

REMARKS COMMEMORATING *CELEBRATION 55: THE WOMEN'S LEADERSHIP SUMMIT**

INTRODUCTION BY DEAN ELENA KAGAN¹

Good morning everybody. Good morning. It's wonderful to see you all here. Thank you again for coming to Celebration 55 and to this most special part of Celebration 55, which is a conversation with Justice Ruth Bader Ginsburg. Justice Ginsburg is going to make a few remarks after I introduce her about Belya Lockwood. Some of you might be thinking who is Belya Lockwood and she will tell you the answer to that question. And then Justice Ginsburg and I will sit down and have a short conversation about Harvard Law School and about law and about the Supreme Court and about anything else we might choose to talk about. Justice Ginsburg was also the star of our Celebration 50, she keeps coming back for these events. We are enormously grateful that she does so.

Justice Ginsburg started at Harvard Law School in one of our very first classes of women. She started in 1955, when there were only nine women in the class. Did I get that right? Ok. She left here after two years and I'm going to come back to this story, took her third year at Columbia Law School and graduated from Columbia Law School. And after that you all know her history which is legendary. After some years at Rutgers University Law School she became a professor at Columbia Law School and also around the same time became head of the ACLU Women's Rights Project. And in that role, she served as really the legal architect of the modern Women's Rights Movement. She took six gender discrimination cases to the United States Supreme Court. She won five of those. In the process she revolutionized the law of sex equality in our nation and because she did that in our nation she also did so in the world. Had she never been a judge, she would have been a monumental figure in American Law and indeed in the development of human rights worldwide. Her work at the ACLU drew the attention of President Jimmy Carter, he appointed her to serve as a Judge of the United States Court of Appeals for the DC Circuit in 1980 and after serving for more than a decade on that Court, President Clinton nominated her his first Supreme Court nomination to succeed retiring Supreme Court Justice Byron White.

She has been a truly extraordinary Justice. Her voice is calm and judicious but also persuasive and powerful. She appreciates at once the limits and the importance of the judicial role in our system of government. She is

* These remarks were made at *Celebration 55: The Women's Leadership Summit* on September 20, 2008. *Celebration 55* commemorated 55 years of female enrollment at Harvard Law School.

¹ At the time of this transcription, Elena Kagan was the Dean of Harvard Law School. At the time of this publication, she is Solicitor General of the United States.

a judge's judge who yet recognizes the human dimensions and consequences of what the Court does. She combines impeccable craftsmanship with deep understanding of our Constitution's history and core values. She has been an honor to this Country and to the world serving on the Supreme Court of the United States.

Now over the years, as I mentioned before, Justice Ginsburg has very graciously participated in the vibrant Harvard Law School Alumni community in these events and in other ways. And I say gracious and I really mean that word more than I do in the ordinary case and that's because Harvard Law School didn't always treat Justice Ginsburg as well as Justice Ginsburg has consistently treated Harvard Law School. And I told this story before but I am going to embarrass Justice Ginsburg a little bit and tell it again, and this is what I referred to before about why it was that Justice Ginsburg does not have her degree from Harvard Law School. Instead her degree is from Columbia and that is because in the second year when she was at Harvard Law School, her husband also went to Harvard Law School and graduated from this place- the great lawyer Marty Ginsburg- and he took a job in New York. He was a little bit, he was a year ahead of Justice Ginsberg, took a job in New York and became very ill, and they also, extremely ill, and thankfully Marty Ginsburg is about as vibrant a man as I know, but at the time, people thought that it was a potentially fatal illness. And Justice Ginsburg and Marty Ginsburg had a small child and Justice Ginsburg asked Dean Griswold whether she could take her third year in New York at Columbia. She had been a star student at Harvard Law School, Law Review, grades, you know, this and that. Her third year at Columbia because of these exigent family circumstances and still receive a Harvard Law School degree and, well she was told no. And, so, Justice Ginsburg does not have a Harvard Law School degree, which many future deans regretted. But notwithstanding this history, she has been wonderfully generous to this place and I just wanted to read something that she said when she was here five years ago at Celebration 50. She said she joined in today's momentous celebration because "I did attend Harvard Law School, because I value the education and friendships gained in those years and because I rejoice in the changed complexion of the school from 1953 to 2003." She has truly supported this institution in countless ways as she has supported women in countless ways and as she has honored our Country in countless ways. Justice Ruth Bader Ginsburg.

REMARKS BY JUSTICE RUTH BADER GINSBURG

As a prelude to my conversation with Dean Kagan, I thought this audience might find engaging a cameo portrait of a resourceful woman who, in 1879, made the Supreme Court change its ways. Her name, Belva Ann Lockwood, her year of birth, 1830. Lockwood was the first woman ever to

gain admission to the U.S. Supreme Court's Bar. She was also the first woman to argue a case before the nine Justices.

