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**A CONVERSATION WITH ASSOCIATE
JUSTICE ELENA KAGAN**

JUSTICE ELENA KAGAN*

Annual John Paul Stevens Lecture
University of Colorado Law School
October 22, 2019

S. James Anaya: Good evening, everybody. For those of you who don't know me, my name is Jim Anaya. I am the Dean of the University of Colorado Law School. I'd like to welcome all of you to the Eighth Annual Stevens Lecture, featuring a discussion with United States Supreme Court Justice Elena Kagan. I'd like to begin the event by acknowledging the Arapaho and Ute people, on whose traditional territory we are gathered. I'd also like to take a moment to recognize a few distinguished guests who are in the audience. First of all, I'd like to welcome University of Colorado President, Mark Kennedy. Also here is our Provost and Executive Vice Chancellor—that is, the Provost of the CU Boulder campus—Russell Moore. We also have with us three of the University of Colorado Boulder regents: John Carson, Irene Griego, and Sue Sharkey. And, one of our own—that is, the law school's own—Colorado Attorney General and former Dean of the Law School, Phil Weiser. Welcome, Phil. I'd also like to recognize members of the federal and Colorado judiciary who are here as well as a number of elected officials. Welcome to you all.

*Associate Justice, United States Supreme Court. Justice Kagan gave this address for the Annual John Paul Stevens Lecture, which brings an outstanding jurist to address the University of Colorado Law School on important judicial issues. Video of the event can be found at https://www.youtube.com/watch?v=a_JQw_ZO4KI [<https://perma.cc/EY92-R5BW>].

This evening's event is organized by the law school's Byron R. White Center for the Study of American Constitutional Law, which was founded with a generous bequest by Colorado Law alumnus Ira C. Rothgerber, Jr. The Center's name honors the late U.S. Supreme Court Justice Byron R. White, a Coloradoan who made a mark on the country's legal landscape with his work on many of the prominent constitutional issues of his day. True to Justice White's legacy, the work of the Center is premised on the belief that informed and engaged citizens and an ongoing conversation around the Constitution are essential to our democracy. No doubt we are at a time when this conversation and a collective commitment to constitutional values have elevated importance. The Center's John Paul Stevens Lecture is named for another prominent U.S. Supreme Court Justice. Justice Stevens regrettably passed away just a few months ago. This lecture series is a tribute to his exemplary and courageous service on the bench and stature as one of the gems of American jurisprudence.

The Stevens Lecture brings to the campus each year a distinguished jurist to contribute to the life of our community. We are fortunate to have welcomed in previous years several outstanding judges, including a number of U.S. Supreme Court justices, who have enriched our community with thought-provoking insight into the role of our judiciary and its highest Court in the nation's legal and related political and social orders. The U.S. Supreme Court in particular has a monumental role. It endeavors to guard the values and architecture of liberty, equality, and solidarity found in the Constitution, and it does so against the excesses of majority will, partisanship, or presidential overreach. The Supreme Court, however, is made up of nine individual human beings, each with her or his individual perspective on the balances struck in the Constitution and on the precise guideposts of constitutional decision-making. We are most proud to have one of these nine with us this evening.

This year's Stevens lecturer is the Honorable Elena Kagan, Associate Justice of United States Supreme Court. Notably, Justice Kagan replaced Justice Stevens on the Supreme Court after the late Justice announced his retirement, and President Barack Obama appointed her to the Court. Immediately prior to joining the Supreme Court, Justice Kagan served as the first female solicitor general of the United States, and in that position, she argued in a number of important cases to the Supreme Court. She's had a storied legal career since graduating from Harvard Law

School, not only in public service but also in the private sector and the Academy. She was a law clerk for Justice Thurgood Marshall, served President Bill Clinton as well as President Obama, practiced law at the powerhouse firm of Williams and Connolly in Washington, D.C., and was a professor at both Chicago Law School and Harvard Law School, eventually serving as Dean of Harvard Law for five years. The blog “Oyez” comments that Justice Kagan brings a fresh perspective to the Supreme Court “based on her prowess with technology and pop culture.”¹ And I would add that she also brings to the Court a wisdom grounded in a love for the law and the justice it can yield and an awareness of the people and world that it touches.

Joining Justice Kagan on the stage this evening is the Director of the Byron White Center, Provost Professor of Civil Rights Law Suzette Malveaux. Professor Malveaux is a nationally recognized expert and frequent commentator on civil rights and class action litigation. She joined the University of Colorado Law School just over a year ago from Catholic University of America, and since then, her commitment to cutting-edge scholarship, innovative teaching, and public service have contributed to the life of the law school. After a discussion with Justice Kagan, Professor Malveaux will take a few questions for the Justice that have been submitted by Colorado Law students in advance. [. . .] It’s now my pleasure and honor to ask you all to join me in welcoming to the stage United States Supreme Court Justice Elena Kagan and Professor Suzette Malveaux.

JK: Thank you. I can’t see anything, but it looks like there are a lot of you here. I’m very honored—it’s great to be here.

SM: There are over two thousand here, so there’s a great demand for you to be here. It’s such an honor. Thank you so much for being here. We’re absolutely thrilled that you’re here for the Stevens Lecture. One of the special things about you being here for the Stevens Lecture, as the Dean mentioned, is that this lecture is actually named after Justice John Paul Stevens, who was your predecessor on the bench. In fact, he gave the first inaugural lecture in 2011. I’ve heard you speak eloquently at his funeral service and elsewhere about how you fill his seat on the bench, but you can’t fill his shoes.

1. *Elena Kagan*, OYEZ, https://www.oyez.org/justices/elena_kagan.

JK: Too large.

SM: Can you tell us a little bit about his influence on you and what it's like to carry forward his legacy?

