Ginsburg traces the struggle for equal rights
Justice returns to HLS for Celebration 55

If we don’t listen, we won’t be listened to.

U.S. Supreme Court Justice Ruth Bader Ginsburg, who attended the law school from 1956 to 1958, was the star attraction of Celebration 55, a four-day September event which drew 600 alumnae, students, and guests and marked the 55th anniversary of female graduates of the law school.

In a conversation with Dean Elena Kagan ’86 in Pound Hall, the justice discussed topics ranging from the role that foreign law should play in the Court’s deliberations to the present ideological split on the Court reflected by the number of 5-4 decisions in major cases.

Before the Q&A, Ginsburg offered a cameo portrait of Belva Ann Lockwood, whom she described as “a resourceful woman who in 1879 made the Supreme Court change its ways.” Lockwood, the first woman ever to gain admission to practice before the Supreme Court, paved the way for today’s female jurists and leaders, Ginsburg said. But “the presence of only one woman on the current Supreme Court bench indicates the need for women of Lockwood’s “sense and steel,” she added.

When Kagan asked the justice what she was thinking about as she looked ahead at a new term, Ginsburg replied: “Hoping I can get the fifth vote.”

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In 2003, O’Connor penned the influential majority opinions in the Court’s Gratz and Grutter cases, paved the way for today’s female jurists and leaders, Ginsburg said. But “the presence of only one woman on the current Supreme Court bench indicates the need for women of Lockwood’s “sense and steel,” she added.

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Excitement was building on election night as 1Ls Jennifer Lambert (left) and Ashley Manning joined close to 300 students to watch the returns in the Harkness Commons. Even before HLS grad Barack Obama ’91 was declared the president-elect by the networks at 11:01 p.m., Lambert and Manning were confident of the results.

Affirmative action is still necessary, says O’Connor at HLS

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"Race still matters in painful ways."
This fall, 26 students moved into the three newly renovated 19th-century houses that were moved from the HLS campus last year to make room for the law school’s Northwest Corner Project. The wood-frame structures were converted into 13 shiny new housing units, and now reside two blocks away from campus, up Massachusetts Avenue.

Goldstone receives MacArthur Award

Justice Richard J. Goldstone, the Learned Hand Visiting Professor of Law at HLS, was honored with the prestigious MacArthur Award for International Justice in October. A former justice of South Africa’s Constitutional Court and also a former chief prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia, Goldstone was recognized for his role in the development of the modern era of international justice. Goldstone, who also served as chairman of South Africa’s Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation in the aftermath of apartheid, is co-teaching a course on the South African Constitution with Professor Frank Michelman ’60.

Directing corporate players

Four members of the HLS community were named to Directorship Magazine’s second annual Directorship 100 for their influence on corporate governance. Professor Lucian Bebchuk LL.M. ’80 S.J.D. ’84 was cited for his work convincing companies to adopt the “Bebchuk Bylaw,” which gives more power to shareholders through the use of the poison pill. Visiting Professor Leo Strine Jr., a vice chancellor on the Delaware Court of Chancery, was included in the regulators and rule-makers category, and Andrew Tuch LL.M. ’99 S.J.D. ’08 and Jim Naughton ’10, co-editors of the HLS Corporate Governance Blog (http://blogs.law.harvard.edu/corpgov/), were recognized in the media category, with top business reporters, for providing “informed viewpoints.”

Award-winning dean

In July, Dean Elena Kagan ’86 received the National Association of Women Lawyers’ highest award, the Arabella Babb Mansfield Award, for her professional achievements, positive influence and valuable contributions to women in the law. She also was named this year’s winner of the John R. Kramer Outstanding Law School Dean Award from Equal Justice Works in recognition of her extensive efforts to promote and support public service.

Bending history

Four individuals with Harvard Law School connections have been named to Esquire magazine’s list of the 75 most influential people of the 21st century: Professor Noah Feldman; President-elect Barack Obama ’91; Kennedy School of Government Professor Samantha Power ’99; and Supreme Court Justice John Roberts ’79. The list, compiled in honor of the magazine’s 75th anniversary, includes individuals from “every field of endeavor” who are “bending history right now.”