In March 1879, the *Evening Star*, a widely read Washington, D.C. newspaper, reported: "For the first time, a woman's name now stands on the roll of [Supreme Court] practitioners." The woman who broke that barrier was not born to wealth or social advantage. Belva Lockwood grew up on a family farm in Niagara County, New York. Widowed with a child at age twenty-two, after only four years of marriage, she enrolled in college to gain the training she needed to become a high school teacher and, later, a school principal. In 1866, she moved to Washington, D.C., and remarried two years later. Once settled in our Nation's Capital City, she became prominent as a suffragist and an ardent advocate for widening employment opportunities for women and ending pay discrimination against them. She also embarked on her long-held ambition to become a lawyer.

Her sister suffragist, Elizabeth Cady Stanton, compared Lockwood to Shakespeare's Portia. Lockwood resembled Shakespeare's character in this respect: Both were individuals of impressive intelligence who demonstrated that women can more than hold their own as advocates for justice. Like Shakespeare's Portia, Lockwood used wit, ingenuity, and sheer force of will to unsettle society's conceptions of women as weak in body and mind. But there was a significant difference. Portia, to accomplish her mission, impersonated a man before revealing who she was. Lockwood, in contrast, used no disguise in tackling the prevailing notion that women and lawyering, no less politics, do not mix. Not only did she become the first woman admitted to the Bar of the Supreme Court, she ran twice for the office of President of the United States.

Her frontrunner status was achieved by unflagging effort. In 1869, then a mother of two approaching her thirty-ninth birthday, Lockwood applied for admission to law school. Her applications were rejected on a familiar ground: Her presence, she was told, "would be likely to distract the attention of the young men." Lockwood persevered until the National University Law School (today, the George Washington University Law School) allowed her to matriculate. She encountered yet another impediment when that school refused to confer upon her the diploma she had earned. Men in the class were again the asserted obstacle. Graduating with women, it was feared, would lessen the value of the men's diplomas.

To overcome that roadblock, Lockwood wrote to President Ulysses S. Grant, the University's president *ex officio*. She wasted no words: "I have passed through the curriculum of study . . . and demand my diploma." Two weeks later, in September 1873, the University's Chancellor awarded Lockwood her law degree.

In 1876, having practiced law in the District of Columbia for three years, Lockwood met the experience requirement and sought U.S. Supreme Court Bar membership. Chief Justice Morrison R. Waite announced the Court's denial of her application with this explanation:

By the uniform practice of the Court . . . and by the fair construction of its rules, none but men are permitted to appear before it as attorneys and counselors.

The announcement of the Court's decision did not note dissents; in fact, three of the Justices, including the Chief Justice, had voted to admit Lockwood. Apparently unaware of the divided vote, the evening paper reported Lockwood's rejection under the headline: *The Chief Justice squelched the fair applicant*. At a White House dinner soon after, the Chief silently suffered some teasing about the Court's action from his wife and First Lady Lucy Hayes.

Undaunted, Lockwood relentlessly lobbied Congress to grant her plea. She succeeded less than three years later. In February 1879, Congress decreed that "any woman" possessing the necessary qualifications "shall, on motion, . . . be admitted to practice before the Supreme Court of the United States." (Lockwood's case illustrates the productive dialogue sometimes carried on between the Court and Congress.) [Once a member herself, Lockwood moved the admission of Samuel R. Lowery, first African-American attorney from the South to gain admission to the Supreme Court Bar.]

Twenty-one months after her admission, Lockwood became the first woman to participate in oral argument at the Court. She next and last argued before the Court in 1906. She was then age seventy-five, my age this year. Using the skill she had gained over a 30-year span in her specialty —pressing claims against the United States — she helped to secure a five million dollar award for Eastern Cherokee Indians whose ancestral lands had been taken from them without just compensation.

Lockwood was not content to rest on her personal achievements. She sought not only suffrage, but full political and civil rights for all women. Though she could not vote for President, she ran for the office herself, pointing out that nothing in the Constitution barred a woman's eligibility. (She took that bold step 124 years before Hillary Rodham Clinton became a contender for the Democratic Party's nomination.) Explaining why she entered the race, she wrote in a letter to her future running mate, Marietta Stow: "We shall never have equal rights until we take them, nor respect until we command it."

In 1884 and 1888, during her two campaigns as the presidential nominee of the Equal Rights Party, Lockwood cast her spotlight on a range of issues warranting public attention and government action. She advocated, for example, preservation of public lands, citizenship for Native Americans, repeal of the Chinese Exclusion Act, reform of family law to make it less unfair to women, and use of tariff revenues to fund benefits for Civil War veterans. No celestial idealist, Lockwood turned to advantage the publicity attending the 1884 campaign to launch herself onto the paid lecture circuit. Her fees financed her campaign and she ended up \$125 ahead.

