2, Speeches and Writings File, Box 30, at 3))).

49. See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”).

50. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2623–24 (2012) (Ginsburg, J., concurring) (“Underlying the Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. . . . As an example of the type of regulation he fears, The Chief Justice cites a Government mandate to purchase green vegetables. . . . One could call this concern ‘the broccoli horrible.’”).

51. See *United States v. Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting) (“Unimaginable evil this is not.”).

52. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 407 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding.”); Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005) (transcript available for download at <http://perma.cc/WAB5-EGV3>) (“Although it is a minority view now, the reality is that, not very long ago, originalism was orthodoxy. . . . [C]onsider the opinions of John Marshall in the Federal Bank case, where he says . . . we must always remember it is a constitution we are expounding. And since it's a

SCALIA (cont'd):

“Flexible!”

Just another word for “liberal,”⁵³

Always “liberal” . . .

What folly! what folly!⁵⁴

5. Duetto: “Always ‘liberal’” (Scalia, Ginsburg)

*Verdi–Mozart mashup. Tempo: Hey, presto!*⁵⁵

SCALIA (cont'd):

Always “liberal,”⁵⁶ these judges:

How they flit from holding to holding . . .

GINSBURG:

Now, wait a minute, Nino,⁵⁷

constitution, he says, you have to give its provisions expansive meaning so that they will accommodate events that you do not know of which will happen in the future. Well, if it is a constitution that changes, you wouldn't have to give it an expansive meaning. You can give it whatever meaning you want and, when future necessity arises, you simply change the meaning. But anyway, that is no longer the orthodoxy.”).

53. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society’s law-trained elite) into our Basic Law.”). See generally David F. Forte, *The Illiberal Court*, 48 NAT’L REV., July 29, 1996, at 40; cf. also Senior, *In Conversation*, supra note 22 (“[W]e get newspapers in the morning. . . . We used to get the *Washington Post*, but it just . . . went too far for me. I couldn’t handle it anymore. . . . It was the treatment of almost any conservative issue. It was slanted and often nasty. . . . I think they lost subscriptions partly because they became so shrilly, *shrilly* liberal.”).

54. Cf. GIUSEPPE VERDI & FRANCESCO MARIA PIAVE, *Sempre libera* [*Always free*], in *LA TRAVIATA* [THE FALLEN WOMAN] act 1, sc. 5 (1853), available at <http://perma.cc/6EZF-AUKY> (“Follie! follie . . . !” [“What folly! what folly . . . !”]).

55. Cf. Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS (May 2002), <http://perma.cc/FY87-852V> (“This dilemma, of course, need not be confronted by a proponent of the ‘living Constitution,’ who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional (You can see why the ‘living Constitution’ has such attraction for us judges.”)).

56. The words sung by the character of Scalia correspond approximately to the poetic structure of the Verdi aria “*Sempre libera*” [“Always free”]. See VERDI & PIAVE, *Sempre libera* [*Always free*], in *LA TRAVIATA*, supra note 54, at act 1, sc. 5 (“*Sempre libera degg’io / folleggiare di gioia in gioia*” [“Always free, I must frolic from delight to delight”]).

57. The words sung by the character of Ginsburg correspond approximately to the rhythms of a Mozart duet. See MOZART & DA PONTE, *Aprite, presto, aprite* [*Open it, quickly, open it*], in *THE MARRIAGE OF FIGARO*, supra note 19, at act 2, sc. 4 (“*Fermate, Cherubino!*” [“Stop, Cherubino!”]).

GINSBURG (cont'd):

According to what we know,
It isn't only "liberals" who merit your complaint.

(Aside)

(It's not like he's a saint
In matters of restraint.⁵⁸)

SCALIA:

How their activism⁵⁹ nudges
Us beyond the bounds of the text . . .

GINSBURG:

This Court could very well be
Called "activist"⁶⁰ in *Shelby*,⁶¹
Where Congress's authority to act was at its height⁶²—
Yet Congress lost the fight
To judges on the right.⁶³

SCALIA:

With their overreaching⁶⁴ scolding
And their personal opinions . . .⁶⁵

58. Justice Scalia joined the majority opinion in *Shelby County v. Holder*. See 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting) ("[T]he Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite.").

59. See Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 12, 2013, at SR4 ("Justices Antonin Scalia and Ruth Bader Ginsburg are ideological antagonists on the Supreme Court, but they agree on one thing. Their court is guilty of judicial activism.").

60. See *id.* ("If it's measured in terms of readiness to overturn legislation, this is one of the most activist courts in history," Justice Ginsburg said in August [2013] in an interview with The New York Times. "This court has overturned more legislation, I think, than any other."); *Justice Ruth Bader Ginsburg Talks About Judicial Activism*, NAT'L CONST. CTR. (Sept. 9, 2013), <http://perma.cc/7R6V-ZKAX> ("[An activist court] is a court that is not at all hesitant to overturn legislation passed by the Congress . . . The worst case was [*Shelby County v. Holder*,] the Voting Rights Act case.").

61. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (Ginsburg, J., dissenting).

62. See *id.* at 2636 (2013) (Ginsburg, J., dissenting) ("Congress' power to act [was] at its height.").

63. See *Justice Ruth Bader Ginsburg Talks About Judicial Activism*, *supra* note 60 ("[D]espite the overwhelming majority in Congress that passed the Voting Rights Act, the Court said, 'that won't do.'").

64. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676 (2012) (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) ("The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. . . . The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches.").

65. *Cf., e.g., Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.").

GINSBURG:

But it isn't overreaching
To oppose discrimination—

SCALIA:

Which, according to your preaching,⁶⁶
Merits proper extirpation?⁶⁷

GINSBURG:

Yes, through proper legislation
That imposes prohibitions—

SCALIA:

Unless we have a situation
Such as race-based admissions!⁶⁸

According to your knowledge,⁶⁹
An applicant to college
Can have his fate determined by the color of his skin,
But whether that's a sin
Depends on who gets in.⁷⁰

Is that *not* discrimination
Where the state could be the actor?⁷¹

66. Cf. *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting) (“It is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a ‘more perfect union’ (a criterion only slightly more restrictive than a ‘more perfect world’) can impose its own favored social and economic dispositions nationwide.”).

67. Cf. *Shelby Cnty.*, 133 S. Ct. 2612, 2632 (2013) (Ginsburg, J., dissenting) (“Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.”); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2434 n.4 (2013) (Ginsburg, J., dissenting) (“‘Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.’” (quoting *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting))).

68. Cf., e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (“I do not agree, however, with Justice O’Connor’s dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) ‘to ameliorate the effects of past discrimination.’”).

69. Cf. MOZART & DA PONTE, *Voi che sapete [You who know]*, in *THE MARRIAGE OF FIGARO*, *supra* note 19, at act 2, sc. 2.

70. Cf. Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147 (1979) (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

71. Cf. MOZART & SCHIKANEDER, *Der Hölle Rache kocht in meinem Herzen [Hell’s vengeance boils in my heart]*, in *THE MAGIC FLUTE*, *supra* note 41, at act 2, sc. 7 (“Verstoßen sei auf ewig, / verlassen sei auf ewig” [“Be disowned forever, / be forsaken forever”]).

GINSBURG:

But that is just a factor,
 A factor of a factor,
 A “factor of a factor of a factor of a factor.”⁷²

And people need protection
 Against the vile infection⁷³
 Of rank discrimination in the form of racial caste,⁷⁴
 Which looks like it could last
 Unless we end it fast.

And saying that our future’ll
 Be suddenly “race-neutral”
 Is acting like an ostrich with its head stuck in the sand—
 Because it cannot stand
 To see what plagues our land.⁷⁵

SCALIA:

I agree that it is vital
 To make whole the wronged *individuals*,
 But to reinforce entitle-
 Ment will only lead to more harm.⁷⁶

72. See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (“As for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’” (quoting *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting))); *Fisher*, 133 S. Ct. at 2434 (“As the thorough opinions below show . . . the University’s admissions policy flexibly considers race only as a ‘factor of a factor of a factor of a factor’ in the calculus” (citation omitted)).

73. See *Shelby Cnty.*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting) (“A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the ‘blight of racial discrimination in voting’ continued to ‘infec[t] the electoral process in parts of our country.’ Early attempts to cope with this vile infection resembled battling the Hydra.” (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966))).

74. See *Gratz*, 539 U.S. at 288–89 (Ginsburg, J., dissenting) (“This insistence on [judicial consistency] would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But . . . [i]n the wake ‘of a system of racial caste only recently ended,’ large disparities endure.” (citations omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273–76 & n.8 (1995) (Ginsburg, J., dissenting))). Cf. generally GIUSEPPE VERDI & TEMISTOCLE SOLERA, *Va, pensiero* [*Fly, thought, on wings of gold*], in NABUCCO [NEBUCHADNEZZAR] act 3, sc. 2 (1842) (“Chorus of the Hebrew Slaves”).

75. See *Fisher*, 133 S. Ct. at 2433–34 (Ginsburg, J., dissenting) (“I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. . . . [T]he University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity.” (citations omitted)). Note that the vertical line to the left of the text indicates simultaneous singing by multiple characters.

76. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (“In my view . . . [i]ndividuals who have been wronged by unlawful racial discrimination should be made whole but under our Constitution there can be no such thing as a either a creditor or debtor race. . . . In the eyes of government, we are just one race here. It is American.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527–28 (1989) (Scalia, J., concurring) (“[T]hose who believe that racial preferences can help to ‘even the score’ display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.”).

GINSBURG:

What hubris! what hubris!⁷⁷

**6. Aria & Variations: “You are searching in vain (for a bright-line solution)”
(Ginsburg)**

After Verdi et al.

GINSBURG (cont’d):

How many times must I tell you,

Dear Mister Justice Scalia:

You’d spare us such pain

If you’d just entertain

This idea . . .

(Then you *might* relax your rigid posture.)⁷⁸

*(À la Verdi)*⁷⁹

You are searching in vain for a bright-line solution

To a problem that isn’t so easy to solve—

But the beautiful thing about our Constitution

Is that, like our society, it can evolve.

For our Founders, of course, were great men with a vision,

But their culture restricted how far they could go,

So, to us, I believe, they bequeath the decision

To allow certain meanings to flourish—

(With a vocal flourish)

—and grow.⁸⁰

77. See *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting) (“Hubris is a fit word for today’s demolition of the [Voting Rights Act].”).

78. Cf. BIZET, MEILHAC & HALEVY, *Seguidilla (Près des remparts de Séville)* [*Seguidilla (Near the ramparts of Seville)*], in CARMEN, *supra* note 3, at act 1, sc. 9 (“Près des remparts de Séville, / Chez mon ami, Lillas Pastia, / J’irai danser le séguedille / Et boire du Manzanilla. / J’irai chez mon ami Lillas Pastia.” [“Near the ramparts of Seville, / At the place of my friend, Lillas Pastia, / I will go to dance the Seguidilla / And drink Manzanilla. / I will go to the place of my friend Lillas Pastia.”]); see also ABA Journal - Law News Now, *Justice Ruth Bader Ginsburg Talks Opera, the Law and Tells of a Plácido Domingo Serenade*, YOUTUBE (Aug. 5, 2012), <http://perma.cc/4ZCV-W48R?type=source> [hereinafter ABA Journal, *Justice Ginsburg Talks Opera*] (“[T]he most famous plea bargain in opera is Carmen’s bargain with Don José: if he will allow her to escape, then she promises him that she will meet him at her friend’s café.”).

79. See, e.g., VERDI & PIAVE, *Libiamo ne’ lieti calici* [*Let us drink from joyful chalices*], in LA TRAVIATA, *supra* note 54, at act 1, sc. 2.

80. See *Lawyers Enjoy a Morning at the Opera with Justice Ginsburg and Solicitor General Verrilli*, ABANOW (Aug. 4, 2012), <http://perma.cc/L3NW-A5X3> (“The founders of our country were great men with a vision. They were held back from realizing their ideas by the times in which they lived. But I think their notion was that society would evolve and the meaning of some of the grand clauses in the Constitution, like due process of law, would grow with society so that the Constitution would always be attuned with the society that law is meant to serve.”); see also *Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting) (“I see today’s decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.”).