Scholars probe turmoil in financial markets

On Oct. 1, two days before Congress approved the $700 billion bailout bill, several Harvard Law School professors came together in a panel discussion moderated by Dean Elena Kagan ’86 about the current economic crisis and the government’s plan for a bailout. Professors Lucian Bebchuk LL.M. ’80 S.J.D. ’84, Howell Jackson ’82, Hal Scott and Elizabeth Warren were on the panel.

Though all panelists had concerns with portions of the bill, all but Warren said some version of the latest bailout plan should be passed.

“If this bill fails, it will be a crisis in confidence about the United States,” said Scott. “The entire world is looking at us right now, and every world leader is supporting that we take this action.”

Bebchuk—concerned about overpaying for assets (as he believes was the case in the government’s recent bailout of Bear Stearns)—proposed that the funds authorized under the bill be divided among different managers, who would receive a portion of the profit they earn on their funds. He detailed his proposal in a recent white paper.

Jackson began the discussion by offering a historical perspective on the crisis, referencing the savings and loan crisis of the 1980s, when the federal government spent $160 billion ($465 billion in today’s dollars) to rescue failing savings and loan companies. He noted one of the innovations that came out of that crisis was the financing of mortgages through capital markets, rather than by financial institutions, which started the process of securitization.

Warren dated the current crisis to the end of the 1970s and the beginning of the 1980s, which, she said, was the time when usury laws were disposed of and loans were deregulated. One of the effects of deregulation, she said, was the increased role of mortgage originators who produced “tricks and traps” mortgages, with adjustable rates and teaser interest rates. The explosion of these instruments, which shifted the risks from banks to homes, was a key reason for the current crisis, said Warren.
Despite the triumph of a black presidential candidate, the civil rights struggle has miles to go, says Professor Klarman

Professor Michael Klarman, a constitutional law and history scholar, joined the faculty earlier this year after a distinguished tenure at the University of Virginia since 1987. He is the author of “From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality,” for which he won the 2005 Bancroft Prize, and, more recently, “Unfinished Business: Racial Equality in American History,” which was published in 2007.

You suggest in “Unfinished Business” that the history of American race relations shows slow and episodic progress. How does the Obama presidential candidacy fit in?
The current state of American race relations is enormously complex. Twenty years ago, I don’t think many people could have imagined that the first two secretaries of state of the 21st century would be African-American or that a black man had a serious chance of being elected president in 2008. On the other hand, the condition of the black urban underclass is worse today than it was 20 years ago: These people are poorer; they are more likely to be incarcerated; their life expectancy is lower; their economic circumstances are worse than they were a couple of decades ago. And one of the complexities of American racial politics is that presidential candidate Obama dare[d] not discuss those issues too candidly for fear of pigeonholing himself as the “black” candidate.

You also noted that the light Hurricane Katrina shed on the problems of the black urban underclass quickly dimmed. What explains how that issue receded?
American history suggests that effective crusades for racial justice happen intermittently, usually in the aftermath of war, and that public commitment to them is fleeting. Reconstruction was largely a product of the role played by African-American soldiers in preserving the Union, and most Northerners lost their enthusiasm for it by the mid-1870s, enabling white Southerners to “redeem” their states from Reconstruction and largely nullify the Civil War amendments to the Constitution. The civil rights movement of the 1960s was partly a function of the Cold War imperative for racial justice—the need for Americans competing with the Soviet Union for the allegiance of nonwhite Third World countries to demonstrate that democratic capitalism was not synonymous with white supremacy. By the late 1960s, the Vietnam War, urban race riots, the rise of the black power movement and the shifting focus of the civil rights movement to issues of economic redistribution caused many Americans to lose enthusiasm for the movement. The rapid loss of focus on the plight of the black urban underclass after Katrina simply confirms how difficult it is, absent extraordinary circumstances, to maintain public support for racial justice.