JK: It was so sad for me and for all my colleagues this summer when he passed away. He was a great, great man, and I never had the chance to serve with him, so unlike many of my colleagues, I can't tell stories about what it was like to be on the bench with him or in conference with him. But he is, and long has been, a hero of mine. He has a passage in one of his books about how he was honored to take the place of Louis Brandeis on the Court. On the Court, there are particular seats, and everybody knows which justices have filled those particular seats. And I sit in a seat which went: Louis Brandeis, and Bill Douglas, and John Stevens, and then me, which is quite extraordinary. I mean, if John Stevens felt that way about Louis Brandeis, I feel that way about John Stevens. He was a man of extraordinary brilliance but even more of extraordinary wisdom, which is not the same thing. He was a man of great integrity. He was a man of great independence. I mean, he always did what he thought was right, no matter what, and sometimes that meant he went his own way—wrote an opinion that nobody else signed on to, or voted in a way that nobody else joined—but that was okay with him, that he had his own view of the law, and he stuck with it, and was extremely independent-minded. He was a deeply kind person, which I think all his colleagues appreciated as well as his clerks and everybody else in the Court.

In terms of his judicial legacy, what he'll go down in history for is a deep commitment to the rule of law, to the principle that no person, however high or mighty, is above the law—that we're all subject to the same legal rules and the accompanying principle that whether you're powerful or whether you're powerless—the most humble person, the poorest person, the least educated person—you're entitled to be treated by the legal system with the same dignity as the rich and the powerful. For me, that is a great legacy of a magnificent thirty-five-year career on the Court.

SM: Absolutely. I have to ask this question because we have lots of students in the audience—can I get a show of hands for the students that are here? We have a lot of students.

JK: And you're all in the front, too, which is fantastic. You all got the good seats. I don't know who they put up there, but . . .

SM: The students are our VIPs.

JK: That's the way it should be. What is law school about except for the students, right? That's what everybody else is there for.

SM: This is for the students. I think they're dying to know: why did you go to law school, what it was like for you to be a law student, and if you could give some advice to our law students about approach to law school or entering their legal career, especially in this time period.

JK: I went to law school for all the wrong reasons—just think I'll be honest about that. When I was a dean, I was talking to a bunch of college students about whether they should go to law school, and I was saying all these kind of formulaic things—about how you should really think about this, whether this is what you want to do, and you shouldn't go to law school just because you can't think of anything else, because you want to keep your options open. And as the words were coming out of my mouth, I was thinking, *I don't know—I went to law school because I couldn't really think of anything else, and I wanted to keep my options open*. So I don't really prescribe this as the way to approach this decision. But I'm here to say that even if you went to law school for all the wrong reasons like that—you know, when I started law school, I just loved law school from the beginning. [*Laughter.*] Does that make me weird? I don't know. From my very first day. I loved law school because it combines two things. One, I loved the thinking that law school demanded, I loved the kind of analytic rigor the law school demanded, I loved the sort of logical-puzzle kind of enterprise that law is. I'm trying to think through complicated legal problems, sometimes arcane legal doctrines, and sort of figuring it all out in the way that you might figure out a crossword puzzle.

But I also loved that this was not an abstract or sterile enterprise—that this was a way to make a difference in the world. It was very obvious to me in my law school classes that the law was about the betterment of our society, about the advancement of human welfare. It had this really practical aspect to it. You could see how it could make a difference in the world and how a person using it could make a difference in the world. So that's what I loved about law school.

I guess what I would say to students about what to do with their years in law school and how to think about their legal careers is: you have this great opportunity to find out in law school what really moves you, what are the kinds of things that you really care about—and they'll be different for all of you. If you come out of law school with a sense of, "Look, if this is the kind of thing that if I worked on, I would want to go to work every day, and I would feel as though I was doing the job full of purpose and meaning," that is a great thing to come out of law school with. Not everybody does, you know—some people find it later on in their legal careers—but to try to use law school as an opportunity to experiment in different things and an opportunity to try to find that passion, that sense of what you really care about.

Don't be so worried about planning. I'm a big anti-planner because I think most law students are planners, and most of you will plan enough. If you, every once in a while, think to yourself, *No, Justice Kagan told us not to plan*, it will be a good corrective. [Laughter.] Because I think actually that most of the best things that happen in people's legal careers—and when I think of people whose legal careers I sort of look at and say, *Wow, to lead a life in the law like that*—it's mostly luck and serendipity. I mean, of course you make your luck, and there are ways of putting yourself in the position to be offered certain opportunities, but you know, for the most part, things come out of the blue, I think. And that's the way life works. I think too many law students and young lawyers put themselves on this plan where first I have to do this, and then I have to do that, and that prepares me for the next thing. They'll start to say no to opportunities that sound really fun and exciting and interesting because it's not on the plan. Because they worry about if they leave the plan, *How do I get back on the plan?* I think the most fun and interesting and exciting parts of most legal careers is when people *do* leave the plan, and they just sort of look around and notice something;

they say, *You know, I never considered that for a minute, but gosh that looks a lot more fun than what I'm doing now.* You know what, I really think that the best legal careers are the ones that are guided by a sense of, *Is this more fun than what I'm doing now? I think I'll go do that, then.* You know?

SM: That makes sense. So your career, and you—I think—have been looking around for a lot of fun, right? If I just think about your career, the way it's gone, you started off at Harvard Law School, as the Dean did a great recap here, and then you were clerking on the D.C. Circuit, and then you were clerking for Justice Thurgood Marshall on the Supreme Court, and then it's jumping to teach at University of Chicago, and then teach at Harvard Law School, and think *I'll become the Dean*, and then Solicitor General, and then a Supreme Court Justice. I mean, in some ways . . .

JK: And you skipped a few too!

[*Laughter.*]

SM: Yeah, I did! We only have so much time, right?

JK: I used to think that I couldn't keep a job really. [*Laughter.*] Every four years, I was off doing something else. But now, I'm looking forward to keeping this for a while.

[*Laughter, applause.*]

SM: Good! From an outsider's point of view, it looks like a dream life. But I'm interested in the times you failed. Can you tell us about those? And how do you deal with disappointment?