GINSBURG (cont'd):

*(A short cadenza, which evolves via scat solo into a jazz waltz)*⁸¹

Let 'em grow . . .

For the law of the land in that era was grounded
In the notion that justice was just for the few,⁸²
But the Founders' assumption was wholly unfounded,
So we've had to subject it to further review.

So we're freeing the people we used to hold captive,⁸³
Who deserve to be more than just servants or wives.⁸⁴
If we hadn't been willing to be so adaptive,
Can you honestly say we'd have led better⁸⁵ lives?

(A short cadenza, which leads to a gospel-pop ballad)
And we can't wait for slow legislation
To catch up with the lives that we already lead;
We have rights, and they need preservation,
And we have to remember this if we intend to succeed:

Though we won't be afraid of forgiving,
We must not stop in our mission to right every wrong—
Not until We the People and our Constitution are living⁸⁶

81. This section of the aria prioritizes the lower register of the soprano voice. *Cf.* ABA Journal, *Justice Ginsburg Talks Opera*, *supra* note 78 (“[If I were an opera singer,] my first reaction would be, well, [my voice] would be a great soprano: I would be Renata Tebaldi or perhaps Beverly Sills. But then I think of Risè Stevens and say, well, perhaps I'd be a mezzo, like Marilyn Horne.”).

82. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Through a century plus three decades and more of [our Nation's] history, women did not count among voters composing ‘We the People.’”).

83. *See id.* at 557 (“A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”).

84. *See id.* at 532 (“[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”).

85. *See* *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 645 (Ginsburg, J., dissenting) (challenging “the unlawful [employment] practice [that] is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man”). Congress later adopted Justice Ginsburg's position by passing the Lilly Ledbetter Fair Pay Act of 2009. Pub. L. No. 111-2, 123 Stat. 5 (2009).

86. *Cf.* Ruth Bader Ginsburg, *Closing Remarks for Symposium on Justice Brennan and the Living Constitution*, 95 CAL. L. REV. 2217, 2219 (2007) (“Justice Brennan was also instrumental in the 1970s, I should not fail to note, in moving the Court in a new direction regarding women's rights. The very first case I argued before the Court, *Frontiero v. Richardson*, yielded, in 1973, the first in a line of Brennan opinions holding that *our living Constitution* obligates government to respect women and men as persons of equal stature and dignity.” (emphasis added)).

GINSBURG (cont'd):

In a nation, in a place
That, regardless of station or race,
Is a nation where *all* of us truly belong!⁸⁷

(À la Verdi)

So, until every person is treated as equal
Well beyond what the Founders initially saw,
Let our past and our present be merely the prequel
To a future enlightened by flexible law!

(Roulades in all three styles: opera, jazz and pop)

Law, law, law!

7. Recitative: “Ah! how very uplifting” (Scalia, Commentator)**SCALIA:**

Ah! how very uplifting—
And yet so rootless and shifting.⁸⁸
“So to us, I believe, they bequeath the decision . . .”
“Bequeath?” To what secret knowledge⁸⁹ are you the heiress?
If I disagree,
Am I then to be
The object of derision,
The *hostis humani generis*?⁹⁰

I have had more than I can swallow
(Or even gargle)
Of this impossible-to-follow
Legalistic argle-bargle!⁹¹

87. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (“Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”).

88. See *United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting) (“There are many remarkable things about the majority’s merits holding. The first is how rootless and shifting its justifications are.”).

89. See *Board of Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 688–89 (1995) (“What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?”).

90. See *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (“It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.”).

91. See *id.* at 2709 (Scalia, J., dissenting) (“As I have said, the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “bare . . . desire to harm” couples in same-sex marriages.”).

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SCALIA (cont'd):

Just start my trial,
So we can get this over with.

COMMENTATOR:

Very well.
For your first trial:
Defend your legal views.

SCALIA:

Gladly! I shall defend them, every last one.

COMMENTATOR:

(Dryly)
Oh *God*, Nino, explain it *all* to me⁹²—

SCALIA:

No—my *friends* call me Nino.⁹³

COMMENTATOR:

And I . . . ?

SCALIA:

Call me “Justice Scalia.”⁹⁴

COMMENTATOR:

(Sighs)
Proceed.

SCALIA:

It all began in my childhood . . .

COMMENTATOR:

(Aside)
(Even lawyers, I suppose, were children once.⁹⁵)

92. See *60 Minutes: Justice Scalia on the Record*, *supra* note 14, at 7 (“I’m not going to change [the other Supreme Court justices’] basic philosophy. These people have been thinking about the law for years. They’re not going to suddenly say, ‘Oh God, Nino, explain it all to me.’ I understand that’s not going to happen.”).

93. Cf. GIACOMO PUCCINI, LUIGI ILLICA & GIUSEPPE GIACOSA, *Si. Mi chiamano Mimi* [Yes. *They call me Mimi*], in *LA BOHÈME* act 1 (1896), available at <http://perma.cc/7WSA-QZYS>.

94. Cf. *id.* (“*Si. Mi chiamano Mimi, / ma il mio nome è Lucia.*” [“Yes. They call me Mimi, / but my name is Lucia.”]).

95. See Charles Lamb, *The Old Benchers of the Inner Temple*, in *ESSAYS OF ELIA* (1823) (“Lawyers, I suppose, were children once.”); JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 32 & n.75 (citing Scalia’s use of the Lamb quotation in his May 1984 commencement address at the University of Dayton School of Law).

8. Aria: “He built stairs” (Scalia) *After Puccini.*⁹⁶

*Horn call.*⁹⁷

SCALIA:

My father came from overseas,⁹⁸
Searched for a life,⁹⁹
Sought something better,¹⁰⁰
And earned it by degrees.¹⁰¹
The steps he took, he made on his own,
With strength of will and firmness of stone,¹⁰²
To reach the vision
He’d pictured in his prayers:¹⁰³
He built stairs . . .¹⁰⁴

96. See, e.g., PUCCINI, ILLICA & GIACOSA, *E lucevan le stelle* [And the stars were shining], in TOSCA, *supra* note 27, at act 3, sc. 2.

97. Justice Scalia played (French) horn in a high-school marching band. See *Mad About Music: Supreme Court Justice Antonin Scalia* (WQXR radio broadcast Jan. 3, 2010) (transcript available at <http://perma.cc/M9K6-6QBN>).

98. See BISKUPIC, *supra* note 95, at 13 (“[Justice Scalia’s] father, Salvatore Eugene Scalia . . . was seventeen when he came through Ellis Island in December 1920. . . . [H]e had left the village of Sommatino on the island of Sicily . . . and then in 1926 became [a] U.S. citizen[.]”).

99. *Cf. id.* at 13–14 (“Salvatore Eugene, or Sam, as he was labeled at Ellis Island, ventured out creatively and intellectually. . . . He had a fine voice and enrolled himself at the Eastman School of Music in far-off Rochester, New York. His stay, however, was brief. He tried running an Italian American newspaper in Scranton, Pennsylvania. That, too, did not last long.”).

100. *Cf. id.* at 14 (“Eventually Salvatore, who was more of an intellectual than an adventurer, concentrated on becoming a college professor. Antonin said later he suspected that his father, a perfectionist, may have realized that he was not going to excel in his earlier pursuits.”).

101. See *id.* at 14–15 (“Salvatore Eugene earned a bachelor’s degree at Rutgers University in 1931 and a master’s at Columbia University in 1932 . . . [and] was hired as an instructor in the Romance languages department at Brooklyn College . . . in 1939. . . . Salvatore Eugene’s first decade there was spent as an instructor. After he earned his Ph.D., in 1950, he became an assistant professor.”); *cf.* PUCCINI, ILLICA & GIACOSA, *Sì. Mi chiamano Mimi* [Yes. They call me Mimi], in LA BOHÈME, *supra* note 93, at act 1 (“Mi piacciono quelle cose . . . / che parlano . . . di primavera” [“I like those things . . . / that speak . . . of spring”]).

102. *Cf.* BISKUPIC, *supra* note 95, at 15 (“[Prof. Scalia] impressed students and colleagues with his self-possession and sense of decorum. . . . [His fellow professor Joseph] DeSimone also referred to his colleague as personally ‘severe’ and professionally demanding. The grown son Antonin years later agreed. ‘Yes, he was severe,’ he said, shaking his head. ‘He was demanding.’” (quoting Joseph F. DeSimone, Professor, Romance Languages, Brooklyn Coll., Personal Tribute in Memory of S. Eugene Scalia (Oct. 2, 1989) (on file with the Brooklyn College Library Archives and Special Collections Division); Interview by Joan Biskupic with Antonin Scalia, Assoc. Justice, Supreme Court of the U.S. (May 1, 2008))).

103. Justice Scalia’s family practiced Roman Catholicism. See *id.* at 19 (“[Antonin] received weekly ‘release time’ to go to Catholic education classes on Wednesday afternoons.”); *id.* at 16 (“Antonin’s aunt Eva used to recount to the family the bias she encountered when looking for teaching jobs, not only because of her ethnicity but also because of her Catholicism.”).

104. After his retirement from Brooklyn College in 1969, Salvatore Eugene Scalia literally built stairs, constructing terraces on the property on which he lived. See *id.* at 24 (“He loved to build those,” [Justice Scalia] recalled. . . . The stone terraces he built lasted. More than a half century later they could still be seen, laced in and out of the old dirt grounds, holding steady amid dead and dying trees. Even when Salvatore Eugene was gone, the little stair steps, constructed at a time when he could go no higher in his profession, held tight.” (quoting Interview by Joan Biskupic with Antonin Scalia, Assoc. Justice,

SCALIA (cont'd):

And so he taught me what he knew:

“Follow the rules

Down to the letter:¹⁰⁵

Stay good and right and true,

For brains and brawn will sell without fail,

But character is never for sale.”¹⁰⁶

His virtues,

His values,

They built stairs,¹⁰⁷

Lending me support¹⁰⁸

As I reached this Court,¹⁰⁹

Where I have judged and learned . . .

That what my father earned

Could only be found

Supreme Court of the U.S. (Jan. 28, 2008))). A 2009 Brooklyn College newsletter featured photographs of these terraces. See Dominick Carielli, *Director's Statement*, SOTTO VOCE, Fall 2009, at 3, available at <http://perma.cc/6QBH-AX45> (“Although slightly covered with vegetation, one can discern the stone path and wall that Prof. Scalia constructed during his retirement.”).

105. See BISKUPIC, *supra* note 95, at 17 (“[There] was the reticent, scholarly father who taught Antonin to value the words of a text and appreciate cast-iron rules akin to those found in Dante’s orderly universe of sin and suffering.”).

106. See *id.* (“His father’s diligence and strict code of integrity impressed the boy. ‘Brains are like muscles—you can hire them by the hour,’ his father told him. ‘The only thing that’s not for sale is character.’” (quoting Antonin Scalia, Address at the National Italian American Foundation Luncheon (May 18, 2006))).

107. Both of Justice Scalia’s parents “focused on their only child’s schooling. ‘They made him an education project,’ Justice Scalia’s eldest son, Eugene, said. . . . The Scalia home was filled with books that helped foster an intellectualism that put Antonin a step ahead of the other striving sons of immigrants in the Irish-Italian neighborhood. . . . Antonin’s parents pushed him to prove himself. Both parents valued education as the path to achievement.” See *id.* at 18 (quoting Interview by Joan Biskupic with Eugene Scalia (June 8, 2007)).

108. See *60 Minutes: Justice Scalia on the Record*, *supra* note 14, at 5 (“‘I had a very secure feeling. So many people who loved me, and who would look out for me,’ Scalia says.”).