What’s the state of school desegregation in the wake of the Supreme Court’s 2007 decision? Is that the end of the school desegregation story?
The nation’s 50-year experiment with school desegregation was largely over before the conservative justices on the Supreme Court attempted to kill it in 2007. Public support for aggressive school integration policies has never been strong but surely had collapsed by the 1980s. The Rehnquist Court reflected that public opinion in a couple of rulings in the early 1990s, which erected substantial hurdles to maintaining court-mandated desegregation policies and clearly hinted that lower courts should begin winding up desegregation decrees. In 2007, the Court went further, barring even voluntary school board efforts to promote integration through race-conscious measures. The ruling was breathtaking, coming from justices who purport to be committed to judicial restraint, federalism and an originalist methodology of constitutional interpretation (given that no credible account of the original understanding of the 14th Amendment establishes government color blindness as its objective). Yet the ruling had relatively little practical effect because so few school districts—probably only 5 to 10 percent of those in the country—employed voluntary integrationist measures by 2007.

You taught a seminar on the Warren Court last spring. Did preparing for or teaching the class change the way you think about the Warren era?
I had no idea of the extent to which Barry Goldwater tried to make the Court and its criminal procedure rulings an issue in the 1964 election. His landslide defeat might well have emboldened the justices to decide cases like Miranda v. Arizona (1966) the way they did. I also learned a lot about the ways in which different justices try to “market” their decisions to the public. In the Bible reading case Abington School District v. Schempp (1963), Justice Brennan tries to minimize the implications of the Court’s ruling for other public religious observances, whereas Justice Douglas seems determined to read the ruling in the broadest possible fashion, including invalidation of the motto “In God We Trust.” I also emerged with a better sense of individual justices and their relationships. I had not quite realized the depth of the animosity between Douglas and Frankfurter. And I had not fully appreciated the extent to which Justice Black had soured on the civil rights movement by the early 1960s.

Your next book will explore the backlash generated by high-profile cases like Brown v. Board of Education and the Massachusetts same-sex marriage ruling in 2003. Why do judges regularly seem surprised by strong reactions to their decisions?
On culture war issues like abortion and gay rights, people on different ends of the socioeconomic spectrum, on average, hold vastly different views. Almost by definition, the justices occupy the elite end of that spectrum. I think this probably has disabled them from appreciating how ordinary people might feel about the abolition of capital punishment in 1972, invalidation of almost all abortion restrictions in 1973 and gay marriage in 2003.
STUDENT SPOTLIGHT

**Far and wide: Four spif-fy summers**

Anna Fecker and Michael Admirand  
**Law Office of Rob McDuff**  
Jackson, Miss.

Michael Admirand ’10 and Anna Fecker ’10 spent their summer on death row in Mississippi and wandering through backwoods towns of the Delta. The 2Ls worked with Rob McDuff ’80, a civil rights and criminal defense attorney in Jackson. They interviewed clients and clients’ families, and researched and drafted memos in preparation for trials. So many of their clients, says Admirand, “were cursed with poor lawyering at the beginning of their trial.” After reviewing cases that had gone before the Mississippi Supreme Court, they discovered a potentially meritorious appeal issue and drafted a cert petition to the U.S. Supreme Court.

**Fecker:** “The number one thing that [this experience] showed me is the absolute importance that everyone in the criminal justice system have integrity about their role. And that extends from the prosecutor to the judge to the defense attorney. When any one of those players is not given the resources and is not working with the best interest of the community and of the victim and of the defendant in mind, then there are so many possibilities for failure. … I think that the system must be fair for the entire system to work —especially in the extremes, when there’s a possibility for the death penalty on the table.”

**Admirand:** “For me, it’s just a really transformative experience to go to death row and to see these clients, to talk with them and put faces and stories to what’s going on in the Mississippi justice system. … [This experience] has confirmed and enhanced everything I’ve wanted to do.”

Hagan Scotten  
**Department of Justice, National Security Division, Counterterrorism Section**  
Washington, D.C.

Before coming to HLS, Hagan Scotten ’10 spent nine years in the U.S. Army and served three tours in Iraq as a Special Forces officer. During his service, he worked with the Iraqi National Counterterrorism Force to investigate and pursue insurgent leaders. This past summer, he worked on counterterrorism issues as a legal intern for the Department of Justice in Washington, D.C.