JK: If you look at my resume, you see all the jobs I got. You don't see all the jobs I didn't get. Truly, for every job I got, there were two that I didn't get and that I was disappointed about not getting. And starting from law school. I did very badly my first semester, and I thought, *Oh my gosh. Law school has finally outed me for the fraud that I have always been.* [*Laughter.*] It wasn't true. I sort of turned myself around and figured it out. I have flitted around a lot. Some people are more like, *I'm going to do one thing, go get one job, and it's going to be perfect, and*

then I'll do that for my whole life. If that's what makes you happy, that's fantastic. But if you're more like me: there are plenty of jobs that I didn't get along the road.

One job I didn't get was when Bill Clinton nominated me to be a judge before. The Senate didn't give me a hearing, and I never became a judge. There were other jobs in government that I didn't get. When I was Dean at Harvard, I was considered to be President of the University and I didn't get that. It was sort of all along the road. Some of these were high-class disappointments. But I am a big believer that you can't let disappointments get you down too much. I know it's a little bit of magical thinking, but I am a big believer in the idea that when a door closes, a window opens. It may be the best thing that ever happened to you that you didn't get a job. That is true of when I was nominated to be a judge. I was quite young at the time—I was in my late thirties. I had just worked for four years in the Clinton White House. I thought I really wanted to be a judge, and the Senate thought otherwise. It ended up that I didn't get it, and I spent the next decade doing all kinds of things that I really enjoyed. And I became a Justice anyway. So, it worked out fine.

SM: I think it worked out OK.

JK: It worked out fine!

[*Laughter.*]

SM: We obviously have a lot of folks here from Colorado, and there are certain legal issues that are salient in a square state like Colorado. What I'm thinking about really is Indian law, water law, environmental protection—those sorts of things. I'm wondering what your approach is. How do you go about educating yourself when it comes to, sort of, those complex areas of law, but then also other cultures that you may not be intimately familiar with? How do you educate yourself and your colleagues to address those matters?

JK: Yeah. I remember it was about my fourth year on the court. I was assigned an opinion by the Chief Justice, and it was a water law opinion involving Kansas, Nebraska, and Colorado. Colorado was more of a bit player in the litigation. It was really a dispute between Kansas and Nebraska. I do remember think-

ing, *I know nothing about this*. You know, it's like these big square states that have water problems. And I grew up in New York City, I went to school in Massachusetts. Water law was not really high on the curriculum.

I think you learn it the same way—there's so many things we don't know. Water law might be one of them. I once wrote in an opinion, I think my next year, a super complicated thing about electricity regulation, which I knew nothing about. So there are those kinds of things, but actually it happens all the time that there are things you don't know, that there are perspectives you never encountered, cultures you've never experienced. I think you're just under an obligation to keep learning as a justice or a judge.

Just going back to your first question about John Stevens. When I got to the Supreme Court, I asked Justice Stevens for any advice he might offer me. He's very humble man, and I don't think he much liked giving advice. But finally, I really tried to push him, and he said, "I think the best thing that I ever did was that I tried to learn something new every single day I was on the Court." You think about that: this is a man who served on the court for thirty-five years. You could be forgiven for saying, around year thirty-four, *I think I've learned it all*. [Laughter.] But he never did. I think that that's the attitude that a Justice has to take. There are all kinds of things in this world and in the law that I don't know. To keep an open mind and to figure out how to learn about them. To know what you don't know. To have strategies for learning about them. That might come in the context of one particular case or it might come in a broader context, but I think that that's John Stevens's advice: to just "think about all the things you have to learn and then go out and learn them" is the way to be a judge.

SM: I hear you and I think one of the things that really brings up is the important issue of diversity—diversity on the Court. As you know, the Court as a whole does not reflect the demographics of American society. If we look at the Justices themselves, many are appellate lawyers, come from a very small number of law schools, only three women on the bench—and I do say "only." And not a lot of diversity when we look at race and religion and ethnicity and geography. So I'm wondering what role do you think—if any—peoples' experiences and back-

grounds shape how the Court makes its decisions, and is there an example where you think it really mattered?

JK: In general, I would say I'm a big believer in diversity in the judiciary, but for a different reason than that, which I'll come back to. In general, I don't think diversity necessarily means that you'll get a different set of views on the Court. I mean, if you think about women: there are lots of women in the world and they have all kinds of different views. My colleague Justice Ginsburg was once asked, *How many women should there be on the court?* And she said, *Nine? How about that?* Whether it's five or whether it's nine, you could have nine women who all had views like me. Or you could have nine women, none of whom have views like me. Or you could have some mix, because women disagree on a lot of different things. All you have to do is look around the U.S. judiciary and you'll find women on every side of most legal questions.

So, I don't really think—and what I think about in conference—I've been on the Court now, this is my tenth year. I can't think of all that many cases where I thought to myself, *This would come out differently if only there were more women here.* The time when I most thought that, where I most sort of thought, *My gosh. This is, you know, there really is a different perspective here,* I have to go back to ten years ago. I was Solicitor General at the time. At that time, the Court had only one woman on it. It was the year before Justice Sotomayor arrived, so it was only Justice Ginsburg. There was a case about a thirteen-year-old girl in a junior high school who was strip-searched because she was thought to have marijuana or some other kind of drug on her. She was strip-searched by male school administrators. I would say that it was not the greatest day on the bench for the Supreme Court, because you could see Justice Ginsburg—in the questions that she asked—that she had a picture in her head of what this was like and what it would feel like if you were that thirteen-year-old girl. But she was really the only one. Some of the men on the Court were not having their finest hour: they were sort of joking and not appreciating what this would have seemed like to a thirteen-year-old girl. There was a lot of commentary on it at the time—all deserved, I think. Then they went back into the conference room, and I don't know what happened there, but they came out and Justice Ginsburg's view—which was that it was an unconstitutional search—that view prevailed by an ex-

tremely lopsided vote. So, in the end she was able to convince people that this was a serious matter even if they were kind of *haha-ing* on the bench.