109. See *id.* (“Scalia’s rise to Supreme Court justice is a distinctly American story. The son of an Italian immigrant, he earned his way into Harvard Law School through old-fashioned hard work and determination. . . . Asked if he was a bookworm, Scalia says, ‘I was a greasy grind. . . . I worked really hard. My father, my mother put me to that. I enjoyed that. I don’t like doing anything badly.’”).

SCALIA (cont'd):

In this our nation,¹¹⁰
 Whose Founding Fathers broke new ground
 When they established our firm foundation:
 A set of rules of limited range,¹¹¹
 A system that allowed us to change,¹¹²
 That helped my father,
 Preserving his unalienable rights¹¹³
 As he set his sights
 On climbing to unprecedented heights . . .

They built stairs,
 Freedom with a frame,¹¹⁴
 Freeing us to aim
 For something ever higher:
 They built stairs
 To the skies¹¹⁵—
 And once we rediscover them, then
 Our nation can begin once again
 To rise.¹¹⁶
 We can rise—

110. *Cf.* *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.”).

111. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 848–49 (2008) (Scalia, J., dissenting) (describing “the new constitutional Republic[’s] . . . system in which rule is derived from the consent of the governed, and in which citizens . . . are afforded defined protections against the Government.”).

112. *See* *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.”).

113. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

114. When addressing constitutional issues, Justice Scalia often refers to the “Framers” who drafted the U.S. Constitution. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (“This grant of congressional power was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”).

115. The 1-2-4-3 musical motive introduced at the beginning of this aria, perhaps most famously articulated in the finale of Mozart’s “Jupiter” Symphony, appears in a seminal 18th century counterpoint treatise titled “Steps to Parnassus.” JOHANN JOSEPH FUX, THE STUDY OF COUNTERPOINT: FROM JOHANN JOSEPH FUX’S GRADUS AD PARNASSUM 66 (Alfred Mann & John Edmunds trans. & ed., W. W. Norton 2d ed. 1965) (1725) (presenting the 1-2-4-3 motive in Figure 88’s cantus firmus).

116. *Cf.* *60 Minutes: Justice Scalia on the Record*, *supra* note 14, at 2 (“‘I confess I’m a social conservative, but it does not affect my views on cases,’ Scalia says.”).

SCALIA (cont'd):

We must rise—
We shall rise!

Anyway, that's my view, and it happens to be correct.¹¹⁷

9. Recitative: "Fair enough" (Commentator, Ginsburg)

COMMENTATOR:

(To SCALIA)

Fair enough.

We now proceed to the second trial—

(Realizing GINSBURG is still there)

Oh.

Justice Ginsburg.

(Hinting)

Thank you.

For your service.

In motivating Justice Scalia to comply.

You may go now.¹¹⁸

GINSBURG:

(Sweetly)

I'd rather stay,

Thank you.¹¹⁹

COMMENTATOR:

Nonsense. You've done your part.

GINSBURG:

I imagine I can be of some further help—

COMMENTATOR:

I require no further aid.

117. *Id.* at 4 (“‘Anyway, that’s my view,’ Scalia says. ‘And it happens to be correct.’”); *cf.* PUCCINI, *ILICA & GIACOSA, Sì. Mi chiamano Mimi* [Yes. They call me Mimi], in *LA BOHÈME, supra* note 93, at act 1 (“‘Altro di me non le saprei narrare / Sono la sua vicina / che la vien fuori d’ora a importunare.’” [“I know nothing other than to tell you about me / I am [merely] your neighbor / who comes out now to bother [you].”]).

118. See Erwin Chemerinsky, *Much Depends on Ginsburg*, *L.A. TIMES*, Mar. 16, 2014, at A24 (“Justice Ruth Bader Ginsburg should retire from the Supreme Court after the completion of the current term in June.”); Jonathan Bernstein, *Ruth Bader Ginsburg Must Go*, *SALON* (Mar. 30, 2013, 9:00 AM), <http://perma.cc/E5AE-TJ8K>.

119. See Adam Liptak, *Court Is One of ‘Most Activist,’ Ginsburg Says, Vowing to Stay*, *N.Y. TIMES*, Aug. 25, 2013, at A1; Jessica Weisberg, *Reigning Supreme*, *ELLE*, Oct. 2014, at 358, 362 (“As long as I can do the job full steam . . .”).

GINSBURG:

I meant, help to Justice Scalia.

COMMENTATOR:

Well . . . this is no place for a lady.

GINSBURG:

Ah, but women belong in all places where decisions are being made.¹²⁰

COMMENTATOR:

(Aside)

(Women complaining . . .¹²¹)

GINSBURG:

Don't blame the women.¹²²

COMMENTATOR:

Well, when will you all be gratified?

GINSBURG:

When the ERA's finally ratified,¹²³
And when we are paid, are paid our worth¹²⁴—

COMMENTATOR:

Enough!

120. See Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A (“Women belong in all places where decisions are being made.”).

121. Cf. WOLFGANG AMADEUS MOZART & LORENZO DA PONTE, *Tutti accusan le donne* [*Everyone blames women*], in COSÌ FAN TUTTE [THUS ARE ALL WOMEN] act 2, sc. 13 (1790) (K. 588), available at <http://perma.cc/7WQX-U98B> (“[C]osì fan tutte!” [“Thus are all women!”]).

122. Cf. *id.*

123. Cf. Campbell, *supra* note 47, at 164 (“Originally opposed to the Equal Rights Amendment on the grounds that it would nullify protective labor legislation for women workers, the ACLU eventually reversed its position in response to the arguments of women scholars and activists, among them Ruth Bader Ginsburg, who criticized the motives behind such classifications.”); see also *id.* at 193 (“[Ginsburg’s] ultimate goal was the full equality of men and women, preferring it to come in the form of the Equal Rights Amendment, but meanwhile laboring long and hard to achieve its equivalent in case law.”).

124. See *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) (challenging “the unlawful [employment] practice [that] is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man”); cf. HENRY PURCELL & NAHUM TATE, *When I am laid in earth*, in DIDO AND AENEAS act 3 (1688) (Z. 626), available at <http://perma.cc/Q85C-L2HM> (“When I am laid, am laid in earth . . .”). Congress later adopted Justice Ginsburg’s position by passing the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

COMMENTATOR (cont'd):

I will *not* allow myself to become an assistant in my own case!¹²⁵

(*To himself*)

(I will *not* allow myself to become an assistant in my own case!

Not again!)

(*To GINSBURG*)

And this is no place for a lady!

10. Aria: “You, sir, are wrong here” (Ginsburg)

*Sinfonia concertante da camera, after Mozart et al.: Allegro arguendo.*¹²⁶

GINSBURG:

I am hurt, hurt, hurt!¹²⁷

(*Exposition: First theme, as in a symphony*)¹²⁸

125. Cf. Campbell, *supra* note 123, at 182–83 (“[T]he original Alabama lawyer for *Frontiero v. Richardson*, Joseph J. Levin, Jr., of the Southern Poverty Law Center . . . retorted [to Ginsburg] that he found himself trying to determine ‘exactly at what point we allowed ourselves to become assistants in our own case.’” (quoting Letter from Joseph Levin, Legal Dir., S. Poverty L. Ctr., to Ruth Bader Ginsburg, Dir., ACLU Women’s Rights Project (Oct. 27, 1972) (on file with the Library of Congress, Ginsburg Collection, Accession 1, ACLU File, Box 3))).

126. This aria, playfully titled a “concerto-like chamber symphony,” is structured as a Mozartean sonata-allegro movement. Some musicological scholarship has characterized this structure as a metaphor for male chauvinism. See Susan McClary, *Sexual Politics in Classical Music*, in FEMININE ENDINGS 68–69 (1991) (“Most opening movements in nineteenth-century symphonies are organized according to a schema called sonata-allegro procedure. Central to this procedure is a confrontation between two key areas, usually articulated by two distinctly different themes. The first theme establishes the tonic key and sets the affective tone of the movement: it is in essence the protagonist of the movement, and it used to be referred to quite commonly as the ‘masculine’ theme. Indeed, its character is usually somewhat aggressive; it is frequently described as having ‘thrust’ and it is often concerned with closure. Midway through the exposition of the movement, it encounters another theme, the so-called feminine theme, usually a more lyrical tune that presents a new key, incompatible with the first. Given that a tonal, sonata-based movement is concerned with matters of maintaining identity, both thematic and tonal, the second area poses a threat to the opening materials. Yet this antagonism is essential to the furthering of the plot, for within this model of identity construction and preservation, the self cannot truly be a self unless it acts; it must leave the cozy nest of the tonic, risk this confrontation, and finally triumph over its Other. The middle segment of the piece, the development, presents the various thematic materials of the exposition in a whole range of combinations and keys. Finally, at the recapitulation, the piece returns to establish both the original tonic key and the original theme. The materials of the exposition are now repeated, with this difference: the secondary theme must now conform to the protagonist’s tonic key area. It is absorbed, its threat to the opening key’s identity neutralized.”) This aria, through its combination of words and music, proposes a contrasting interpretation of sonata-allegro form. By detailing Justice Ginsburg’s involvement in women’s rights litigation, the aria demonstrates how the so-called “feminine” theme, initially the secondary outsider (in the exposition section), undergoes conflict and struggle with the “masculine” theme (in the development section) and ultimately gains acceptance—and has the final word—in the key once occupied only by the “masculine” theme (in the recapitulation section).

127. Cf. MOZART & SCHIKANEDER, *Der Hölle Rache kocht in meinem Herzen* [*Hell’s vengeance boils in my heart*], in THE MAGIC FLUTE, *supra* note 41, at act 2, sc. 7 (“Hört, [hört, hört,] Rachegötter, hört der Mutter Schwur!” [“Hear, [hear, hear,] gods of vengeance, hear the mother’s oath!”]).

128. See, e.g., WOLFGANG AMADEUS MOZART, SYMPHONY NO. 25 IN G MINOR (1773) (K. 183/173dB) (“Little G minor”), available at <http://perma.cc/A9G4-CGHQ?type=pdf>; WOLFGANG AMADEUS MOZART, SYMPHONY NO. 35 IN D MAJOR (1782) (K. 385) (“Haffner”), available at <http://perma.cc/RF8T-KUAZ>.

GINSBURG (cont'd):

You, *sir*, are wrong here
To tell me I don't belong here.

You sound like a certain employer,
A hot-dog justice and lawyer:¹²⁹
Reigning supreme,¹³⁰
He took up your theme¹³¹
And made it clear that I would not clerk here,
Since women were not to work here¹³²—

For he was not a man to shy away from scandal¹³³
But was apparently too delicate to handle
The thought of women at the bar.¹³⁴

(Transition)

Ah! *Goesaert*¹³⁵ v. *Cleary*¹³⁶

129. Felix Frankfurter was an Associate Justice of the Supreme Court of the United States from January 30, 1939 to August 28, 1962. *Members of the Supreme Court of the United States*, U.S. SUP. CT., <http://perma.cc/Z7SX-YMCF> (last visited Nov. 11, 2014).

130. *Id.*

131. One traditional analytical approach to sonata-allegro form (the structure of this aria) classifies sections by thematic content: the first theme is masculine, and the second theme is feminine. *See supra* note 126; *see also* CHARLES ROSEN, SONATA FORMS 2 (rev. ed. 1988) (“The second theme, or second group . . . is traditionally supposed to have a more lyrical and tranquil character than the first group, and is sometimes said to be more ‘feminine.’”).

132. *See, e.g., Interview: Ruth Bader Ginsburg, Justice of the U.S. Supreme Court*, ACAD. OF ACHIEVEMENT (Aug. 17, 2010), <http://perma.cc/WZ4T-SAMD> (“Justice Frankfurter, like his colleagues, was just not prepared to hire a woman. Now these were pre-Title VII days, so there was nothing unlawful about discriminating against women. And gentlemen of a certain age at that time felt that they would be discomfited by a woman in chambers, that they might have to watch what they say, they might have to censor their speech. It was surprising that Frankfurter had that typical—in those days—reaction, because he was the first justice to hire an African American as a law clerk some years before. But as I said, like many other federal judges of the time, he just wasn’t prepared to hire a woman.”).