Visitors to my chambers will see posted on a wall outside a replica of the vote sheet recording the Court's refusal to admit Lockwood, and one of several less than flattering cartoons published during her 1884 presidential run against Cleveland and Blaine. She was not intimidated by detractors. To the end of her life in 1917, she remained an unflappable optimist.

So much has changed for the better since Belva Lockwood's years in law practice. Admissions ceremonies at the Court nowadays include women in sizable numbers. It is no longer cause for special notice when women represent both sides in an argued case. Women today serve as presidents of bar associations, federal judges, state court judges, elected representatives on the local, state, and federal level, and in high executive posts. Still, the presence of only one woman on the current Supreme Court bench indicates the need for women of Lockwood's sense and steel to see the changes she helped to inaugurate through to full fruition.

If you would like to learn more about Belva Lockwood, a biography is now available. Last year, New York University Press published a fine work by political scientist Jill Norgren, titled *Belva Lockwood: The Woman Who Would be President*. Inspired by Lockwood's work and days, I was pleased to write a foreword for the book. And for those with children or (like me) grandchildren in the 9-12 age range, book stores will soon carry a condensed, easy-to-read, well illustrated version the author, Jill Norgren, calls her Baby Belva. Also, on October 27, the Bar Association of the City of New York will host a program on Lockwood and others who paved the way for today's women-in-law. New York State's Chief Judge Judith Kaye, will join me in introducing the program.

And now, if you please, it is time for my conversation with the Dean who has changed the ways of Harvard Law School, and for that, deserves a rousing

Brava Elena!

CONVERSATION BETWEEN JUSTICE RUTH BADER GINSBURG &
DEAN ELENA KAGAN

Kagan: Justice Ginsburg let's start with what you were just talking about. Why is it important, do you think, for women to know the story of women like Belva Lockwood?

Ginsburg: For one thing, we should appreciate the women on whose shoulders we stand, women who said the same things we said many years later, but we spoke at a time when society was willing to listen. In 1971, the Supreme Court, for the first time ever, held that a law discriminating against women constituted a denial of the equal protection of the laws. At that time, I was affiliated with the ACLU, counsel to the successful appellant in *Reed v. Reed*. We put on the cover of the brief for Sally Reed

the names of two women, one Pauli Murray, the other Dorothy Kenyon. Those women, both on the ACLU's Board, were saying a generation before, the same things we were saying, they were writing similar briefs and articles, but society was not yet prepared to listen. So we were standing on their shoulders, and they were models of courage for us because they didn't take no for an answer. Belva Lockwood's story is a perfect illustration. She didn't go off in a corner and cry when the Supreme Court turned down her application for admission to the Court's Bar. She was determined to correct the Court's error. So she went to another forum, to Congress. It's that attitude we found inspirational, that I can do it spirit, the determination that if I suffer a defeat now and then, I will overcome it.

Kagan: About a century later, eighty years, I guess, you came to Harvard Law School. What would have happened if you would have walked into Dean Griswold's office and said, "I demand my diploma?"

Ginsburg: He would have said "we don't because we don't." But you know, he was educated over the years. In the first case I argued before the Supreme Court, *Frontiero v. Richardson*, opposing counsel was one of the Solicitor General's young men. At the end of the argument, the Dean came out and shook my hand, as if to say "you're okay, I am glad to associate you with HLS." By then, the Dean's wife, Harriet Griswold, who was a polio victim, had become prominent in the Americans With Disabilities movement. The Dean was proud of what she was doing to improve transportation for people in wheelchairs. He had become sensitive to a kind of discrimination and I think appreciated, what perhaps he didn't comprehend earlier, about Government's obligation to ensure equal citizenship stature for all people. I had another problem with Dean Griswold. He would often introduce me, in the years I was on the U.S. Court of Appeals for the D.C. Circuit, by explaining that I had met my husband at the Harvard Law School, and when my husband got a good job in New York, I left Harvard and transferred to Columbia for my third year. Feeling bold one day, I said to him, "Dean, the way you describe my marriage is a bit embarrassing. My daughter Jane was 14 months old when I started law school." Like many men of his age, he likely believed that a woman with a child did not belong in Harvard Law School.

Kagan: How did he ever take you? He couldn't imagine. So 1950's, Harvard Law School, what was it like for women?

Ginsburg: I have a classmate, Ginni Davis. Where is Ginni? There she is.

Kagan: Who are all the 1950's graduates here? How about standing up?