“It was useful to have been an officer in the Army and, in particular, Special Forces officer coming here. I did some work that touched fairly close on things I had done over there, and that was useful, literally, from the point of view of recognizing names and places and understanding the dynamics of some of the bad guy groups in Iraq. … I’m researching an area of law where there just doesn’t seem to be much law. You can sort of understand how in some areas, the law is very well-developed and very complex, and so to figure that out, you need to get all the nuances right. But there are the alternate areas where it’s an issue that just isn’t often addressed. And that’s proving to be a more interesting challenge, but sort of a very different type of just digging and digging and digging and not finding anything. You don’t want to say there’s nothing there when there is something there. So it’s like proving a negative. … There are a couple of guys I’m working with here who are working on things like the Foreign Intelligence Surveillance Act or the protection of classified information. There isn’t anybody who knows more about the Classified Information Protection Act than a couple of the attorneys here I got a chance to work with, and that was neat.”

Madison Kitchens  
**Institute for Justice**  
Washington, D.C.

A libertarian, Madison Kitchens ’10 became active in conservative political organizations as a Duke undergraduate. This summer, he worked at the Institute for Justice, a civil liberties firm, on one case dealing with free speech and another focused on eminent domain issues.

“In Swift v. Clarksville Property Rights Coalition, we are representing a group of private property rights advocates in Tennessee who were sued by a city councilman and developer for libel. The suit stems from an advertisement the group placed in the local newspaper that criticized a redevelopment plan for using eminent domain and abusing the power of government to benefit private developers. It’s been a rewarding experience to help vindicate the rights of concerned citizens in the face of those who seek to silence their political speech via retaliatory lawsuits aimed at intimidation. … From the very beginning of this clerkship, I was able to craft the direction of a lot of the litigation, to bounce ideas off the attorneys who were really open to hearing a new and fresh perspective on matters. So the hands-on experience has certainly been a welcome treat here. And I’ve been able to participate in a broad swath of legal issues, anything from the larger scope of law, whether it be defamation law or eminent domain law, to very complex civil procedures.”

Anna Myles-Primakoff  
**Government of Liberia, Ministry of Education**  
Monrovia, Liberia

Anna Myles-Primakoff ’10 has devoted her time and attention to advancing children’s rights in African countries. For the past three years, she has worked with places like UNICEF’s Child Protection Office in Nairobi, Kenya, and UNICEF’s Communications Program in Accra, Ghana. This summer she worked with the legal unit of Liberia’s Ministry of Education. She’s also written proposals to help the ministry get funding for mandatory courses on peace, human rights and citizenship in all schools at all grade levels.

“It’s a huge period of transition, so that’s why it’s an exciting time to be here. Also because we’re trying to amend seriously most of the laws of the country. The Ministry of Education itself is overhauling almost all of their policies. … There’s just a lot of energy in the country about trying to do things really quickly. … In development, [children’s education issues] can be the most rewarding part because you get more kids into school and you can immediately see the results of that. It’s very tangible, and it’s also very optimistic. Generally, the argument against human rights activism is often paternalistic. But I think in the case of children’s rights, it’s often more appropriate to be paternalistic, and it can, I think, serve as a wedge to make broader changes.”

More than $1.8 million in Summer Public Interest Funding was awarded to 373 students this summer.
Funding enabled HLS students to serve in 27 states and 35 countries around the world.

Clockwise from left: Anna Myles-Primakoff ’10 in Monrovia, Liberia; Anna Fecker ’10 and Michael Admirand ’10 in Jackson, Miss.; Madison Kitchens ’10 in Washington, D.C.; and Hagan Scotten ’10 in Washington, D.C.
Chair talks: Feldman, Benkler, Hanson

Three more members of the HLS faculty recently commemorated their appointments to endowed chairs with lectures.