133. For example, prior to his appointment to the Supreme Court, Frankfurter publicly criticized the Sacco and Vanzetti trial. *See* Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, Mar. 1927, available at <http://perma.cc/CYK3-PQ8T>. Justice Frankfurter was also the first justice to hire an African American law clerk. *See supra* note 132.

134. Justice Frankfurter had reservations about women at bars in more than one sense: he also authored the Supreme Court’s opinion in *Goesaert v. Cleary*, 335 U.S. 464 (1948), upholding a Michigan statute that prohibited women from being bartenders.

135. Note to singers: the pronunciation of this name is close to “goss-sahrt.” *See Pronouncing Dictionary of the Supreme Court of the United States*, YALE L. SCH., <http://perma.cc/6THK-PMJU> (last visited Nov. 11, 2014). *But see* Letter from Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., to author (Sept. 25, 2013) (on file with author).

136. *Goesaert v. Cleary*, 335 U.S. 464.

GINSBURG (cont'd):

Left us with the query,¹³⁷

(*Ironic*)

“What’s a girl to do?”¹³⁸

(*Second theme, as in a piano*¹³⁹ *concerto*)

And so my story might have led
To a typical “feminine ending”¹⁴⁰
(The woman ends up bending
To a man’s more potent will).

Though ladies *could* be self-sufficient,¹⁴¹
Our judges thought themselves omniscient,¹⁴²
So women never had the chance to prove their skill.

(*Closing*)

It wasn’t only Bradley
Who hurt them rather badly;¹⁴³

137. This lyrical motive (with its harmonization) was composed by Fanny Mendelssohn Hensel and published after her death. See FANNY MENDELSSOHN HENSEL, PIANO TRIO IN D MINOR (1850) (Op. 11). Like Justice Ginsburg, Fanny Mendelssohn Hensel’s professional advancement was deemed unsuitable by a man named Felix (in this case, her brother, composer Felix Mendelssohn). See Letter from Felix Mendelssohn to his mother, Lea Mendelssohn Bartholdy, *née* Salomon (June 2, 1837), in LETTERS OF FELIX MENDELSSOHN BARTHOLDY, FROM 1833 TO 1847 (2d ed. 1865) (“You write to me about [my sister] Fanny’s new compositions, and say that I ought to persuade her to publish them. . . . [F]rom my knowledge of Fanny I should say that she has neither inclination nor vocation for authorship. She is too much all that a woman ought to be for this. She regulates her house, and neither thinks of the public nor of the musical world, nor even of music at all, until her first duties are fulfilled. Publishing would only disturb her in these, and I cannot say that I approve of it. . . . If she resolves to publish, either from her own impulse or to please [her husband] Hensel, I am, as I said before, quite ready to assist her so far as I can; but to encourage her in what I do not consider right, is what I cannot do.”).

138. Ginsburg has used the term “girls” when describing male justices’ attitudes toward women’s rights: she “reasoned that the dissenters in [certain Supreme Court] cases were willing to give ‘something to the girls so long as only ad hoc decision making was occurring But when those decisions edged toward establishing general principle, they turned back.’” See Campbell, *supra* note 47, at 230 (quoting Ruth Bader Ginsburg, *The Supreme Court Clarifies the Distinction Between Invidious Discrimination and Genuine Compensation* (Mar. 20, 1977) (unpublished draft) (on file with the Library of Congress, Ginsburg Collection, Accession 1, ACLU File, Box 2, at 3)).

139. The “feminine” theme here is introduced by the piano, an instrument associated with women in Mozart’s time. See Arthur Loesser, *The Claviers Are Feminine*, in MEN, WOMEN, AND PIANOS: A SOCIAL HISTORY 64–67 (1954).

140. See *supra* note 126.

141. In Justice Ginsburg’s own words, “My mother told me to be a lady. And for her, that meant be your own person, be independent.” See *Morning Edition: Ruth Bader Ginsburg and Malvina Harlan: Justice Revives Memoir of Former Supreme Court Wife* (NPR radio broadcast May 2–3, 2002), available at <http://www.npr.org/templates/story/story.php?storyId=1142685>.

142. See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”). *But see supra* note 47.

143. See *Bradwell*, 83 U.S. at 141–42 (Bradley, J., concurring) (“[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interest and views which belong, or should belong, to the family

GINSBURG (cont'd):

A fuller Court¹⁴⁴ would twist the knife again.¹⁴⁵

Our law dismissed 'em

From a system

That was run¹⁴⁶

(A series of vocal and instrumental runs)

By men,

For men,

By men, men, men.¹⁴⁷

Then—then—*then*—

(Development)

New litigation

Would fight sex discrimination,

And I was to argue our cause here

institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. . . . And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”).

144. The Supreme Court, during the tenure of Chief Justice Melvin Fuller, held in *Muller v. Oregon* that it was not unconstitutional to limit the working hours of women because of “the difference between the sexes.” 208 U.S. 412, 419 (1908).

145. See *id.* at 421–23 (“That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . . [H]istory discloses the fact that woman has always been dependent upon man. . . . [I]t is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him.”). As co-founder of the Women’s Rights Project at the American Civil Liberties Union, Ruth Bader Ginsburg sought to challenge the assumption upon which *Muller* was based—namely, that “the law’s different treatment of a woman operated benignly in her favor.” Campbell, *supra* note 47, at 167.

146. See, e.g., *Glossary of Opera Terms*, OPERA AMERICA, <http://perma.cc/7GRK-FD76> (last visited Nov. 10, 2014) (“Roulade or Run: A quick succession of notes sung on one syllable.”); see also WOLFGANG AMADEUS MOZART, PIANO CONCERTO NO. 22 IN E-FLAT MAJOR (1785) (K. 482).

147. Cf. WOLFGANG AMADEUS MOZART, SYMPHONY NO. 41 IN C MAJOR (1788) (K. 551) (“Jupiter”), available at <http://perma.cc/MT6-XBDN>.

GINSBURG (cont'd):

Against the one-sided laws here.¹⁴⁸

The Equal-Rights-Amendment

Trend¹⁴⁹ meant . . .

(Fugato)

A few good¹⁵⁰ cases still were waiting,

With their delay creating

A threat¹⁵¹ that would require a real answer.¹⁵²

Making justices encounter subjects¹⁵³ otherwise ignored.¹⁵⁴

And—though the case of Mr. Moritz¹⁵⁵

148. *Cf., e.g., Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AM. CIV. LIBERTIES UNION (Mar. 7, 2006), <http://perma.cc/7N7B-QHG8> [hereinafter *ACLU Tribute*] (“The ACLU Women’s Rights Project was born in 1972 under Ginsburg’s leadership, in order to remove these barriers and open these opportunities.”).

149. *See supra* note 123.

150. Here begins a fugue-like section. *Cf.* EBENEZER PROUT, *FUGUE* 1, 5 (4th ed. 1891) (“A FUGUE is a composition founded upon one subject, announced at first in one part alone, and subsequently imitated by all the other parts in turn, according to certain general principles to be hereafter explained. The name is derived from the Latin word *fuga*, a flight, from the idea that one part starts on its course alone, and that those which enter later are pursuing it. . . . It must also be said that we often meet, especially in modern music, with vocal fugues having an independent instrumental accompaniment. In such cases what has been said as to the entry of the subject with one part alone does not apply We very frequently meet with passages written in the fugal style, that is, in which a subject is announced in one part and imitated by the others, but in which the imitation is not at the regular intervals of reply of subject and answer. Such passages are called FUGATO passages.”). Building upon the tradition of Glenn Gould, the singer here explicitly refers not only to names of Supreme Court cases litigated by the ACLU’s Women’s Rights Project, but also to fugue structure itself, announcing the fugue, real answer and countersubject. *Cf. generally* GLENN GOULD, *SO YOU WANT TO WRITE A FUGUE?* (1963).

151. *Cf.* Campbell, *supra* note 47, at 211 (“Ginsburg had argued that the Court’s refusal to face the issue of the ‘rights of pregnant women created a very real threat of economic blackmail.’”).

152. *Cf.* PROUT, *supra* note 150, at 2–3 (“The SUBJECT of a Fugue is the theme announced in the first instance . . . on which the whole composition is founded. . . . The ANSWER is the transposition of the subject into the key of the perfect fourth or fifth above or below the key of the subject. . . . The answer is frequently an exact transposition of the subject; in this case it is called a *real* answer; and a fugue which contains a real answer is said to be a ‘real fugue.’ At other times the answer is a modified transposition of the subject, alterations being necessitated by the form of the subject itself. Such an answer is called a *tonal* answer; and a fugue in which there is a tonal answer is called a ‘tonal fugue.’”).

153. *Cf. id.* at 3 (“A counterpoint which accompanies subject or answer systematically (though not of necessity invariably) is called a COUNTERSUBJECT.”).

154. *Cf., e.g.,* Ruth Bader Ginsburg, *Keynote Address at the University of Cape Town, South Africa: Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle* (Feb. 10, 2006) [hereinafter *Cape Town Address*], *available at* <http://perma.cc/R4KF-X6CA> (“Those with whom I was associated at the ACLU kept firmly in mind the importance of knowing the audience—largely men of a certain age. . . . We sought to spark judges’ and lawmakers’ understanding that their own daughters and granddaughters could be disadvantaged by the way things were.”); Ruth Bader Ginsburg with Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 *YALE L.J. ONLINE* 283 (2013), <http://perma.cc/6DMT-TGHW> (“I would try to get men on the bench to think not so much about what good husbands and fathers they were, but about how they wanted the world to be for their daughters and granddaughters.”).

155. *Moritz v. Commissioner*, 469 F.2d 466, 467 (10th Cir. 1972) (“Ruth Bader Ginsburg and Martin D. Ginsburg, New York City . . . , for petitioner-appellant.”).

GINSBURG (cont'd):

Was very useful for its
 Appendix,¹⁵⁶ through which we were led to read¹⁵⁷ —
 The sexes were still quite stratified,¹⁵⁸
 So we were not fully gratified:

So we stripped the courts of their “ro-
 Mantic” views in *Frontiero*:¹⁵⁹
 The justices grew wise and felt¹⁶⁰
 Paternalism was just a con.¹⁶¹

The cases we'd select,
 Though sometimes indirect,¹⁶²

156. See, e.g., Cape Town Address, *supra* note 154 (“Take the [*Moritz*] case nonetheless the Solicitor General urged, for the Court of Appeals decision ‘casts a cloud of unconstitutionality upon the many federal statutes listed in Appendix E.’ What was Appendix E? It was a printout from the Department of Defense computer (an unexpected release in those ancient pre-PC days); the printout listed, title by title, provisions of the U.S. Code ‘containing differentiations based upon sex-related criteria.’ It was a treasure trove. One could use the Solicitor General’s list to press for curative legislation and, at the same time, bring to courts contests capable of capturing public attention and accelerating the pace of change.” (citations omitted)).

157. Cf. *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional an Idaho statute favoring men over women in determining the administrator of an estate); Campbell, *supra* note 47, at 180 (“[Ginsburg]’s initial plan was to present to the Court a pair of cases, *Reed* and *Moritz v. Commissioner*, to emphasize that sex role stereotyping had negative ramifications for both sexes.”).

158. Cf. Campbell, *supra* note 47, at 176–77 (“In what is surely one of the most striking ironies of Ginsburg’s career, the Supreme Court handed down *Reed* on November 22, 1971. The same day that newspaper headlines heralded the end of bias against women, the Senate Judiciary Subcommittee rejected the House-approved Equal Rights Amendment.”).

159. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”); *id.* at 678 (“Ruth B. Ginsburg, New York City, for American Civil Liberties Union, amicus curiae, by special leave of Court.”).