- Ginsburg: I had just come from a college, the Arts College at Cornell University, that enrolled four men to every woman. The reason given for that restrictive quota, the girls had to live in dormitories, the boys could fend for themselves, finding rooms or sharing apartments in College Town. At Harvard Law School, it wasn't an issue for me because Marty and I were married with a child, so we of course lived off campus in an apartment. But the dormitories at the Harvard Law School, the Harkness Complex, were reserved for men. Dorm space was provided for men only. The women had to find places to live in town. It was an irony — moving from one place where women had to live in the dormitory to another place where there was no room for them there.
- Kagan: Some people would say that they were doing you a favor by not having. . .
- Ginsburg: Perhaps they were. But, something else, and I think, Ginni, you probably were conscious of this too. You were in my first-year section. There were two of us and a hundred odd of them. The women felt that all eyes were on them. Even if it wasn't in fact the case, you felt that you were on display for the entire hour and you better get it right, because if you gave a wrong answer, you would fail not only for yourself, but for your entire sex. So. . .
- Kagan: Heavy responsibility.
- Ginsburg: Oh yes.
- Kagan: Did any of your professors do ladies day?
- Ginsburg: None of my professors did, but other sections, perhaps two out of four had ladies day. I didn't suffer that experience, which went rather well, I'm told, because women in the class ahead prepared the women slated to be on display that day.
- Kagan: Sort of an advantage. Let's shift to what you are doing now, the Supreme Court term is starting in two weeks and I know you are limited in what you can say but as you approach a new term, what are you thinking about?
- Ginsburg: How I can get a fifth vote in close cases. It happens sometimes, not often, but I had the heady experience once of being assigned a dissent speaking for my senior colleague and myself, that's all. In the fullness of time, the opinion came out. The Court divided 6 to 3, but my opinion, which started out as a dissent, ended up speaking for six. So hope springs eternal.
- Kagan: How did that happen? When does it happen? When are people persuadable?

- Ginsburg: Efforts to persuade one's colleagues begins at oral argument. That's the first time, after the conference at which we granted review, we are conversing with each other about a case. Questions are sometimes meant more for a colleague's ear more than for the advocate. We confer and arrive at the probable decision fairly soon after the argument. We met on Wednesday afternoon to discuss Monday's cases, and on Friday morning to talk about Tuesday and Wednesday cases. After the case conference, you know what your colleagues think and you try to take that into account in writing the opinion. We're in the business of persuasion. We try to do it orally. If that doesn't succeed, you hope your writing will persuade others.
- Kagan: Now you said you think about that fifth vote. That's what you are thinking about as you start the term. That suggests that the Court is deeply divided. That on important cases, it's likely to be a five - four decision. Does that worry you about the Court?
- Ginsburg: Yes, it is a concern, particularly when I know, and I think commentators would agree, that the first full year Justice O'Connor was absent, every 5 - 4 decision in which I was in dissent, I would have been in the majority had she remained on the Court. Of course, it is better for the Court if we have a higher unanimity rate. But 5 - 4 decisions can be revisited and many have been. I spend at least as much time on my dissenting opinions as I do on my opinions for the Court, and I am hopeful that one day, those opinions will represent the views of the Court.
- Kagan: You read a couple of your dissenting opinions last term.
- Ginsburg: The term before, I read two, not the full opinions, but summaries of them. Last term, I announced no dissents from the bench.
- Kagan: Excuse me, that's right. Tell a little bit about why you do that, when you chose to do that.
- Ginsburg: Ordinarily, only the majority opinion is announced, and the majority opinion writer will say, after summarizing the opinion, that Justice or Justices so and so dissented. But if you think the Court has not just gone wrong, if you think it has gone wrong egregiously, that's when you read a summary of the dissenting opinion from the bench. It may be that you have another forum in mind. The Lilly Ledbetter case is a good example. I had a particular audience, it was Congress. My dissent, joined by three of my colleagues, said, in effect, Congress you could not have meant what this Court thinks you meant, so fix it. The Lilly Ledbetter Bill passed in the House. It stalled in the Senate, perhaps because the President's advisors announced that should the Bill pass in the Senate, they would advise the Presi-

dent to veto it. But I expect, I fully expect that in the next Congress the Bill will pass. In the *Carhart* case it was really to discomfort my colleagues who prize stare decisis, yet in the span of four years, the Court flip flopped on the issue. Justices who claim to be proponents of states' rights put their stamp of approval on a federal law that preempts any state choice in the matter. That decision, placing a federal ban on so-called "partial birth abortion," will be overturned in time, I expect.

Kagan: I see you are carrying a kind of dog-eared copy of the Constitution. I'm wondering why.

Ginsburg: I carry it with me wherever I go. This copy is the one I had with me at the latest school group visit to the Court. I don't remember whether it was a second grade or a six grade class. I always read portions of the Constitution to them.