**NOAH FELDMAN**

Court should respect international law

The fact that the Constitution affects our relations with the world requires the justices of the U.S. Supreme Court to have a foreign policy of their own, said HLS Professor Noah Feldman in a Sept. 16 lecture marking his appointment as the Bemis Professor of Law. Feldman acknowledged that the Court has traditionally declined to exercise political judgments of the sort involved in making foreign policy, but said that, since the Constitution plays a major role in shaping America’s engagement with the rest of the world, the justices have no choice but to involve themselves in questions that affect U.S. foreign relations. He urged them against the reflex of floating considerations of international law, and praised the Court’s recent decision upholding constitutional protections for detainees at Guantánamo for recognizing the practical necessity and importance of reassuring Americans and the world that the U.S. has not given up its role as the chief proponent of the rule of law worldwide.


**YOCHAI BENKLER**

The challenges and promise of social production

Yochai Benkler ’94 marked the occasion of his appointment to the Jack N. and Lilian R. Berkman Chair with an Oct. 14 lecture titled “After Selfishness: Wikipedia 1, Hobbes 0 at Half Time.” He posed the question of why social production—the backbone of such phenomena as Wikipedia—has proved to be much more than a fad, and has instead become pervasive, both on the Internet and offline. Using examples as wide-ranging as the transformation of a once-failing General Motors plant to the rise of YouTube, Benkler identified structures of motivation evidently more powerful than the principles of scientific management, bureaucratic hierarchy and market incentivization, which had characterized systems of production in the earlier part of the 20th century. Collaborative systems, built upon freedom and altruism, benefit from the increased salience and often invisible factors of individual free choice, which have proved to be much more than a fad.


**JON HANSON**

Ideology, the law, and situationism

Individual free choice, an idea that permeates common sense and legal theory, assumes that actions reflect the stable preferences of individual actors. Individuals are responsible for their preference-driven choices, and laws can therefore be designed on that assumption. But if that assumption is wrong, said Jon Hanson in a lecture commemorating his appointment to the Alfred Smart Professorship, then laws built upon it may not be advancing the ends they purport to serve.

Hanson’s view, steeped in interdisciplinary study in the mind sciences, is that the assumption of individual free choice is often faulty. The decisions people make, he said, are frequently determined by influential factors in the situation—that is, non-salient and often invisible factors that influence not only how they behave, but also how they make sense of their behavior.

The lawmaking process must do a better job of taking that into account, he said. The lecture, titled “The Human Animal, Ideology, the Law, and other Situational Characters,” can be viewed online at www.law.harvard.edu/news/spotlight/faculty-research/hanson_lecture.html.

**Torts expert John Goldberg joins HLS faculty**

Vanderbilt University Law School Professor John Goldberg, an expert on torts, jurisprudence and political philosophy, joined the Harvard Law School faculty as a tenured professor this fall.

He is the author of “Tort Law: Responsibilities and Redress” (Aspen Press, 2004), a casebook now in its second edition, and he has published more than 30 scholarly articles in leading law reviews. He also serves on the editorial board of the law journal Legal Theory and is the senior editor of Journal of Tort Law.

A professor at Vanderbilt since 1995, he was consistently recognized there for excellence in the classroom. During his tenure, he taught an unusually broad array of first-year and upper-level courses and was awarded four teaching prizes, each for teaching a different subject: Advanced Torts/Philosophy of Law, Torts, Contracts and Civil Procedure.

Active in the American Law Institute’s consultative group Third Restatement of Torts, he will serve next year as president of the Torts and Compensation Systems section of the Association of American Law Schools.

After receiving his J.D. from New York University, Goldberg clerked for District Judge Jack Weinstein of the Eastern District of New York and for Supreme Court Justice Byron White. He then practiced law at Hill & Barlow in Boston before joining Vanderbilt.
number of historically laden amicus briefs submitted to the Court, especially in controversial cases.

In the politically divisive gun control case decided by the High Court last spring, District of Columbia v. Heller, “the mass of briefing ... was nothing short of spectacular, filling over five volumes in the Supreme Court library,” Scalia said. One brief, he noted, appended 200 pages of historical data relating to the right to bear arms as it was understood at the time of the founding fathers.