But I think that, as I said before, you can find people of all kinds of different views who are women or African American, who are Hispanic. I think the more important reason to have diversity on the court is because I think that if the Court doesn't have legitimacy with the American public, the Court can't do all that much, and the Court won't be taken seriously. To have legitimacy with the American public, I think one part of that—it's not the only part by any means—but one part of that is that all kinds of different people should be able to look at the Court and say, *I see somebody there who looks like me, who thinks the way I do, who has experiences of the kind that I had*. That's the kind of thing that gives the Court public legitimacy. I sometimes sit in the courtroom, and I see all of these school groups who come into the courtroom. I think, *This is so great*. There are only three of us, but the three of us are pretty vocal on the bench. We don't by any means fade into the background. I sit on the left, Justice Sotomayor sits on the right, and Justice Ginsburg sits in the middle. So, there are women's voices coming from all over, and I think it's fantastic that all these girls are listening to this and all these boys are listening to this. It says something about how women can be in the legal profession and in society. I hope that some of us serve as role models for people who—you know, children and teenagers, even you guys [*pointing at audience*]*—who look at the Court and see somebody who they can relate to*.

[*Applause.*]

SM: I want to turn to an issue which you have actually written about already: the confirmation process. In the past, you have criticized the confirmation process as—as you call it—“a vapid and hollow charade.”² Those are your words. What are your thoughts now about the process today, and what do you think are some of the most important attributes of a Supreme Court Justice?

2. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

JK: I should give you a little bit of perspective about when I said those words. Before I went through the process, I mean quite a bit before, I wrote an article on the confirmation process when I was a professor at the University of Chicago. It was when I was a young professor, I was in my early thirties. I had just come back from a summer that I spent working for Joe Biden, who was then the chair of the Judiciary Committee. He had done the confirmation hearings for Ruth Bader Ginsburg, and Joe Biden had a practice that he would invite—for every confirmation process for which he was the chair of the Judiciary Committee—he would invite an academic out and have the academic work with his team and think about what kind of questions to put to the nominee and so forth. And I was the academic one summer for the confirmation of Justice Ginsburg. I found it a terribly frustrating affair, really, because Justice Ginsburg was remarkably good at never answering anything. Years and years later, I really tried to emulate that, of course. [Laughter.] But at the time, it didn't seem like such a great idea to me, and I wrote this piece. So when I became a nominee, it was this piece that was very troublesome for me because every time I said, *You know, Senator, I really can't answer that*, they would say, *You know, you wrote this article calling the nomination process a vapid and hollow charade*. And so that was inconvenient.

[Laughter.]

SM: As academics and stuff, it will come back to bite us. You've got to be careful of what you write.

JK: I will say, now having been through the process and having come out on the other side, I guess I can't have *too* many criticisms of the process. It worked. But I think it's actually a pretty frustrating thing for everybody concerned in it, and I don't quite know how to fix it. I have no silver bullet to tell you how to fix it, because the senators, for the most part, just want to know how people are going to vote on different things. I don't begrudge them that. I mean, we decide very important matters, and I think probably for a senator, they think, *Well don't make me guess. You know, tell me what you think of X and Y and Z*. For the nominee: number one, this is really not a good path to be confirmed. Number two, there were certain kinds of ethical rules

that nominees have to follow. I found that when I was a nominee, what I really tried to be aboveboard and open about was the way I thought judges should act, my theory of constitutional interpretation, or my theories of statutory interpretation. I really tried never to end the conversation. I really tried—as much as a senator wanted to ask me about those things—to be open and forthcoming about them. But I think that, the senators, not all of them are lawyers. To the extent that they are lawyers, they haven't really thought about some of those questions in a long time and they kind of want to know how you're going to vote. So it's just sort of ships passing in the night, I think, and it's hard to really have a process that works for everybody, that works for the nominees, and that works for the senators. Again, I don't really have a great solution to it. The qualities that should be looked for—I wouldn't say that senators should be uninterested in how people are going to vote. It's actually a pretty important part of who a Justice is going to be, so I wouldn't count that off the table.

But if you put that aside, I think the qualities are the kinds of qualities that I talked about when I talked about Justice Stevens. It is integrity and independence and wisdom and open-mindedness and obviously knowledge about the law. But more those questions: Is this a person who is going to keep learning? Is this a person who is going to keep an open mind? Is this a person who is not afraid to be independent and go out on a limb sometimes? Is this a person, maybe most important, who will be honest and who will have a lot of integrity in the way they approach decision-making? I think that that's what you should look for.

SM: Absolutely. I'm just sort of going to lighten it up a little bit. I think one of the things that I've learned is that the Washington press has identified you as the hippest Justice.

JK: That might be a low bar.

[Laughter.]

SM: I wasn't going to say that, but you said it, right? First of all, is it true?

JK: I don't know—what qualifies me as hip really? I don't think so.

[*Laughter.*]

SM: So I'm wondering what you think accounts for that. You have a reputation that's out there. I've seen different things: that might be your love of video games, comic books, you've been called "Special K." So can you help us out here?

JK: I've got nothing for you here.

[*Laughter.*]

SM: Well, we're going to let "Notorious RBG" and you duke it out. . .

JK: I think she's the hippest justice, don't you think?

SM: I'm going to let the two of you sort that out.

JK: No, I think so. She gets the honors.

SM: So you don't know where that's coming from?

JK: I once wrote this opinion that had a lot of comic book references in it. Because, not just because I put them in gratuitously, it was an opinion about . . . it was a patent case. The patent was on this glove that you put on and then you went like this [*extending arm and hand*] and webs came out of the fingers. It was a Spiderman glove. So I once wrote an opinion full of Spiderman references, so maybe that's where it comes from.

SM: And I've heard you've quoted Dr. Seuss. So there are a couple . . .

JK: Dr. Seuss! There you go, there you go.

SM: Right.

JK: I just, actually, somebody just sent me today Has anybody read my opinion in *Yates*?³ Yeah? The fish? Is a fish a tangible object?

SM: Oh, right! *One Fish Two Fish Red Fish Blue Fish*.⁴

JK: *One Fish Two Fish Red Fish Blue Fish*.

SM: There you go.

JK: So I've now become associated with Dr. Seuss, and particularly *One Fish, Two Fish*. At the end of every year when clerks ask Justices to sign various things, you know, mostly Justices are asked to sign photographs of themselves. And I'm asked to sign *One Fish, Two Fish*.