Kagan: I'd love to know what the purple post-its are. Which portions? Is this a First Amendment day or. . .

Ginsburg: One of them is always the Preamble. My explanation of the genius of this Constitution: It begins "We the people of the United States." What people? In 1787, white property owning men. But the Preamble next says, "in order to form a more perfect Union." The Union has become more perfect as it has become more embracing, so that we the people today includes people left out at the beginning. Not only people who were held in human bondage, but Native Americans and half the population — women. The Preamble is my favorite part of the original Constitution. The worst provision in the original Constitution is the fugitive slave clause in Article IV. That's another provision with a tab. And then, because my pocket copies include the Declaration of Independence as well as the Constitution, I often refer to the statement about why the United States was dissolving its band with Great Britain. The Declaration of Independence speaks of "a decent respect to the opinions of mankind," which required the declarants to state the reasons that impelled them to separate. We cared about what the rest of the world thought.

Kagan: That we really cared about what the rest of the world thought. There was, there was a New York Times article recently, just a couple of weeks ago, talking about foreign courts' reception of U.S. Supreme Court's opinions. And saying that foreign courts really no longer cite the U.S. Supreme Court, at least to the extent that they used to. Why has that happened? Do you care about it?

Ginsburg: I have often said that if we don't listen, we won't be listened to. The role of listener is fairly new for the United States. Until

after World War II, we were about the only country in the world that engaged in judicial review for constitutionality. In other systems, parliamentary supremacy was such a strongly held belief that courts were bound by whatever the congress or the parliament said the constitution meant. But after World War II, a number of countries came to see that you couldn't always trust elected representatives of the people to remain faithful to the nation's most fundamental values. They thought a charter of rights and a court to review legislative and executive action for consistency with that charter was a good idea. Today there are constitutional courts on every continent engaged in such review. Our neighbor to the north, Canada, adopted a Charter of Rights and Freedoms in 1982, and began to engage in review of legislation and executive actions for compatibility with that Charter. In the beginning, the new courts looked to our Court because it was their only model. But as time went on, they looked more and more to each other. When I go abroad, I have often been asked a question on this order: "We refer to decisions of the United States Supreme Court on issues that are common. Don't you think we have anything to contribute? Why don't you look at our opinions as well?" There is a tremendous misunderstanding in the United States about references to decisions of tribunals abroad. That is, they are in no sense binding on any United States judge. They are simply informative, they may be highly persuasive, and I simply cannot understand why it is alright for me to look at, and admit in an opinion by citation that I have looked at, an article by Professor so and so from the Harvard Law School, the Columbia Law School, the Willamette Law School, but its not alright for me to admit by citation that I have consulted an opinion by the former Chief Justice of Israel, Aharon Barak. It makes no sense to me to regard it as somehow unpatriotic to look beyond our borders for enlightenment. We should be delighted that we have spread the idea of constitutional review by courts abroad. And now, the conversation should run both ways. I think the article that you mentioned was by Adam Liptak in the New York Times. He wrote that while our opinions are still cited, the decisions of the Supreme Court of Canada are cited more often, and why? Because the Supreme Court of Canada does look abroad and does refer to decisions say of the European Court of Human Rights, the Constitutional Court of Germany, and other nations.

Kagan: Broad question. How do you conceive of your role? What do you think a Supreme Court Justice ought to do? How do you,

how should a Supreme Court Justice decide, especially constitutional, cases?

Ginsburg: Well, for one thing, you cannot do whatever you would want to do were you Queen.

Kagan: What a disappointment.

Ginsburg: Because you don't want the other eight to run off and do the same thing. I mean, we are bound by precedent. We are obliged to be faithful to the laws that Congress passes whether we like them or not. So there are many constraints on judges, plus the realization that the judges can't do for society what people have to do for themselves. Courts are reactive institutions. They are not in the vanguard of movements for social change. It has to start with the people. The Court then reacts to changes going on in the larger society and can either put its imprimatur on the side of change, as it did in the 70s gender discrimination cases, or it can be a retarding influence. I appreciate that judges must be restrained in accord with their oath of office and the craft of judging. Still, there are opportunities for interpretation. One aspect of the job — an appellate judge is part of a collegial body. I try to explain to people that as you go up the ladder, you become less and less powerful in this sense: If you are a District Judge, you are in command of your courtroom. We have a firm final judgment rule so you can't run up to the Court of Appeals every time a trial judge rules against you, you are stuck in that courtroom and the judge is lord of the manner. The Court of Appeals judge, by contrast, has no power unless she carries one other mind with her. And then at the Supreme Court, the magic number is five. One thing I should say about the current Court. As different as we are in the way we approach some very hard questions, the Court is a genuinely collegial place. It is more collegial than any law faculty I ever encountered. We genuinely like and care, not just respect, but care about each other. The best example I can give is the year I lived with colorectal cancer. All of my colleagues rallied around me and helped me get through that year without missing a Court sitting.