160. Cf. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding unconstitutional the gender-based distinction under 42 U.S.C. § 402(g) of the Social Security Act permitting widows but not widowers to collect special benefits while caring for minor children). The first syllable of “Wiesenfeld” is to be pronounced “wise.” See Oral Argument at 23:18, *Weinberger*, 420 U.S. 636 (No. 17-1892), available at <http://perma.cc/JW2Y-3YBG> ([Ruth Bader Ginsburg:] “Mr. Chief Justice and may it please the Court: Stephen Wiesenfeld’s case concerns the entitlement of a female wage earner, a female wage earner’s family, to Social Insurance of the same quality as that afforded the family of a male wage earner.”).

161. Cf. *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding a Florida statute granting a property tax exemption to widows but not to widowers). Regarding “romantic paternalism,” see *Frontiero*, 411 U.S. at 684.

162. See, e.g., *ACLU Tribute*, *supra* note 148 (“Deb Ellis, a WRP staff attorney in the mid-’80s, applauds Ginsburg’s tactic of occasionally using male plaintiffs in equal protection cases . . . to demonstrate that sex-based distinctions harm men and women—indeed, entire families. . . . While some would have focused solely on the injustice such rules work on women, Ginsburg rejected differential treatment based on gender as inherently harmful to all involved.”).

GINSBURG (cont'd):

Would have a grand effect¹⁶³:

(Grand stretto)

The thirsty boys and Whitener's store in
 The case of *Craig v. Boren*¹⁶⁴—
 The composition of a jury
 In *Duren v. Missouri*¹⁶⁵—
 All added up to change our sexist law . . .¹⁶⁶

(Recapitulation: First theme)

Yet
 You have the nerve now
 To tell me what women deserve now?

With your administrative shortcuts of convenience,¹⁶⁷
 You, sir, have used up all my patience and my lenience
 And caused my temp'ature to rise.¹⁶⁸

(Transition)

But, as we've learned,
 The tide has turned:
 You thought you could block us,

163. Here, the fugato section culminates in a modified "grand stretto," or "stretto maestrale." See *Stretto*, in SCHIRMER PRONOUNCING POCKET MANUAL OF MUSICAL TERMS 212 (Theodore Baker ed., 4th ed. 1978) [hereinafter SCHIRMER] ("A division of a fugue (usually a final development, for the sake of effect) in which subject and answer follow in such close succession as to overlap."); see also PROUT, *supra* note 150, at 126 ("We said above . . . that one voice was allowed to discontinue the subject in a stretto when the next voice entered with it. It is, however, sometimes possible for each voice to continue the subject to the end, so that the stretto is a canon at short distances of time for all the voices. A close stretto of this kind was called by the old theorists a *stretto maestrale*—that is, a 'masterly stretto.'").

164. *Craig v. Boren*, 429 U.S. 190 (1976) (holding unconstitutional an Oklahoma statute prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and females under the age of eighteen). See also David von Drehle, *Redefining Fair with a Simple Careful Assault*, WASH. POST, July 19, 1993, at A1 ("Craig v. Boren was a 'gossamer' case, Ginsburg later wrote, a 'nonweighty interest pressed by thirsty boys.'").

165. *Duren v. Missouri*, 439 U.S. 357 (1979) (holding unconstitutional a Missouri statute making jury duty optional for women).

166. See, e.g., Ginsburg with Greenhouse, *supra* note 154 ("Very few overt gender lines remain.").

167. Ginsburg famously argued against the rationale of administrative convenience in *Frontiero*. See Campbell, *supra* note 47, at 185 ("The appellees [in *Frontiero*] also defended the statute [at issue] on the grounds of administrative convenience . . . Ginsburg employed a similar argument [to Joseph Levin's], but went further, noting that the administrative convenience was nothing more than a cover for the stereotypical notion that the husband, whatever his income, ought to be treated as the breadwinner." (citing Amicus Brief of the ACLU, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (on file with the Library of Congress, Ginsburg Collection, ACLU File, Box 3, at 46))).

168. Cf. *id.* at 183 ("After receiving Levin's letter, Ginsburg cancelled their next meeting, writing to Levin that he had 'made [her] temperature rise,' and that if all he required were suggestions, he should consult the appropriate chapter of her book." (quoting Letter from Ruth Bader Ginsburg, Dir., ACLU Women's Rights Project, to Joseph Levin, Legal Dir., S. Poverty L. Ctr. (Oct. 31, 1972) (on file with the Library of Congress, Ginsburg Collection, Accession 1, ACLU File, Box 3))).

GINSBURG (cont'd):

You thought you could lock us out,¹⁶⁹
But you were wrong.

(Second theme)

For, though you've tried to keep the key,¹⁷⁰
Your defenses have slowly eroded:
Your views are now outmoded,¹⁷¹
And we sing a different tune.¹⁷²
The change was not just accidental:¹⁷³
Our years of work were instrumental
(Instrumental interjection)
. . . And none too soon.

(Closing)

For Lady Justice needs us
To follow where she leads us,
And if the law's evolving as it should,
We'll see this evolution level-
ing her scales
(A series of vocal and instrumental scales)
For good.

(Cadenza, with cello¹⁷⁴ obbligato)

Although you've come and made your call,
You do not understand the sport—

169. Earlier in this opera, the Commentator attempted to bar access to this location. *See supra* text accompanying note 38.

170. Here, in this particular recapitulation section of sonata-allegro form, the key is altered: although the “masculine” tonic remains, the mode has changed from minor (the mode of the “masculine” first theme) to major (the mode of the “feminine” second theme). *See supra* note 126.

171. The Supreme Court has acknowledged a comparable (if less operatically phrased) sentiment when citing Ginsburg's victories. *Cf. Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (“Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect *outmoded* notions of the relative capabilities of men and women.” (emphasis added)). Accordingly, although the tonic of the current key is that of the “masculine” theme (*viz.* G), the mode has changed to that of the “feminine” theme (*viz.* major). *See supra* notes 126, 170.

172. Here, the singer is singing the “feminine” theme. *See supra* note 126.

173. *See Accidental*, in SCHIRMER, *supra* note 163, at 4 (“Any chromatic sign not found in the key signature, occurring in the course of a piece.”).

174. Justice Ginsburg played cello in her high-school orchestra. *See Mad About Music: Special Edition: Supreme Court Justices Ginsburg and Scalia*, at 8:32–8:58 (WQXR radio broadcast June 3, 2012), <http://perma.cc/CR9U-QQ5V>.

GINSBURG (cont'd):

And you may think you hold the ball,
But you're playing in my Court!¹⁷⁵

11. Recitative: "You want to play here?" (Commentator)

COMMENTATOR:

Very well, then.

You want to play here? Then we'll play here:

I'll make you join him. Then you'll *have* to stay here.¹⁷⁶

The COMMENTATOR gestures, the room quakes and darkens, and the doors are resealed.

COMMENTATOR (cont'd):

I have resealed the exits!

No man—or woman—can leave or enter.

Now *both* of you can enjoy the pleasure of having me as your tormentor,

For both of you shall now stand trial.

The second trial

Is a trial of silence.

No matter what I say,

You will not speak.

If you speak,

You will fail.

If you fail,

You will be punished.

And you do not want to be punished.

Your silence begins . . . now.

(Suddenly turning toward SCALIA—then toward GINSBURG)

Now, what to say?

Hmm . . .

175. Justice Ginsburg has deployed sports metaphors to illustrate the relationship between the legislature and the judiciary. *Cf., e.g.,* Vance v. Ball State Univ., 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting) ("The ball is once again in Congress' court to correct the error into which this Court has fallen."); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court.").

176. *Cf. MOZART & DA PONTE, Se vuol ballare [If you want to dance], in THE MARRIAGE OF FIGARO, supra* note 19, at act 1, sc. 2 ("Se vuol ballare, signor contino, / il chitarrino le suonerò." ["If you want to dance, [my] little count, / I will play the little guitar."]).

12. Aria & Ballet: “Withdrawn!” (Commentator, Scalia)*The obligatory French ballet, after Meyerbeer.*¹⁷⁷

The COMMENTATOR pursues SCALIA and GINSBURG, who—prohibited from speaking—can only communicate with each other through gestures and body movements.

COMMENTATOR (cont’d):*(Pursuing SCALIA)*

Justice Scalia:

We’re told by the papers and pundits and teachers

That our Constitution is very alive,¹⁷⁸

That justices surely are partisan creatures

Who tend to interpret it four against five . . .¹⁷⁹

177. Like the famous ballet in Meyerbeer’s *Robert le Diable*, in which a chorus of ghostly nuns attempts to seduce the title character by dancing, drinking, gambling and making love, the Commentator here attempts to tempt the justices into breaking their silence—by deploying criticism, flattery and (crocodile) tears. Cf. GIACOMO MEYERBEER & EUGÈNE SCRIBE, *ROBERT LE DIABLE* [ROBERT THE DEVIL] (1831), available at <http://perma.cc/7JUL-R45C>.

178. See, e.g., Patel, *supra* note 7 (“I have classes of little kids who come to the court, and they recite very proudly what they’ve been taught, ‘The Constitution is a living document.’ It isn’t a living document! It’s dead. Dead, dead, dead!” Scalia said, drawing laughs from the crowd. ‘No, I don’t say that . . . I call it the enduring Constitution. That’s what I tell them.’”). As to the reliability of such received wisdom, Justice Scalia notes that “[y]ou shouldn’t believe what you read about the Court in the newspapers, because the information has either been made up or given to the newspapers by somebody who is violating a confidence, which means that person is not reliable.” *Piers Morgan Tonight: Interview with Antonin Scalia* (CNN television broadcast July 18, 2012) (transcript available at <http://perma.cc/6ZPA-HGB5>).

179. See, e.g., *92Y American Conversation: Jeffrey Toobin on the Supreme Court*: “Yes, It’s Very Political,” 92ND ST. Y (Nov. 16, 2012), <http://perma.cc/L5ST-AS9J> (“If you want to know what matters, there are five Republicans and four Democrats. That’s a number that matters. And so the answer is . . . when it comes to the issues that we all care about . . . politics matters as much as law . . . You tell me who gets elected president, and I’ll tell you how a Supreme Court’s gonna decide a case. So, yes, it’s very political.”). But see, e.g., *Piers Morgan Tonight: Interview with Antonin Scalia*, *supra* note 178 (“I have ruled against the government when Republicans were in the administration and I’ve ruled for the government when Democrats were in the admin—I couldn’t care less who the president is or what the administration is . . . Not a single one of them [acts in a politically motivated manner] . . . I don’t think any of my colleagues, on any cases, vote the way they do for political reasons. They vote the way they do because they have . . . their own judicial philosophy. And they may have been selected by the Democrats because they have . . . that particular philosophy or they may have been selected by the Republicans because they have that particular judicial philosophy. But that is only to say that they are who they are. And they vote on the basis of what their own view of the law brings them to believe . . . [T]he court is not at all . . . a political institution. Not at all . . . It offends me . . . that people point to the fact—and they didn’t used to be able to . . . when David Souter and John Paul Stevens were still on the Court . . . they often voted with the appointees who were Democratic appointees, so that the 5-4 decisions [were] not always . . . five Republican appointees versus four Democratic.”); *Q&A: Justice Antonin Scalia* (C-SPAN television broadcast July 29, 2012), available at <http://perma.cc/GL5B-UM5T> (“[M]y opinions don’t always come out the same way. I mean, you know, they’re not always ‘conservative.’ To the contrary, sometimes—in some respects I ought to be the pin up of the criminal defense bar because a number of my opinions have defended the rights of criminal defendants even though . . . socially I’m a law and order conservative. But . . . my job is not to say how it ought to be but to say what the Constitution demands.”).

COMMENTATOR (cont'd):

Now, you say that you are just being obedient
 To what all the clauses initially meant¹⁸⁰—
 But isn't it more than a little expedient
 That the final result often seems to display a conservative bent?¹⁸¹

(SCALIA moves to answer—but with GINSBURG's help restrains himself)
 Withdrawn! Withdrawn!
 The question is withdrawn.