[*Laughter.*] [. . .]

SM: People know there are strong friendships on the bench, and I know that you have taken really strong opposition in terms of your positions against your colleagues in terms of their point of view. How does that impact the way you interact with one another? And what kind of institutional mechanisms are present that actually support and promote your ability to continue to have deep friendships with people that you vehemently disagree with?

JK: I like to think that I know how to write a strong dissent, and I'm not the only one on the Court who knows how to do that. We do write some strong words about each other. But you're quite right that we have very good relationships on the Court. It's a quite collegial institution, and there are really good friendships on the Court among people who disagree with each other about many things. Why? My colleague—my old colleague, whom I miss quite a lot—Justice Scalia used to have a line where he said, *If you take this personally, you're in the wrong business*. I think that that's basically true. Look, we're dealing with important matters. Of course we're going to criticize each other, and of course we're going to tell each other, *You got the law really*

3. *Yates v. United States*, 574 U.S. 528 (2015) (Kagan, J., dissenting).

4. DR. SEUSS, *ONE FISH TWO FISH RED FISH BLUE FISH* (1960).

wrong today. But that doesn't mean that we can't think that the other person is operating in good faith and is a good person.

It seems to me that you can have very good friendships with people you disagree with. For that matter, not everybody you agree with you like. Right? So if you don't like everybody you agree with, you should be able to like some people you don't agree with. I think we all get that. One of the things that binds us together is that there are only eight other people in the world who really know what my job is like, and it's a job where you can't talk to a lot of people about it. So in that sense, it's a pretty tight community, because there we all are, and it's just the nine of us doing this thing, and we're the only people that can kind of understand what the experience is like.

But we try to do other things. We have a lot of lunches together: every time that we hear arguments and every time we meet in conference. This is about four times a week for two weeks out of every month. Which is a lot. We go up to a dining room in the court and we have lunch together. There are rules about this lunch. The rules are: You can't talk about cases. A more informal rule is that you can't talk about politics. I think that the theory is that we have enough to fight about, we shouldn't add anything to the list. So we talk about books and movies and theater and people's families and sports. Justice Ginsburg always likes to get us to talk about opera, but nobody else really knows very much about it. [*Laughter.*] But I think it I think it's a really good thing for the Court to do. It was a practice that Justice O'Connor really started and sort of insisted on, and I think she was a very wise person to do so. It just forges bonds of collegiality and makes people relate to each other as people and not as that person who holds views that are so disagreeable to me.

SM: I do want to go back to the idea of the role of dissent, you mentioned dissent. I'm wondering for yourself: how do you go about determining when it is more important to dissent than to build consensus among your colleagues? I'm thinking in particular about the *Rucho v. Common Cause*⁵ case. Many of you know the recent case where the Court had a 5–4 contentious—very contentious—decision, where the Court decided that it was not the Court's job to intervene or try to resolve political gerry-

5. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

mandering issues. Your dissent said, “Of all times to abandon the Court’s duty to declare the law, this was not the one.”⁶ You went on to say, “With respect, but deep sadness, I dissent.”⁷ Can you talk about what that was like for you?

JK: In general, the first point about, *When do you dissent and when do you try to reach consensus*—it’s not always, of course, your choice. To try to reach consensus, more than one person has to do it. Sometimes it’s not your choice. If people want to go their own way, then people are going to go their own way. Other times, I think everybody agrees, that maybe this was one of these cases. The Court had tried to avoid the issue at times prior to last year’s decision, but when we finally got around to deciding it, there were really two options, and there wasn’t a whole lot of room for compromise. Some issues are like that. Others are definitely not. I definitely don’t think compromise is a dirty word in the courts or in any place else. In fact, I think it’s really important, in general, to try to reach across perceived divisions and to try to see if you *can* find any common ground and if you *can* find any room for compromise. I like to think that it’s something I do quite a lot. But sometimes you can’t. You can’t, either because you have no takers on the other side, or you can’t because you can’t: because there’s a matter of fundamental principle at stake, and there really isn’t a third way or a compromise position.

This decision, the *Rucho* decision, was a decision I felt very strongly about. It was about whether the courts could get involved in partisan gerrymandering. It was not about the constitutionality of partisan gerrymandering. I think everybody recognized that partisan gerrymandering of the extreme kind that we saw in two cases that came to the Court—one was done by a Republican legislature, and one was done by a Democratic legislature—and it was a really extreme gerrymander that basically deprived people in their respective states of the opportunity to have their votes mean anything. It was a kind of rigging of elections. It was representatives picking their voters rather than voters picking their representatives. And nobody really argued that this was constitutional, done in this sort of extreme way, but the majority thought that the Court just couldn’t get in-

6. *Id.* at 2525 (Kagan, J., dissenting).

7. *Id.*

volved in it. That it presented no manageable standards for the Court to decide when a gerrymander had gone too far. And I thought that that was quite wrong, and that courts around the country had actually worked pretty hard in developing exactly the kinds of manageable standards that the Court—that the majority—claimed to be demanding. It wasn't so hard to figure out exactly how these cases should be litigated, and when it was that some gerrymanders should be declared off limits, like these two—it was perfectly obvious that these two should have been invalidated.

So, I did. I think I wrote a strong dissent. I think it was a dissent, I hope, that was not so much angry as deeply saddened, because if the Court is not going to protect the basic structures of our democracy, then it's hard to know what the Court's role is. I think the Court—the majority—failed to do that, and I said so.

[Applause.]

SM: I agree that the court is tasked with interpreting and guarding the rule of law. In light of the extreme partisan political climate that we're in, the highly contentious Supreme Court confirmation process, and even the significant division among the Justices themselves in cases that have political implications—and here I'm thinking about abortion, gun control, affirmative action—it's hard for many Americans not to see the Court as political. What would you say to those who worry about the Court's independence?