Kagan: I know that you and Justice Scalia go to the opera together.

Ginsburg: Yes, we go to other places together too, like India. In early 1994, we visited all of the cities that had high courts left over from the days of British rule. The day we were to go to Calcutta, we had been up all night because the plane we were to take from Madras didn't fly. In the morning, our weary band flew to Delhi instead. Justice Scalia, chivalrously volunteered to fly from Delhi to Calcutta on his own so I could rest. I said I

could not let him represent the Court alone. Balance was surely needed. Justice Scalia is utterly charming, something you might not glean from his opinions. And he is a wonderful shopper, which my husband is not. An example from our visit to India. We were in a shop in Delhi, with a large stock of items that weren't worth very much. He spotted the one item of real quality, a beautifully inlaid box. Another day, in Agra, we were buying carpets together. The rug merchant tossed one carpet before us after another in dizzying succession. After this went on for half an hour or more, Justice Scalia said, "stop, that's the one, the right one." He has a very good eye.

Kagan: Why don't we take a few questions then from the audience? Can't be that shy.

Goodman: My name is Collette Goodman and I'm class of '75. I just wanted to add a footnote to Justice Ginsburg's story about her diploma or degree. At the end of my second year, my husband accepted a fellowship at Stanford University. And so I went in to the Administrative Dean and I said that I wanted to do my third year at Stanford. But I thought since I'd done the bulk too, at Harvard, that I should get my degree from Harvard. And he didn't disagree. I think I may have been the first person, but the records would show that and just as an added footnote, at the end of my third year at Stanford, we decided to move to Washington. And we had sold our house here and finances were kind of tight. And I said to my parents that I didn't think I would actually come back for the graduation ceremony. And they said no way, you've got to come back. My daughter had been born at the beginning of my second year. And, so, they flew me back here, there was a big ceremony in the yard and then we come back to the different schools to actually hand out diplomas. But the skies opened up and the rain came down. So they had to move everything inside and it's kind of confusing but they were just, you know, calling names, and as they were going down the roster my daughter filled her diapers, and it got sort of unbearable for people around my parents. So they ran downstairs, got her changed, and got back just in time to see me get my diploma. So I not only was awarded it but I actually physically received it.

Ginsburg: And Harvard, you know, went through a transition period. For people like you who were married, no questions were asked. You were here two years, you got your diploma. But what about a pair not married but living together? There was a committee; it was headed by Frank Sander. Its function was to

judge the significance of the significant relationship. Can you imagine a law professor devoting. . .

Kagan: So much Harvard history I don't know about, and would really prefer not to.

Eisenberg: Hi, I am Rebecca Eisenberg and I am very nervous. I am a member of the well-represented class of '93. And thank you so much for being here, this is just an incredible, exciting moment that you are here and speaking to us. Thank you. My question is brief, although I have an even briefer follow up. The brief question is, what do you think are the prospects for having another women soon to be appointed to the Supreme Court, because I think we all passionately do agree with you, that we would like another. And the second kind of follow up is, is it too late for you to receive your honorary law school degree?

Ginsburg: I'll answer the follow up question first. It is never too late. Your good Dean has told me that I can have a Harvard Law School degree, no strings attached, anytime. I haven't asked for one yet. The truth is that, over the years, I have gotten so much more mileage out of not having a Harvard Law School degree. So, now the first part of your question. . .

Eisenberg: The future prospects for women.

Ginsburg: Our neighbor to the north, Canada, I think now has four women out of nine Supreme Court justices. Look at our State Supreme Courts. Some of them even have a majority of women. The problem with the U. S. Supreme Court is there is no compulsory retirement age. Who is going to leave? Not my younger colleagues who are in their fifties, the Chief Justice and Justice Alito. Justice Thomas, I think, will soon turn sixty. The oldest Justice is Justice John Paul Stevens. If he should leave us, he is eighty-eight, he might well be replaced by a woman. But frankly, I am not in a hurry to see him go. He is a superb colleague, super intelligent and swift. And then, who is next? I am the next oldest, so it would be a like kind replacement. Anyway, I'm hoping to stay on.

Kagan: We're not in a hurry to see you go.

Sennett: Good morning, Justice Ginsburg. Thank you very much for being here. My name is Amy Sennett and I am actually a first year student at the Law School. I'm actually wondering if you could help me a little bit with some torts homework that I have. My torts professor recently introduced the idea that tort law might have a role to play in curbing sexual harassment. Specifically, I came across your dissent from Justice O'Connor's majority opinion in *Gebser*. Which if I understood it correctly,

held that schools such as Harvard University are not liable in sexual harassment suits unless they were aware of a specific incident and did not report it. And that's regardless of whether or not they have a sexual harassment policy. So, we are thinking about this in our torts class and I'm wondering if I can hear a little bit about your thinking about the potential for liability here and perhaps, your thinking, or where the Court's thinking currently stands. Thank you.