(Pursuing GINSBURG)
 Justice Ginsburg:
 It's clear your career has been very impressive
 —The teaching, the judging, the WRP¹⁸²—
 Establishing you as a leading progressive,
 So perhaps you can answer this question for me:
 If picketers stand in the way of improvement
 And threaten the progress we've already made¹⁸³—
 Then why would you question the core of our movement
 By going on record and looking for flaws in *Roe v. Wade*?¹⁸⁴

180. See, e.g., SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 22–23 (“The text is the law, and it is the text that must be observed A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”); *Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. L. SCH. (Apr. 20, 2010), <http://perma.cc/D42Q-7NSP> (“Examining what the Founders meant when writing the Constitution is the best method for judging cases, U.S. Supreme Court Justice Antonin Scalia said . . . ‘I deny the premise that law has nothing to do with historical inquiry Historical inquiry has nothing to do with the law only if the original meaning is irrelevant.’”).

181. See, e.g., JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT, at xix (2006) (“[T]he sixth school of conservative thought represented in the legal community today is originalism The conservative nature of originalism . . . is evident in several ways. First, as a method of constitutional interpretation, originalism places a presumption against the creation of new rights. . . . The second way in which originalism is conservative is that many of its adherents support an authoritarian legal system, which is reflected in their positivistic reading of the Constitution. . . .”). But see JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 209 (2007) (“Scalia did not always reach more conservative results than Rehnquist. On the contrary, his legalistic devotion to constitutional text and history led him to side against the government in some important civil liberties cases in which Rehnquist preferred to defer to state authority.”).

182. See *ACLU Tribute*, *supra* note 148.

183. See, e.g., Editorial, *Abortion Rights: Uphold Buffer Zones*, N.Y. TIMES, Jan. 13, 2014, at A26 (“Abortion is one of the most emotionally fraught issues in American society, and public discussion often turns into an attack on the women who choose to exercise their constitutionally protected rights.”).

184. See, e.g., Editorial, *Justice Ginsburg's Misdirection*, N.Y. TIMES, Apr. 2, 2013, at A26. But see, e.g., Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), <http://perma.cc/PTT4-5ZPB> (“Casual observers of the Supreme Court who came to the Law School to hear Ruth Bader Ginsburg speak about *Roe v. Wade* likely expected a simple message from the longtime defender of reproductive and women's rights: *Roe* was a good decision. Those more acquainted with Ginsburg and her thoughtful, nuanced approach to difficult legal questions were not surprised, however, to hear her say just the opposite, that *Roe* was a faulty decision . . . ‘My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change[.]’ . . . She would've preferred that abortion rights be secured more gradually, in a process that included state legislatures and the courts . . . Ginsburg also was troubled that the focus on *Roe* was on a

COMMENTATOR (cont'd):

(GINSBURG moves to answer—but with SCALIA's help restrains herself)

Withdrawn! Withdrawn!

Withdrawn, withdrawn, withdrawn!

(To both SCALIA and GINSBURG)

But . . .

Doesn't it feel lonely

When the party machines

Look at justices only

As a political means?

But for an outcome

With which they agree,

Their support would no doubt come

To be

Withdrawn . . .¹⁸⁵

(To both SCALIA and GINSBURG, in increasingly rapid alternation)

So say what you will about legal abortion,

Affirmative action, or funding campaigns—

Then watch it get blown out of proportion

And repeated in retweeted refrains.

And just how much more of your time can you spend on

The logic that half of our people ignore,

(Cornering SCALIA, with increasing shrillness)

When the only thing we can depend on

Is that someone will blame *Bush v. Gore*,¹⁸⁶

right to privacy, rather than women's rights. 'Roe isn't really about the woman's choice, is it? . . . It's about the doctor's freedom to practice . . . it wasn't woman-centered, it was physician-centered.');

Jason Keyser, *Ginsburg Says Roe Gave Abortion Opponents Target*, ASSOCIATED PRESS, May 11, 2013, available at <http://perma.cc/YU3Q-VQN8> ("That was my concern, that the Court had given opponents of access to abortion a target to aim at relentlessly[.]"). Nevertheless, the political leanings of media outlets can correlate with their evaluation of the judiciary. See Editorial, *Abortion Rights: Uphold Buffer Zones*, *supra* note 183.

185. *But cf., e.g., Q&A: Justice Antonin Scalia*, *supra* note 179 ("You can't judge judges unless you know what they're working with . . . Unless you want them to ignore the text, it's really unfair to judges to say, 'I like the result, therefore that's a good judge. I hate the result, therefore that's a bad judge . . . And the rule for a judge ought to be 'garbage in, garbage out.' If you're dealing with an inane statute, you are duty-bound to produce an inane result.'").

186. *Bush v. Gore*, 531 U.S. 98 (2000); *cf.* Jess Miller, *Lawyers and Opera: Supreme Court Edition*, CHAUTAUQUAN DAILY (July 29, 2013), <http://perma.cc/LP5V-MAT5> ("I should add to that that I don't think the end result would have been any different—because the House then had a strong Republican majority—so Bush would have been our president in any event, but it would have been decided later rather than sooner.").

COMMENTATOR (cont'd):

Bush v. Gore,
Bush v. Gore,
Bush v. Gore,
Bush v. Gore,
Bush v. Gore,
Bush v.—

SCALIA:

(Bursting out loud)
Oh,
Get over it!¹⁸⁷

13. Recitative: “I asked for silence” (Commentator)

SCALIA and GINSBURG realize what has just transpired. An uncomfortably long silence. Then:

COMMENTATOR:

(Eerily calm)
I asked for silence:
Now it is broken.
Justice Scalia,
You who have spoken:
Your precious chance at redemption has vanished:
(Suddenly terrifying)
You have sealed your fate—
And you must be banished!

Behold your eternal destination!
Flaming,
(He gestures; the chamber erupts in flames)
Formless
*(He gestures again; the chamber begins to dissolve into a nightmare)*¹⁸⁸
Anarchy—
Where rules have no teeth,

187. E.g., *Piers Morgan Tonight: Interview with Antonin Scalia*, *supra* note 178 (“[The most] contentious [case]? Well, I guess the one that, you know, created . . . most waves of disagreement was *Bush v. Gore*, OK? That comes up all the time. And my usual response is get over it.”).

188. Cf. *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283 (2014) (Scalia, J., dissenting from denial of certiorari) (“Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky. And I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency.”).

COMMENTATOR (cont'd):

Where men have no shame,
Where words have no meaning:

The flames rage; the nightmare is upon them. The COMMENTATOR begins an incomprehensible incantation. An infernal gateway appears, beyond which lies no redemption.

COMMENTATOR (cont'd):

This,
This is your fate—
Unless you recant your originalist creed.
That is all you have to do to be freed.
Now, Justice Scalia,
Now, what do you say?

14. Aria: “Structure is destiny” (Scalia)

After J.S. Bach.

SCALIA stands at this infernal gateway.

SCALIA:

Structure is destiny.¹⁸⁹
And I was built¹⁹⁰
To follow the canons,¹⁹¹
To know and distinguish
Innocence from guilt.

But if words can be whittled
Until they are hollowed,
If laws are belittled
Until barely followed,¹⁹²
Then my world is already dead.

189. See, e.g., Alex Hopkins, *Scalia Touts Weight of State Courts on Citizens in Speech at GW*, WASH. TIMES (Sept. 16, 2013), <http://perma.cc/FKQ2-XSRV> (“‘Structure is destiny,’ [Scalia] added, recalling the numerous hours that the Founding Fathers spent debating how to ensure that the legal foundation of the U.S. was not based on just words alone.”).

190. See Senior, *supra* note 22 (“I don’t know when I came to [originalism]. I’ve always had it, as far as I know.”).

191. Cf. SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 25 (“Textualism is often associated with rules of interpretation called the canons of construction[.]”); ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 9 (2012) (“We believe that our effort is the first modern attempt, certainly in a century, to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation.”).

192. See, e.g., Senior, *supra* note 22 (“Words have meaning. And their meaning doesn’t change.”).

SCALIA (cont'd):

I reject your bargain.
I will plunge into your fire
And forge ahead.

And I will brook¹⁹³ no disagreement,
For I will look to my Protector,
And He will see me take the bitter with the sweet,¹⁹⁴
And He will judge me
In the fullness of time,¹⁹⁵
And whatever the verdict,
My joy or sorrow
Will be sublime.¹⁹⁶

(To GINSBURG)

Justice Ginsburg, I have to leave you.¹⁹⁷

15. Scene: “That won’t do” (Ginsburg, Commentator, Scalia)

GINSBURG:

No . . .

COMMENTATOR:

Very well.

GINSBURG:

No . . .

193. This phrase is to be sung on the pitches B-A-C-H (B-flat, A, C, B-natural). “Bach” is the German for “brook.” Cf. *Mad About Music: Supreme Court Justice Antonin Scalia*, *supra* note 97 (quoting Scalia, who explains that sometimes he has music on in the background when drafting opinions, “[a]nd the best is Bach. . . . It doesn’t intrude and it’s very orderly. I truly believe it. It sets your mind in order”).

194. See Senior, *supra* note 22 (“I repudiate [my description of myself as a fainthearted originalist] . . . I try to be [a stouthearted originalist]. I try to be an honest originalist! I will take the bitter with the sweet!”).

195. See *Justice Scalia, the Great Dissenter, Opens Up* (NPR radio broadcast Apr. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=89986017> (“You know, winning and losing, that’s never been my objective. It’s my hope that in the fullness of time, the majority of the court will come to see things as I do.”).

196. See Senior, *supra* note 22 (“I have never been custodian of my legacy. When I’m dead and gone, I’ll either be sublimely happy or terribly unhappy.”).

197. Cf. Heinrich Isaac, *Innsbruck, ich muss dich lassen* [*Innsbruck, I Must Leave You*] (Choral Domain Pub. Libr. rev. ed. 1999) (ca. 1450–1517), available at <http://perma.cc/3CW7-YGNK> (“Innsbruck, ich muss dich lassen, / ich fahr dahin mein Strassen, / in fremde Land dahin.” [“Innsbruck, I must leave you; / I will go my way / to a foreign land.”])).

COMMENTATOR:

Justice Scalia,
I hereby—

GINSBURG:

No!
That won't do,¹⁹⁸
That won't do,
You cannot banish him,
That won't do.

COMMENTATOR:

You are searching in vain for a useful solution—
But justice here is blind!

So plead, by all means:
Rage! Yell!
Try to free him
From his custom-tailored hell,
But he will still be banished—

GINSBURG:

Then banish *me* as well!

COMMENTATOR:

Why?

GINSBURG:

Because I spoke too.

SCALIA, COMMENTATOR:

What?

GINSBURG:

I spoke too.

SCALIA, COMMENTATOR:

When?

198. Cf. *Justice Ruth Bader Ginsburg Talks About Judicial Activism*, *supra* note 60 (“[D]espite the overwhelming majority in Congress that passed the Voting Rights Act, the Court said, ‘that won’t do.’”).

GINSBURG:

Banish *me* with him,
For I spoke too.

SCALIA:

Ruth, do not enslave yourself
To my infernal fate . . .

COMMENTATOR:

How noble this all sounds . . .

SCALIA:

Ruth, leave now and save yourself
Before it is too late . . .

COMMENTATOR:

But what are your grounds?
Justice Ginsburg,
Justify your demand;
Explain this peculiar choice.

GINSBURG:

We serve justice together,
And that means we can speak with one voice.¹⁹⁹
And here, I choose to join him.²⁰⁰

SCALIA:

Ruth, are you sure this is productive? . . .

GINSBURG:

(To the COMMENTATOR, re: SCALIA)

He spoke,
So I spoke.

199. Cf. Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) (transcript available at <http://perma.cc/Z6E8-6NUM>) (“Our Chief Justice . . . expressed admiration for the nation’s fourth Chief Justice, John Marshall, in my view, shared by many, the greatest Chief Justice in U.S. history. Our current Chief admired, particularly, Chief Justice Marshall’s unparalleled ability to achieve consensus among his colleagues. During his tenure, the Court spoke with one voice most of the time.”).