JK: I do think people's views and concerns about this can be exaggerated—which is not to say that there's not a kernel there that really ought to be taken seriously—but just to sort of put it in a broader perspective. I think that some people think the Court is just this institution, and it always operates by these 5–4 votes, and everything we do is like that, and that part of the court is conservative, and part of the court is liberal, and that's all there is to say about the Court. I don't think that that's right by a long stretch. About half the cases that we hear every year—and these are only the most important cases or the most difficult cases—they are all cases, or almost all cases, which have involved lower courts disagreeing with each other. Notwithstanding that, about half the cases we do each year are done unanimously. Another very substantial chunk of the cases we

decide are not unanimous but they're pretty lopsided, or even if they're closer, everybody is all scrambled, and there's no way to read them as, *Oh, there's a conservative majority and a liberal minority*, or anything like that. I think that there are whole years that go by, and I think last year was a pretty good example where even if you just take the 5–4 cases, there were a lot of people doing what might be perceived as unusual things, making unusual alliances, finding unusual bedfellows, and it would be very hard to look at, for example, last term and then say, *Oh, that's just this politicized court*. I don't think you could do it.

Now, I don't want to dismiss the question at all, because I do think that there are certain sorts of issues that are hot-button issues in this society. And they are often the issues that get the front-page treatment in the newspapers, where there are really different ways of looking at those issues. And I don't think that that's a matter of partisanship—you know, who's a Democrat, who's a Republican—but I think it is a matter of different ways of looking at the Constitution, of understanding how to do constitutional interpretation, different views of particular constitutional provisions.

So, for sure there are real differences on, *How do we interpret some parts of the Constitution which matter a lot to people?* I guess what I would say as to those issues is: part of my message would be to the Court, and part of my message would be to the public. I mean, I think that everything I just said suggests the Court should think hard when it's doing its work about trying as hard as it can *not* to look politicized and polarized and deeply divided. Because I think you're right: we live in this polarized time. And the last thing that the Court should do is to look as polarized as every other institution in America. I mean, it would be great for the Court to be seen as *not* that, and the only way to be seen as *not* that is not to be that. And so I think that there is a lesson for the Court and how it operates.

I would also say to the American public that they shouldn't jump to conclusions so fast on the basis of, you know, one decision or another. We're sort of trying our hardest to decide really difficult matters, and we're all doing so in good faith. And sometimes it will look like the world is falling in because of one decision—but maybe it will look to other people like the world is falling in because of another decision. I'm not saying that people should always give us the benefit of the doubt if we don't deserve it. So I think this issue that you raised is an issue for us, but I

also think it's important for the public to recognize that we actually are a different kind of institution from our buddies across the street.

SM: That's important, thank you. So, in the interest of time, I'm going to ask you one more question before we turn it to the student questioners. This goes a little bit back to your career, the idea that you had lots of starting lines—we've all been at the starting line at some point—and you've had many. And so I'd love for you to basically tell me what that was like for just one of them. I have three options. Pick whichever you'd like to talk about. You've been at the starting line as a junior Justice, where you were for about seven years before Gorsuch joined the court. You were at the starting line as the solicitor general when you argued your very first appellate oral argument before the Supreme Court in *Citizens United*⁸—no pressure—and then you were the first female dean at Harvard Law School.

JK: I'll pick one of the first two. Now you tell me which one you really want to hear about.

SM: I really want to hear about the junior Justice one.

JK: Junior justice? Alright, junior Justice. So, yeah, I was a junior Justice for seven years. It's a pretty long stretch of time, actually, as these things go. The record is eleven years. Justice Breyer just missed the record by about two weeks, I think. Yeah. So Justice Breyer was the junior Justice for eleven years. You think, "well, what is that thing, the junior Justice?" It turns out that the Court is kind of a hierarchical institution in some ways and not in other ways. I mean, we all have the same vote. You know, the Chief Justice's vote doesn't count for any more than my vote counts for. But in other ways, it's a hierarchical institution. And the junior Justice, in particular—I don't know how to say this other than—gets hazed by everybody else. [*Laughter.*]

So there are three things that the junior Justice does. One of them is semi-serious: it's that the junior Justice—when we go into the conference room and when we discuss cases, it's just the nine of us. We don't take any clerks, there are no members of the administrative staff of the court—so somebody has to take good

8. *Citizens United v. FEC*, 558 U.S. 310 (2010).

notes, so that when we come out of the room, we'll be able to tell everybody else what it is that we've decided in there. Then they can issue the appropriate orders and things like that. And that's the junior Justice's job. So that's sort of fun actually, you know.

SM: We do that in faculty meetings.

JK: Okay! You know, you have a sense of responsibility. So when everybody else leaves the conference room and goes to eat lunch, the junior Justice stays behind and all the administrative staff of the court pour in and you kind of deliver the news of what we've done. So that's the serious role.

The second role—because there are only the nine Justices in the conference room—it turns out that sometimes people have to bring us stuff. So some of us are—shall we say—forgetful. They forgot their coffee, they haven't taken the right file, they haven't taken the right book. So there's a phone in the conference room and you can call back to your chambers and say, you know, "get my glasses, get my coffee, get my book," and somebody will come to the conference room and knock on the door. Knock on the outer door, I should say, because the conference room is really this kind of inner sanctum, holy-of-holies thing. It has one door that you open from the inside and then it just faces another door about two feet away, and then somebody has to open that door from the outside. So when somebody knocks on the door . . . Now, you would think that the person, let's say, who forgot her coffee would go get the door, right? And get her coffee? But it turns out not. [*Laughter.*] It turns out that the junior Justice has to open the door.

SM: Really, wow!

JK: And get the coffee and say, "who is this for?" And then deliver it to the person who really needs that jolt of caffeine. So about five years into my job, I injured my foot, and I was walking around with one of those big boot contraptions. I don't know if any of you have ever worn them? And the knock would come on the door, and still, everybody would just stare at me, you know? *Boy, she's really slow to the door these days, you know?* [*Laughter.*] So that's the second thing.