Ginsburg: I think the case, *Gebser* case involved children in the second grade, didn't it?

Sennett: I'm sorry, I'm

Ginsburg: I think it was public school.

Sennett: Yes.

Ginsburg: Public school children.

Sennett: Yes.

Ginsburg: *Gebser* contrasts with the *Faragher* and *Burlington* cases, where the Court said that the employer can defend against a charge of harassment if the employer has in place a good complaint policy, not only on paper but in practice. That would establish a defense against vicarious liability. Why the Title IX case should have gone one way and the Title VII case another way, is a mystery. *Gebser* came before *Faragher* and *Burlington*, as I recall. Perhaps *Gebser* will be reconciled.

Pittas: Justice Ginsburg? Everybody, I'm Sydelle Pittas and if you haven't heard the story before, Justice Ginsburg was responsible for my admission to law school without an undergraduate degree. So it was kind of the other way around. And I was told in my second year that I was an experiment in the education of older women. I was 28 at the time. Many years later, I'm still thanking the Justice. And I want to ask though, we sometimes forget, the cases that you did argue before the Supreme Court, were social security cases and pension cases and you also selected, or found, or they came to you, male plaintiffs to make some of your landmark cases. Would you give us some strategy for, I think now the question is, insurance tables and the discrimination that still exists against women getting private insurance pensions? Would you like to give us some inspiration on how to bring those cases?

Ginsburg: First let me tell this audience about Sydelle's case. She was a dancer and had been in that profession for several years. Sydelle, please tell us about your pre-law-school career.

- Pittas: I was a ballroom dancer and I had worked my husband's way through school and graduate school teaching ballroom dance and that's one of the reasons I didn't even start college until 25.
- Ginsburg: But she had such experience in life. She went to Rutgers undergraduate and earned straight A's. She had a stellar record. But Harvard had a rule, a rigid rule, that you must have four years of undergraduate studies to gain admission. I thought Sydelle's record and her life experience added up to so much more than a fourth year in college. I asked Harvard why they couldn't be more flexible. And they were. Let me say something about the plaintiffs in the social security cases. The male plaintiffs were seeking spousal benefits. In the cases brought to the Court, the wage earner was a woman. The person seeking benefits was a husband or a widower. The first case fitting that pattern was *Frontiero v. Richardson*. Sharron Frontiero was an officer in the Air Force. She was denied the quarters allowance she would have received if she were a male officer. And she was not given medical and dental benefits for her spouse at the base facilities. The woman as wage earner didn't get for her family the same benefits a man got for his family. The thought was that the woman was a pin-money earner, working only for herself. The man was supposed to be the family breadwinner. That's what the social security cases were about. The wage earner in all those cases was a woman. Her spouse was not covered by social security and so he was applying for benefits under her account. My favorite case in that series is Stephen Wiesenfeld's case. Stephen's wife died in childbirth. He was the sole surviving parent. He vowed not to work full-time until his son was in school full-time. When he went to the Social Security Office, he was told that there were no benefits for him. The provision in question was called mother's benefits. The case involved discrimination against the woman as wage earner — when she died her spouse did not get the benefits that a male wage earner's spouse would receive. There was also discrimination against the male as a parent, because he did not have the opportunity a widow would have to care personally for his child. Finally, there was discrimination against the child. That case was the only time my later Chief, Justice Rehnquist, ever voted in my client's favor, the only time he found any gender line violative of equal protection. He thought the classification was utterly irrational from the point of view of the baby. Why should the baby have the opportunity for the care of a sole surviving parent if that parent is female but not male? The cases illustrate that gender lines in the law, based on stereotypes, can

be harmful to all people, to women first, then men and children. As to the insurance industry, of all the things I did while serving as a faculty member at Columbia Law School, the one that disturbed my colleagues most was the TIAA CREF litigation. The ACLU Women's Rights Project helped plan a class action. We had a hundred named plaintiffs, women on the faculty and in administrative posts at Columbia, asking why, "when we retire, we get less per month than similarly situated men." The assumption was that women, on average, live longer than men, on average. Some added the consideration that women eat less than men. TIAA CREF said, if we change the system so that women would get the same monthly benefits as men, the men would flee *en masse* to other insurers. Well it didn't happen. TIAA CREF is today flourishing but they have combined tables, so that a woman, when she retires, will get the same benefits that a man of the same age gets. Women's greater longevity was not so long ago considered one of those truths that couldn't be questioned. No doubt women, *in general*, live longer than men. But many women die young. And many men die old. The reason the litigation succeeded was that Columbia University, an employer, was offering the program. Employers are subject to Title VII. We do not have a federal antidiscrimination law governing private insurance contracts. I've seen it the other way, having been the parent of a teenage boy. Our automobile insurance premiums went up considerably when he got his license.