200. As Justice Ginsburg notes, “There are a number of cases . . . they’re not picked up by the press too often, where Justice Scalia and I are in total agreement, and if you think of this last term, of Fourth Amendment cases, the one where Nino was . . . in dissent. [The] question was whether the police, when they arrest someone suspected of a felony, . . . can take a DNA sample.” *Justice Ginsburg on Supreme Court Rulings and Political Activism* (C-SPAN television broadcast Sept. 6, 2013), available at <http://perma.cc/S5LZ-68GA>; see *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J. dissenting) (“Justice Scalia, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.”).

GINSBURG (cont'd):

You may consider *my* speech . . . constructive.
So banish *me* with him,
For I spoke too.

COMMENTATOR:

But *why* would you do this for your enemy?

GINSBURG, SCALIA:

Enemy?

GINSBURG:

Hardly.

SCALIA:

Sheer applesauce!²⁰¹

GINSBURG:

I would not.
But I would do this for my friend.²⁰²

COMMENTATOR:

Friend?
But you two are so . . . different!

SCALIA, GINSBURG:

Yes:

16. Duet: “We are different. We are one” (Scalia, Ginsburg)

SCALIA, GINSBURG (cont'd):

We are different.
We are one.
The U.S. contradiction—

SCALIA:

The tension we adore:²⁰³

201. *Cf. Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 113 (2007) (Scalia, J., dissenting) (“The sheer applesauce of this statutory interpretation should be obvious.”).

202. *Cf., e.g., Piers Morgan Tonight: Interview with Antonin Scalia*, *supra* note 178 (“My best buddy on the Court is Ruth Bader Ginsburg, has always been.”).

203. *See, e.g., Emmarie Huetteman, Breyer and Scalia Testify at Senate Judiciary Hearing*, N.Y. TIMES, Oct. 6, 2011, at A21 (“Justice Scalia expounded on what sets the United States apart from other countries: not the Bill of Rights, which ‘every banana republic has,’ but the separation of powers. Americans ‘should learn to love the gridlock,’ he said. ‘It’s there for a reason, so that the legislation that gets out will be good legislation.’”)

SCALIA, GINSBURG:

Separate strands unite in friction
To protect our country's core.
This, the strength of our nation,
Thus is our Court's design:
We are kindred,
We are nine.²⁰⁴

SCALIA:

To strive for definition,²⁰⁵

GINSBURG:

To question and engage,

SCALIA:

Let us speak to our tradition²⁰⁶—

GINSBURG:

Or address a future age.²⁰⁷

SCALIA:

This, the duty upon us . . .

GINSBURG:

This, the freedom . . .

SCALIA, GINSBURG:

. . . To judge how our strands are spun:
This makes us different:

204. The original composition of the Court was six justices. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 23. In 1869, the number of justices was increased to nine. Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44 (“[T]he Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices . . .”).

205. Cf. SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 13–14 (“By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.”).

206. See, e.g., Rob Seal, *Scalia: Judges Should Consider Tradition in Church and State Cases*, U. VA. L. SCH. (Apr. 11, 2008), <http://perma.cc/3PYB-R8E4> (“What Shakespeare is to the high school English student, the society’s accepted constitutional traditions are to the prudent jurist. He doesn’t judge them, but is judged by them. . . . [Rules] ought to be rooted in—ought to be derived from—the text of the Constitution, and where that text is in itself unclear, the settled practices that the text represents.”).

207. See, e.g., *Morning Edition: Ruth Bader Ginsburg and Malvina Harlan: Justice Revives Memoir of Former Supreme Court Wife*, *supra* note 141 (“Dissents speak to a future age. It’s not simply to say, ‘My colleagues are wrong and I would do it this way.’ But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that’s the dissenter[s]’ hope: that they are writing not for today but for tomorrow.”).

SCALIA:

We are one . . .

GINSBURG:

We are one decision from forging the source of tomorrow . . .

SCALIA:

One decision from shifting the tide . . .²⁰⁸

SCALIA, GINSBURG:

Always one decision from charting the course we will steer . . .²⁰⁹

For our future

Is unclear,

But one thing is constant—

The Constitution we revere.²¹⁰

We are stewards of this trust,²¹¹

We uphold it as we must,

For the work of our Court is just

Begun . . .

And this is why we will see justice done:

We are different;

We are one.

208. Compare Daniel J. Hemel, *Scalia Describes “Dangerous” Trend*, HARVARD CRIMSON Sept. 29, 2004, <http://perma.cc/B8JU-U5BF> (“The Supreme Court’s recent decisions . . . represent a ‘dangerous’ trend, Justice Antonin Scalia told a Harvard audience last night.”), with *At the Supreme Court: A Conversation with Justice Ruth Bader Ginsburg and Stanford Law School Dean M. Elizabeth Magill*, STANFORD LAWYER (Oct. 4, 2013), <http://perma.cc/ZNS2-VMZU> (“If you reflect on the history of the Court, there have been periods in which the Court is stemming the tide of progress in the nation at large. I think this may be one such time, but, eventually, this time will pass.”).

209. See SCALIA, A MATTER OF INTERPRETATION, *supra* note 2, at 7, 12 (“[A]n absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any ‘law’; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not binding.) . . . I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method.”).

210. See *Justice Ginsburg on Supreme Court Rulings and Political Activism*, *supra* note 200 (“I should say that one of the hallmarks of the Court is collegiality, and we could not do the job the Constitution gives to us if we didn’t—to use one of [Justice Antonin] Scalia’s favorite expressions—‘get over it.’ We know that—even though we have sharp disagreements on what the Constitution means, we have a trust, we revere the Constitution and the Court, and we want to make sure that, when we leave it, it will be in as good shape as it was when we joined the Court.”).

211. See *id.*

17. Arioso: “You pass” (Commentator, Ginsburg, Scalia)

The flames have dissipated.

COMMENTATOR:

(Moved, but desperately trying to hide his tears)

You pass.

You pass.

This was, in fact, the third and final trial,

And you pass.

You both pass.

(As the chamber begins to transform . . .)

Justice Scalia,

Faithful to the end,

Justice Ginsburg,

Loyal to your friend,

All is forgiven,

All is resolved,

Apologies to both of the parties involved

For everything here

That you had to endure,

But we had to be sure . . .

And you pass,

You both pass—

And here is your prize!

(A celestial stage appears)

This room is a secret gateway

To a world of perpetual spring,

Where life is transformed into opera,

Which you are now able to sing . . .

GINSBURG and SCALIA realize that they are singing.

GINSBURG:

Ah . . .

I hear it now!

SCALIA:

Ah . . .

I thought my voice sounded different here.

COMMENTATOR:

(Handing each JUSTICE a key)

And you'll always find it when you
Use this special key.
And now, let us visit your venue.
Come with me . . .

The COMMENTATOR, GINSBURG and SCALIA all approach and occupy the celestial stage.

18. Aria: "Come to this celestial stage" (Commentator)

Invocation to lawyers.

COMMENTATOR (cont'd):

Come to this celestial stage:
Draw near it
And hear it
Lift your thoughts from print and page
To sound in blessed accord.²¹²
This is your reward:

When life's complaints²¹³ grow harsher with each hearing,²¹⁴
When your moments of grace are all too brief,²¹⁵
When it seems your whole world is careering,²¹⁶
Come here and seek your relief,²¹⁷

212. This aria refers both to audiences in general and to lawyers in particular. See *Accord*, in BLACK'S LAW DICTIONARY 16 (1st ed. 1891) ("To agree or concur, as one judge with another.").

213. See *Complaint*, in BLACK'S LAW DICTIONARY, *supra* note 212, at 239 ("[T]he complaint is the first or initiatory pleading on the part of the plaintiff in a civil action.").

214. See *Hearing*, in BLACK'S LAW DICTIONARY, *supra* note 212, at 564 ("The hearing of the arguments of the counsel for the parties upon the pleadings, or pleadings and proofs; corresponding to the trial of an action at law.").

215. See *Brief*, in BLACK'S LAW DICTIONARY, *supra* note 212, at 154 ("An epitome or condensed summary of the facts and circumstances, or propositions of law, constituting the case proposed to be set up by either party to an action about to be tried or argued.").

216. Compare DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 206 (1937) ("[A]s the years have rolled on, and Justice [George] Sutherland has remained, it almost seems that he has taken as the guiding scripture of his life, a speech he once delivered in the Senate: 'It is not strange that, in the universal fever of haste, government itself should be swept by this mad spirit of impatience which has given rise to the new Apostle of Reform, whose demand is that we shall abandon the methodical habits of the past and go careering after novel and untried things.' A quarter of a century has passed since he delivered that speech, and Justice Sutherland, despite age and health, still sits, black-robed and solemn, athwart the path of the Apostle of Reform."), with Senior, *supra* note 22 ("Maybe the world is spinning toward a wider acceptance of homosexual rights, and here's Scalia, standing athwart it. At least standing athwart it as a constitutional entitlement. . . . You know, for all I know, 50 years from now I may be the Justice Sutherland of the late-twentieth and early-21st century, who's regarded as: 'He was on the losing side of everything, an old fogey, the old view.' And I don't care.").

217. See *Relief*, in BLACK'S LAW DICTIONARY, *supra* note 212, at 1018 ("Relief" also means deliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, or the reformation or rescission of a contract; but it does not seem appropriate to the awarding of money damages.").

COMMENTATOR (cont'd):

Then go
Back to your world
To live,
Wise
And strong.

And know
That you can always
Come to this celestial stage,
Where spirits and voices all rise,
All rise
In song,
Here where you belong!

19. Trio: “Now tread the boards” (Commentator, Ginsburg, Scalia)

After Puccini and R. Strauss.

*SCALIA and GINSBURG begin to vocalize, reveling in their harmony.*²¹⁸

COMMENTATOR (cont'd):

Now tread the boards
That angels and heroes have trod.
With these rewards,
What more can one ask of God?

Take your place in this chamber
Where Music and Word are twins.
Now your dream finally begins.

SCALIA:

*(Sotto, singing Rodolfo’s “Che gelida manina” from La Bohème)*²¹⁹
Che gelida manina,

218. This trio addresses the issue of textual intelligibility in operatic ensembles by assigning to one voice an original principal text in English to be sung at a higher volume—and, to the other two voices, direct quotations from famous operas sung at lower volume in Italian and German. Cf. PAUL ROBINSON, *Reading Libretti and Misreading Opera*, in *OPERA, SEX, AND OTHER VITAL MATTERS* 43 (2002) (“[W]hen two or more people sing at the same time the words generally suffer. So once again we are confronted with an illustration of what is perhaps opera’s central paradox: the most important words are often the least likely to be understood.”).

219. PUCCINI, ILLICA & GIACOSA, *Che gelida manina! [What a cold little hand!]*, in *LA BOHÈME*, *supra* note 93, at act 1; see also *Mad About Music: Supreme Court Justice Antonin Scalia, supra* note 97 (“Oh my, what would be the role for me? . . . Rodolfo, you know, I would like that, in [*La*] *Bohème*. Yeah, I’ll stick with *Bohème*.”).

SCALIA (cont'd):

se la lasci riscaldar.
 Cercar che giova?
 Al buio non si trova.
 Ma per fortuna
 è una notte di luna,
 e qui la luna
 l'abbiamo vicina.

GINSBURG:

*(Sotto, singing the Marschallin's "Hab' mir's gelobt" from Der Rosenkavalier)*²²⁰

Hab' mir's gelobt, ihn lieb zu haben in der richtigen Weis',
 daß ich selbst sein Lieb' zu einer andern . . .
 . . . wer's erlebt, der glaubt daran . . .

You've done quite the job in
 Finding music in my marrow;
 Now I can be a robin
 Instead of just a sparrow.²²¹
 To think my old music teacher
 Had me mouth every word,²²²
 I know I could reach her
 Now,
 With this voice,
 The voice of the most melodious bird . . .