The third thing is that they put you on the cafeteria committee. This is really their way of saying, "You think you're hot

stuff, you're a member of the Supreme Court, you just got confirmed? No. You're going to be on the cafeteria committee, where you are going to meet once a month with a bunch of people to discuss what happened to the good chocolate chip cookies." [Laughter.] And then your colleagues do this stuff—you know, as I said, we eat together a lot, so your colleagues would say stuff like: "There's too much salt in the soup, Elena." Then somebody else will say: "I don't know. There's not enough salt in the soup." So they do this, obviously, jokingly. But no, in the end, they basically blame you for the cafeteria. So that's the job of a junior Justice, and I was delighted to pass it on to Justice Gorsuch. Who—I think it's really unfair—only had to be junior Justice for a year!

SM: Wow. So, well thank you for sharing that. [Applause.] I could continue asking you so many more questions. But because of my time, we're going to end the fireside chat portion of the evening and turn our attention to the students. We have six students who have submitted questions, so I'm going to go ahead and bring those students into the conversation. And let's, we'll hear from them. [. . .] I'm going to ask Leah Fugere to come up first, please. Leah is a third-year law student, editor-in-chief of the Law Review, and a member of the national moot court team. Leah, please join us.

LF: Justice Kagan, thank you so much for traveling to Colorado Law. In his opinion in *DIRECTV*,⁹ Justice Breyer noted that the fact that the controlling case, *Concepcion*,¹⁰ was closely divided had no bearing on the undisputed obligation that it imposed as precedent. So what effect, if any, does the Court's unanimity, or lack thereof, have on the weight that we afford precedent?

JK: I don't think it has much effect. You know, we decide some things unanimously, we decide some things eight to one, seven to two, six to three, five to four. In the end, the Court is the Court, and the Court reaches a judgment, and that judgment needs to be respected—except in the unusual circumstances when people decide that it's appropriate to overrule precedent.

9. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

10. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

But whether it's nine to zero or five to four I don't think makes much of a difference. The Court speaks as the Court regardless of the vote. Maybe there's a different analysis for highly fractured opinions of the Court. You know, if there really isn't a majority at all, and the Justices have split every which way and one opinion ends up as controlling. Maybe there's a different analysis for that. I'm not even quite sure of that. But five to four, nine to zero, I think the rules of stare decisis operate in the same way.

SM: May I have José Ramón García-Madrid? José is a first-year law student, secretary of OUTLaw, and interested in immigration law.

JGM: Good evening, Justice Kagan. So there is some speculation that Justices, particularly in their comments at oral arguments and in their opinions, are talking about more than just the case at hand. So for example, the understood subtext in the competing analyses of due process between Justice Scalia and Justice Brennan in *Burnham v. Superior Court*.¹¹ So the question is: to what extent should lawyers and the public read into this subtext?

JK: I can't say I've thought about *Burnham* since I was, you know, a civil procedure professor. [*Laughter.*] So I'm going to ignore that part of the question, alright?

[*Laughter.*]

SM: Don't ask me to help either.

[*Laughter.*]

JK: But if the question is: do we talk about things other than the issue at hand? I think for most cases, the issue at hand is quite enough, thanks. I mean, I'm sure that there are times when there's something that's sort of off-stage that's affecting what we do in argument or in our opinions. I think it's hard enough just deciding the cases. For the most part, I guess, I would take us at our word that if we're deciding a case, we're

11. *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

deciding a case, and there's not some mystery decision that's driving the analysis.

I do think that when you started off by saying that the arguments weren't necessarily about the case at issue, I thought you were going in a bit of a different direction. It made me think that the arguments are often—when you watch a Supreme Court argument, we ask a lot of questions that are not really questions, you know? They're statements with a question mark at the end. They're sort of speeches, and then you raise your voice at the end of the sentence. [*Laughter.*] And I think that that's because the questions we ask really have an audience that's not just the lawyer at the podium, but we're talking to each other, and we're telling each other how we're thinking about a particular case. And that actually performs an important function on the Court because we don't talk about cases before argument. It's only after argument that we get together and talk about cases. And then we immediately start to sort of go around the table and vote. So if you're one of the people, like me, who votes last or near to last, it's actually pretty important to be able to have a forum where you can indicate how you feel about a subject before you get to the conference room. And usually argument serves that purpose. I mean, we do it as a kind of—there's somebody who's standing at the podium, and we're sort of directing our views to them. But the views are really directed to the other people on the bench, and what might appear on a transcript like a bunch of questions being directed to lawyers are better understood as a conversation that the Justices themselves are having prior to the first voting.

SM: Thank you. May I have Peter Selimos please. He is a first-year law student, participates in the Environmental Law Society and the Silicon Flatirons student group. Peter.

PS: Hello, Justice Kagan. You're so cool.

[*Laughter.*]

PS: Technology and social media . . .

JK: Hip!

SM: Yeah! The hippest Justice! This is why it happens, right? You just heard it.

PS: Technology and social media have exploded over the last several years. What impact has this technological revolution had on the Court and how it operates?

JK: None. [*Laughter.*] This is horrible. I'll qualify that: less than you might think. So when I clerked for the Court, I clerked for the Court in 1987, and then I came back in 2010—so twenty-three years later. And in those twenty-three years, there had been this technological revolution, communications revolution. And I got to the Court and I thought, "It just has not touched the Court at all." The Second Circuit is in love with fax machines. The Second Circuit . . . the judges on the Second Circuit literally communicate with each other through faxes. And you might think that that's really funny, except the Supreme Court hasn't really gotten to faxes yet. [*Laughter.*] So the way we communicate with each other is we print out whatever it is we're writing, whatever memo we're writing. And we have, each of us has a person called a "chambers aide," and the chambers aide walks around the building and just delivers it. You know, in hard copy, in this kind of parchment-like paper.

Here are some good things about that: We never send emails that we regret afterwards because we never send emails at all. I mean, some of us, I think, are perfectly proficient in the use of technology *within* our chambers but not across chambers. And when we go, for example, into the conference room, nobody brings laptops—nobody brings any kinds of modern device. Except for one of us, and I'm not going to name names, whose phone continually goes off. But for the most part it's really a pen and paper kind of thing.