Audience

Member:

I'd just like to explore with you Justice Ginsburg, and it's so good to see you again, the issue you raised when you said that the Court is reactive. And I'm not trying to call you on that, I would just love you to clarify for example, *Brown*, I don't need to mention *Roe* or *Reed* or *Loving*, and also at the State Court highest level now our *In Re Marriages* case. It seems to me that all of those cases have really made new law if I can put it that way. Even though you could argue that *Reed* is a construction of the equal protection clause, but I am just wondering if you could clarify how much you are reactive versus active as a Court.

Ginsburg:

Well, let's just take *Brown* as an example. In the *Brown* argument, the government was a major player. The government urged the Supreme Court to put an end to racially segregated schools because, the government explained, the Soviet Union is embarrassing us. They are constantly pointing to enforced segregation in the U. S. and saying there's apartheid in America.

So please help us out, Court, and have an end to this. There was a brave District Judge in California who, long before *Brown*, I think it was in 1947, heard the case of Hispanics complaining that Mexican-American children were being assigned to different schools. That District Judge held California's practice unconstitutional. It never went any further. So, it never got to the Supreme Court. *Loving*, the case that declared the Virginia miscegenation law unconstitutional, was decided in 1967. In 1947, I think, Chief Justice Traynor of the California Supreme Court declared that State's miscegenation law unconstitutional. Even thirteen years after *Brown*, there was no federal decision to that effect. For years, the Supreme Court ducked that issue. The case constantly ducked was titled *Naim v. Naim*. By the time the Supreme Court got around to the *Loving* decision, most people in this Country thought that was the right and proper thing to do. Similarly, *Brown v. Board of Education* was influenced by societal conditions. We had just fought World War II, a war against racism. And here, our own country indulged in racism, not only in practice, but in the law books. So, the Court was not really in the vanguard in any of those cases. In *Reed*, why was *Reed* decided as it was? Because there was a revival of the women's movement and, Brenda, you were very much part of it. Paul Freund once said that the Court does not and should not respond to the weather of the day, but does and should respond to the climate of the era.

Kagan: We'll just take these two last. Is that alright?

Ginsburg: Yes.

Kagan: Yes? Good.

Audience Member: Good afternoon Justice. I was a clerk on the Constitutional Court of South Africa and I wonder if you've read any judgments from that Court, and if you have, what do you think of them?

Ginsburg: It's one of the most interesting courts in the world. South Africa got its current Constitution in 1996. It is a fascinating Constitution. The Constitutional Court has had some very important judgments. One of them held that the death penalty was unconstitutional; although that was not clear from the Constitution's text. They have had the equivalent of their *Marbury v. Madison*. It is one of the courts looked to most frequently by other Constitutional Courts. There's one thing wrong with the Constitutional Court of South Africa. It has a compulsory retirement age and it is about to lose one of my favorite Justices, Justice Albie Sachs.

- Kagan: Justice Goldstone is teaching with us this year.
- Ginsburg: I think he retired, by choice, before he turned 75.
- Cendali: Good afternoon, I'm Dale Cendali from O'Melveny and Myers. Two things, first I wanted to thank you. You wrote a forward to a book about arguing before the Court and you talked about your first oral argument and how you saw it as an opportunity to teach. That was instrumental to me in preparing for my own sole argument before the Court and I want to thank you for making that a much better experience because of the epiphanies that you shared. My question to you though, is could you speak on the role of the influence of the Solicitor General's Office to the Court in deciding cases and to what degree in certain areas of the law you find the Solicitor General's Office more persuasive than others, such as, for example, intellectual property?
- Ginsburg: The Solicitor General is our number one repeat player. Lincoln Caplan wrote a book some years ago called the Tenth Justice. Calling the Solicitor General that is an exaggeration. The SG does not sit at our conference table. But when we are uncertain about the importance of a question presented in a Petition for Review, we often call for the views of the Solicitor General and ask basically, "is this decision unsettling, is it causing problems out there, or is it something time will take care of or is it not all that important?" The Solicitor General's Office is also one that prides itself on its integrity. I have not seen an SG's brief that does what some lawyers' briefs do, that twist or turn the truth. If the SG cites a case and I go to the shelf, it will say what the SG said it does. It's an office we can all be proud of.
- Kagan: Justice Ginsburg, this has been a fascinating session. It's been an honor to have you here. And for my part, I'll be thinking of you when you are trying to get that fifth vote.