SCALIA:

We stand in this chamber
 Where Music and Word are twins.

220. RICHARD STRAUSS & HUGO VON HOFMANNSTHAL, *Hab' mir's gelobt* [I made a vow], in DER ROSENKAVALIER [THE KNIGHT OF THE ROSE] act 3 (1911), available at <http://perma.cc/TNY8-PPSD>; see also Robert Barnes, *The Question Facing Ruth Bader Ginsburg: Stay or Go?*, WASH. POST MAG. (Oct. 4, 2013), <http://perma.cc/Y2MD-TX8T> ("If she could sing, she would star as the Marschallin from 'Der Rosenkavalier.'"); *At the Supreme Court: A Conversation with Justice Ruth Bader Ginsburg and Stanford Law School Dean M. Elizabeth Magill*, STANFORD LAWYER (Oct. 4, 2013), <http://perma.cc/Y2MD-TX8T> ("I would be the Marschallin in *Der Rosenkavalier*. She is a woman who realizes she is no longer young. A transition is occurring in her life. I like the part of the Marschallin because she is a spirited woman, but at the same time she is a wise woman, understanding herself and the circumstances in which she lives.").

221. *Cf.*, e.g., Ruth Bader Ginsburg, *Remarks for Chautauqua Lawyers in Opera*, U.S. SUP. CT. (July 29, 2013), <http://perma.cc/CR2-W4ZJ> ("Truth be told, I am ill-equipped to break out in song. My grade-school music teacher ranked me a sparrow, not a robin. The instruction given me: do not sing, only mouth the words.").

222. *Cf. id.*

COMMENTATOR:

Now tread the boards
That angels and heroes have trod
—And how!
What more can one ask of God?

SCALIA:

Each of us sings like a bird.²²³

GINSBURG:

Now my dream finally begins!²²⁴

COMMENTATOR:

What more can one ask of God?²²⁵

20. Finale (Trio): “Frozen Lime Soufflé” (Commentator, Ginsburg, Scalia)

*Waltz in a Viennese manner,*²²⁶ *after R. Strauss & J. Strauss II. Tempo:*
*reasonably quick.*²²⁷

Somewhere, chimes.

SCALIA:

Ah!

GINSBURG:

We must go.

SCALIA:

Meetings . . .

GINSBURG:

But we’ll come back tomorrow.

COMMENTATOR:

Wait!

One last thing.

The COMMENTATOR produces a box and a letter.

223. This passage contains a hidden vocal acrostic—namely, the title of the opera.

224. *See id.*

225. *See id.*

226. *Cf.* MARTHA-ANN ALITO ET AL., CHEF SUPREME: MARTIN GINSBURG 40–43 (Clare Cushman ed., 2011) [hereinafter CHEF SUPREME] (“Shrimp in an Indian Manner” and “Squid in an Italian Manner”).

227. *Cf. id.* at 76 (“Reasonably Quick Potato Gratin”).

COMMENTATOR (cont'd):

Justice Ginsburg,
You have an admirer:
Our celestial *chef de cuisine*.
When you come back tomorrow,
We shall have a party;
There you will get to know him better.
In the meantime,
He left you this gift
And this letter.

GINSBURG:

(Taking and reading the letter; reacting)
Ah!

COMMENTATOR:

Well?

SCALIA:

Well?

GINSBURG:

(Handing the letter to the OTHERS)
Well . . .

SCALIA, COMMENTATOR:

(Jointly and severally, reading the letter)
“I have heard you and concluded
That we’d make a perfect team,
So I’m writing now to court you
And support you in your dream.”²²⁸

228. See Stephen Labaton, *The Man Behind the High Court Nominee*, N.Y. TIMES, June 17, 1993, at A1 (“Even though she had established an extraordinary record as a lawyer and teacher, Ms. Ginsburg has acknowledged that without the strong personal and political support of her husband, she may never have become President Clinton’s choice for the Supreme Court. For his part, Mr. Ginsburg said in an interview today: ‘I have been supportive of my wife since the beginning of time, and she has been supportive of me. It’s not sacrifice; it’s family.’”); see, e.g., *Morning Edition: Martin Ginsburg’s Legacy: Love of Justice (Ginsburg)* (NPR broadcast July 3, 2010), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=128249680> (“[Martin Ginsburg] told a friend, ‘I think the most important thing I have done is to enable Ruth to do what she has done.’”).

SCALIA, COMMENTATOR (cont'd):

If you'll be my darling diva,²²⁹

Then I'll be your chef supreme.²³⁰

We'll have the life for which we've been looking

(You'll do the thinking;²³¹ I'll do the cooking²³²).

So, for you, in lieu of some common bouquet . . .²³³

(GINSBURG has opened the box to reveal a sumptuous dessert and corresponding spoons)

Try my frozen lime soufflé.²³⁴

With a spoon, GINSBURG tastes it . . . savors it . . . and reacts ecstatically.

Well?

GINSBURG:

This frozen lime soufflé:

Goodness, where to start with it?

He has won my heart with it!

GINSBURG passes the soufflé to SCALIA, who also tastes it.

COMMENTATOR:

Then come to our soirée!

If I may remind you two,

He will come and find you to-

Morrow at our party.

229. When asked to imagine herself in a musical career, Justice Ginsburg chose to be an operatic soprano. See *Mad About Music: Special Edition: Supreme Court Justices Ginsburg and Scalia*, *supra* note 174 (“In my dreams, yes[,] I am [an operatic performer] . . . I might be Beverly Sills as Cleopatra, or in any of her ‘queen’ roles. I could be Renata Tebaldi . . .”).

230. See generally MARTIN GINSBURG, *CHEF SUPREME* (2011).

231. Cf. Ruth Bader Ginsburg, *The Honorable Ruth Bader Ginsburg: Associate Justice of the Supreme Court of the United States*, in *THE RIGHT WORDS AT THE RIGHT TIME* 115 (2002) (“It was June 1954. I had just graduated from Cornell University and was about to marry Marty Ginsburg, the only young man I dated who cared that I had a brain.”).

232. See James Ginsburg, *Thoughts on Dad*, in *CHEF SUPREME*, *supra* note 226, at 118, 120 (“[M]y father loved to repeat my sister’s line about the division of labor in our family: ‘Mommy does the thinking and Daddy does the cooking.’”).

233. It is the composer and librettist’s hope that this provides soprano heroines playing stage divas a welcome respite from their usual fate in operas. See, e.g., FRANCESCO CILEA & ARTURO COLAUTTI, *ADRIANA LECOUVREUR* act 4, sc. 8 (1902), available at <http://perma.cc/MSJ6-9KU7> (ending with a diva’s expiration due to poisoned violets) (“Ella sviene . . . / Ma come avvenne? / Fiutò dei fior . . . / Un velen . . . / Ella muor!” “[The diva] faints . . . / But how did this happen? / She sniffed the flowers . . . / A poison . . . / She is dying!”).

234. Cf. *CHEF SUPREME*, *supra* note 226, at 94–95 (“Frozen Lime Soufflé”).

GINSBURG:

Does my suitor have a name?

COMMENTATOR:

(With significance)

Yes, indeed: his name is Marty . . .²³⁵

SCALIA:

Marty?

GINSBURG:

Marty! . . .

My Marty?

COMMENTATOR:

The one and the same.

(To GINSBURG, who is lost in thought)

Is there something you'd like me to tell him?

GINSBURG, still holding the spoon, has produced a handkerchief and now brings it to her lips—is it a dab or a kiss?

GINSBURG:

(With a coquettish smile)

Let my eager suitor simmer²³⁶

Like a custard over heat,²³⁷

Soon enough I'll have him swooning

(Twirling the spoon expertly²³⁸)

While we're spooning something sweet.²³⁹

(Displays her handkerchief conspicuously)

And if he can find my kerchief²⁴⁰

235. See, e.g., *Morning Edition: Martin Ginsburg's Legacy: Love of Justice (Ginsburg)*, *supra* note 228 (referring to Martin Ginsburg as "Marty").

236. Cf. CHEF SUPREME, *supra* note 226, at 94 ("[H]eat the milk (over direct low heat) until it is hot but not boiling.").

237. Cf. *id.* ("Pour the hot milk slowly into the egg yolk mixture, still beating, to produce a smooth uncooked custard mixture. . . . Cook the mixture . . . until [it] is thick and creamy.").

238. Cf. Linda P. Campbell & Linda M. Harrington, *Judge Ruth Bader Ginsburg: Portrait of a 'Steel Butterfly,'* CHI. TRIB., June 27, 1993, <http://perma.cc/J8QD-WWD2> ("The 1950 yearbook from James Madison High School shows a Ruth Bader with dark hair and high cheekbones who was a baton twirler, member of the pep squad, orchestra and honor society and feature editor of the school newspaper.").

239. Cf. CHEF SUPREME, *supra* note 226, at 95 ("Carefully spoon—do not just pour it—the lime soufflé mixture into the prepared soufflé mold.").

240. Cf. STRAUSS & HOFMANNSTHAL, DER ROSENKAVALIER, *supra* note 220, at act 3 (ending with a dropped handkerchief).

GINSBURG (cont'd):

(With a flourish, tosses the handkerchief atop a convenient piece of furniture)
And return it when we meet,²⁴¹
Then we'll reserve our time for relaxing
(I know his life has been rather . . . taxing²⁴²).
Then, it's *me* that he will be whisking²⁴³ away
For a tart²⁴⁴ and decadent²⁴⁵ day
Filled with frozen lime soufflé!

GINSBURG, SCALIA:

But now we must really go.

SCALIA:

There's another plain meaning I mean to make plainer . . .²⁴⁶

GINSBURG:

And I have to go see my personal trainer . . .²⁴⁷

COMMENTATOR:

And I need to go have a chat with John Boehner . . .

(Bidding SCALIA and GINSBURG goodbye)

Until tomorrow . . .

SCALIA:

Until tomorrow . . .

GINSBURG:

Until tomorrow . . .

241. Cf. VERDI & PIAVE, *LA TRAVIATA*, *supra* note 54, at act 1, sc. 3 (“Prendete questo fiore . . . / Per riportarlo . . . / Domani.” [“Take this flower . . . / So you can bring it back to me . . . / Tomorrow.”]).

242. See, e.g., *Morning Edition: Martin Ginsburg's Legacy: Love of Justice (Ginsburg)*, *supra* note 228 (“Marty Ginsburg, in addition to becoming a famous tax lawyer, became a famous chef.”).

243. Martin Ginsburg's recipe for frozen lime soufflé emphasizes whisking, explicitly exhorting the cook to “[b]eat [the custard] well with a wire whip,” to be “whisking constantly” while cooking the custard (twice), to “whisk occasionally” while the custard is cooling, to “whisk well to incorporate” the lime juice into the room-temperature custard, and to “us[e] a balloon whisk [to] beat the egg whites.” See CHEF SUPREME, *supra* note 226, at 94–95.

244. Cf. *id.* 104–05 (“Tarte Tatin”).

245. Cf. *id.* at 100–03 (“Decadent Chocolate Bombe”).

246. Cf. SCALIA & GARNER, *supra* note 191, at 72 (“Courts have sometimes ignored plain meaning in astonishing ways.”).

247. See Ann E. Marimow, *Personal Trainer Bryant Johnson's Clients Include Two Supreme Court Justices*, WASH. POST, Mar. 19, 2013 (“‘I never thought I'd be able to do any of this,’ said Ginsburg . . . ‘I attribute my well-being to our meetings twice a week. It's essential.’”)

*SCALIA and GINSBURG exit. The COMMENTATOR picks up the handkerchief, resumes his initial position and transforms back into a statue.*²⁴⁸ *The chamber is as it was at the beginning.*

End of Opera

248. Cf. STRAUSS & HOFMANNSTHAL, *DER ROSENKAVALIER*, *supra* note 220, at act 3 (“[Er] sucht das Taschentuch, findet es, hebt es auf, trippelt hinaus.” “[He] [l]ooks for the handkerchief—finds it—picks it up—trips out.”)).