So, is this terrible? You know, the Court works remarkably well, notwithstanding that this is true. And so I don't feel day-to-day that it's like our operations could be much better if we started communicating with each other in different ways. I mean, within our chambers, our technology is perfectly adequate so that when I write an opinion and when my clerks do stuff for me, it's all good. I guess what strikes me about the technology question is just, this just goes to this question that I think I've kept coming back to about all the things that you have to keep in mind that you have to learn. I mean, if you wanted to put

together a court of the people who are most proficient in new technological developments, or new scientific developments for that matter, I doubt you would come up with the nine of us. [*Laughter.*] I mean for one thing we're just too old, you know. So it puts an extra burden on us, I think, to recognize that there's lots of new stuff that we don't know and to figure out how to learn about it before we make any mistakes. And I hope we all feel that responsibility, I think we do. And I think that there are plenty of ways even for people to whom all the stuff that you take for granted is a little bit of second language, even for those people to learn a lot about it and to be able to make good and wise decisions.

SM: Great, thank you. We have three more questions. Connor May, second-year law student, who is a member of the Environmental Law Society, Silicon Flatirons student group, and the International Law Student Association.

CM: Hello, thank you for being here. How do you see the role and the composition of the judicial branch changing at all in response to changes in the legislative and executive landscape? Are you concerned at all about a more contentious legislature and a stronger executive, and the effects of those, pressuring the Court further into the "political thicket" Justice Frankfurter predicted?

JK: Well, I don't know, we've had a contentious legislature and a strong executive in this country for a while, and I'm not sure that the Court—whether it's more or less contentious, or strong or less strong—I do not think that the Court should define its own role based on the fluctuations in what happens in the executive and the legislature. Which isn't to say that over long stretches of time developments in the political process surrounding us don't affect what the Court does—of course it does. But I wouldn't think that on a more short-term basis, that we should either curb ourselves, or either become less aggressive or more aggressive based on what happens to be happening at that moment in the political process. I think we should look after our own business.

SM: Okay, thank you. Chelsea Lauwereins is a third-year law student who is pursuing a career in public defense.

CL: It's really wonderful to have you. I know we're all very honored. You've touched on this question already, but it is the question I submitted, so hopefully it allows you to expand on this a little bit. How do you feel the Court will change or be affected by the increasing use of party affiliation in nominations and appointments to the bench? Is there a way to maintain the neutrality required by the position with the increasing polarization of party ideals?

JK: Okay, I think we have talked about that. I think all of us wish that the confirmation process was less politicized. You know, I think all of us have in our heads some golden age where Justice Scalia and Justice Ginsburg were confirmed to the court by ninety-eight to zero votes because everybody understood that even though they had extremely different views, they were both brilliant and they both were people of great integrity and independence and wisdom. I mean, all of us sort of look back at those times and say, *That's how the process should work*. And you know, rather than these sort of pitched battles between parties where every nominee gets sent up and praised for a few votes from the party that's not the party of the President who appointed. Now, I got four or five, I think, Republican votes. Not very many. And it's been like that for a considerable period of time. Boy, I'd have to be a smarter person to know how to get back to those days, and a lot of water has been under the bridge, if that's the expression. And in the end, that's something for Congress to decide.

SM: Thank you. Last but not least, Javon Quarles is a second-year law student, co-president of the Black Law Students Association, and a member of the Veterans Law Society.

JQ: So first, thank you for being here. So my question is, you had the wonderful fortune of clerking for Justice Thurgood Marshall. You described him as the greatest lawyer of the 20th century. What was it like to clerk for him? And what has been his impact on you? And what was the most meaningful experience that you had with him?

JK: I think for sure he was the greatest lawyer of the 20th century. In two respects. I mean first, I think if you ask about

great lawyers it's like, *Well, who did the most justice in their lives?* I don't know of anybody in the 20th century who did more justice as a lawyer than Thurgood Marshall did. [*Applause.*] And then he was just a phenomenal lawyer. He was a lawyer of a kind you don't really see anymore. I mean, we've become a kind of very specialized profession, so the people who do appellate work don't do trials and vice versa. And the people who do civil cases don't do criminal cases and vice versa. And he did everything. He argued almost twenty cases before the Supreme Court. Won almost all of them. But at the same time, he would criss-cross the South, the Jim Crow South, you know. Stopping in these little towns with these small courthouses and represent people who were being charged with criminal offenses. You know, mostly African American defendants being tried by white juries. And he would be their trial lawyer, and then the next day he would go back up to the august halls of the Supreme Court, and then the next day he would go back down to Mississippi, and on and on and on—until he broke the back of the Jim Crow system. And you could see why he was so good at all these different kinds of lawyering.

He just had an ability to get to the heart of a problem, to see sort of straight through to what was most important in any legal issue. And he kept his eyes on the prize for his entire career, to use that expression. I mean, he didn't let himself be distracted. He had a strategy for how he wanted to go about fighting the fight for racial equality. So he was a strategic thinker, but he could also do all the little stuff. You know, he was a forest *and* a trees person. He was really quite remarkable in that way, in blending qualities that very few people can blend.

The most amazing part of clerking for him was that in addition to everything else he was, he was the world's best storyteller. I've never heard anybody tell stories better. He had all these voices that he did, he was a mimic, he did accents and voices, and he did faces. He had the most kind of mobile face and he was not embarrassed to do all these crazy kinds of expressions. And then he had the world's best stories and the world's most important stories—whether it was about his boyhood in segregated Baltimore or his time at Howard Law School where he met Charles Hamilton Houston and together they started really developing the strategy that led to the eradication of Jim Crow. Or all the stories that came out of his time at the Legal Defense Fund. Stories about other civil rights leaders. Stories

about presidents and senators whom he had met. And, you know, sometimes they were really sad stories, but he also had this real comic bent, so it was a little bit like make you laugh, make you cry. And you felt, when you were a clerk with him, that you were just getting something that you couldn't have gotten in however many books you read. Which was this window into this crucially important part of American history. And I think he knew that that's what he was giving his clerks, among other things. He was giving them an education in the law of the kind that all Supreme Court Justices give their clerks, but he was also giving them an education in American history and an education in what it means to do justice. And I hope I never forget those lessons.

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