In Heller, the petitioners contended that the Second Amendment’s guarantee of the right to bear arms had an exclusively military connotation. “It was necessary and easy enough for the Court’s originalists to show this was not so,” Scalia said, by resorting to such sources contemporaneous to the framing as “Blackstone’s” and various state constitutions, as well as the English Bill of Rights of 1689, which guaranteed a right to bear arms for personal use.

“The Court had before it all the materials needed to determine the meaning of the Second Amendment at the time it was written,” he said.

“My burden as an originalist is not to show that originalism is perfect but merely to show that it beats the other available alternatives, and that is not difficult,” he said.

O’Connor continued from page 1

which addressed the use of affirmative action in admissions policies for the University of Michigan’s undergraduate and law school programs.

In Gratz v. Bollinger, the Court ruled that the University of Michigan’s point system for considering race was unconstitutional because it was too restrictive. But in Grutter v. Bollinger, the Court upheld the University of Michigan Law School’s policy of taking race into account, noting that race was just one among several kinds of diversity considered in admissions.

In her keynote, O’Connor said that the Court did not expect the decision in Grutter to be permanent law, but rather a temporary bandage for a problem that would soon be repaired. But, she said, “in today’s America, I’m inclined to think that race still matters in painful ways.”

In the time since the Gratz and Grutter decisions were handed down, O’Connor said, there has not been enough attention given to the issue of diversity in education. “I frankly haven’t seen enormous changes in this country in the last five years,” she said.

THE EXPECTATION is that affirmative action is just a “temporary bandage,”

O’Connor said.

O’Connor continued from page 1

you think the Court has not just gone wrong, if you think it’s gone wrong egregiously so, that’s when you read your opinion from the bench. And it may be that you have another forum in mind.”

She cited the 2007 case of Ledbetter v. Goodyear Tire & Rubber Co. There, in a 5-4 decision, the Court, taking a highly restrictive view of Title VII, severely limited the ability of women and others to bring EEOC claims alleging discriminatory pay practices.

“I had a particular audience. It was Congress. And it was saying, in effect, ‘Congress, you could not have meant what this Court thinks you meant, so fix it,’” she said.

When Kagan asked about the waning influence of Supreme Court decisions on international courts, Ginsburg replied: “I have often said, if we don’t listen, we won’t be listened to.”
CAMPAIGN WRAP-UP

With Harvard President Drew Faust on hand, HLS celebrates a record-setting campaign

Counting our blessings

HARVARD PRESIDENT DREW FAUST talks with Jack Cogan ‘52, campaign co-chairman and chairman of the faculty campaign, which achieved the support of 97 percent of the faculty and raised $1.7 million.

FINN M.W. CASPERSEN ’66: “This campaign allowed us to reinforce Harvard Law School’s position as the world’s premier center for legal education and research.”

$476,475,707 RAISED FOR HLS “I am deeply grateful to the more than 23,000 alumni and friends who joined in this effort. They know how special Harvard Law School is and how transformational it can be.” – Dean Elena Kagan ’86, pictured below with (l-r) Finn Caspersen ’66, former HLS Dean Robert Clark ’72 and President Faust.

DEAN ELENA KAGAN ’86 celebrating with Bernard Aidinoff ’53 and Conrad Harper ’65 during the October gala celebration.

SPEAKING at a gala celebration in a tent on Holmes Field on Oct. 23, Dean Elena Kagan ’86 marked the conclusion of the school’s record-breaking “Setting the Standard” capital campaign, telling the more than 400 law school leaders attending, “This campaign has made it possible for us to strengthen the law school in all kinds of new and exciting ways.” Launched five years ago, the record-setting campaign ended on June 30 and raised more than $476 million, exceeding its ambitious goal by nearly 20 percent. In addition to Dean Kagan, former Dean Robert Clark ’72, Campaign Chairman Finn Caspersen ’66 and Harvard President Drew Faust were also on hand to commemorate the occasion. In her remarks, Faust said, “I stand before you tonight both to celebrate and to anticipate the Harvard Law School community’s ‘exertions and personal sacrifices ... in the interests of the age and of society,’” quoting Harvard’s 15th president, Josiah Quincy.

PHOTOGRAPHS BY MARTHA STEWART