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# PRESIDENT OBAMA'S CONSTITUTIONAL LEGACY

SYMPOSIUM DISCUSSION: TAUNYA LOVELL BANKS

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DRAKE UNIVERSITY LAW SCHOOL

**John Eastman:** It's a very interesting thesis that one of his major legacies is the women on the court since he was elected defeating what would have otherwise been the first woman president and so I wonder if there's some tension in this legacy of President Obama?

**Taunya Lovell Banks:** Well, but you know he was elected defeating a woman, but his election also made him the first person of color as President so maybe that's a tradeoff. He certainly had a reputation throughout his Administration of trying to diversify representation throughout government, so I think his appointment of women, and I think you can't overlook that Sotomayor is not simply a woman, she is the first Latino ever appointed to the court, but I think that's a significant achievement.

**Audience Member:** Professor, you seem to have two major focuses, one was their voting behavior one was their involvement in argument. And I guess what I'm curious about is, reproductive rights cases, which is the highline and I don't wish to minimize it, but I could almost pigeon-hole it as a subset of a civil rights category of Supreme Court cases. Did you look to see what their behavior and argument or dynamics and argument were in areas other than civil rights or reproductive rights?

**Taunya Lovell Banks:** The Supreme Court has a very nice database so I have all of that and I could put all of that in the article, but I have a limitation. There is section that I cut out I was going to present here that I talked about how Ginsburg and Sotomayor differed to fit the positions on one of the race discrimination cases so even in the area of civil rights, but that was on the question of which standard should apply, that was *Fisher I*, which standard should apply, whether strict scrutiny should apply to an allegedly benign provision and Sotomayor voted with the majority which said strict scrutiny should apply and remanded the case. Ginsburg dissented. What is very interesting is their record in looking at how they vote, whether they vote alike or not, you can't pigeon them ideologically. They often times with the conservative wing on certain issues. Ginsburg traditionally has been

fairly conservative in some procedure issues. But I was really focusing much more here on why I think it's their presence at oral argument that is a bigger legacy than whether they vote alike. I tend to think that they vote alike not because they're women, they vote alike because they are appointees of a progressive democratic president but they are independent enough to vote differently in other things and that that pattern will become more clear as we get more cases. The problem, one of the problems is that the court doesn't hear as many cases, and so we don't get as much as an opportunity to develop a hefty record. And so, I could go and look at particular cases and try and tease out with those particular cases. But it's both hard to sort of say "oh they're going to vote this way" or "they'll vote this way or they won't vote this way" in certain kinds of cases. And to be perfectly honest, I'm not interested in doing that. I hope that someone else will do that because the data is there readily available.

**Audience Member:** Well my concern is we're glancing two values, or areas of research, one is: what's the value of having more women lawyers who then are Supreme Court Justices and that should manifest itself over a wide range of subject matter areas with how they vote.

**Taunya Lovell Banks:** But I'm with O'Connor on this. I think it's very dangerous to sort of talk about women speaking with a single voice and that's why I take issue with Lithwick talking about the women taking over. She creates the impression they there's going to be a women's voice that will translate ideologically and I don't think that that's the case. And I think that even making those arguments, or making an argument like that, is a dangerous argument to make and so I think that the significance of women on the Court is that these are women who believe in hot benches and that they're going to be, they're going to have a very strong voice. I mean, in the *Fisher I* case, there are about eight pages of the transcript where Sotomayor and Ginsburg go at each other. That is really very interesting, but that's because that's how they behave during oral argument. But the fact that they didn't vote together then they voted together in *Fisher II* says to me that they're fairly independent and that's how we should view them.

**Audience Member:** I'm not sure if this is a legacy question or not, but I was interested in hearing the description that you read of the transcript about interruptions and the research that shows that men have a tendency to interrupt women and sort of speak over them. I'm curious about both the pattern of interruption on the Court between the Justices and also interruptions potentially by the arguing lawyers, although they might not do that. I'm just curious if they ever do try to interrupt the women judges or not.

**Taunya Lovell Banks:** Well I mean, I've personally heard of cases where an inexperienced lawyer will try to interrupt the Justice without regard to the gender. But what, I mean in reading the transcript and listening to the transcript, it sounded like what we call a 'hot bench' and you know because the women were interrupting each other – poor Sotomayor before Kagan, you know, Sotomayor was trying to get in before Kagan made her first statement and she couldn't get in and that's just sort of, you just have to muscle in. As I said, all three are not shrinking violets. And that makes it sort of a refreshing kind of change and it also helps that you're talking about that is deeply divided ideologically. What's happening I think in these arguments is that you're seeing some of the division on the court play out in oral argument.

**John Eastman:** And let me weigh in as well on that. If anything, Justice Ginsburg is fairly well known for interrupting others. To the point that at one point, Chief Justice Rehnquist even chastised her, "quit interrupting, Ruth, let him finish his questions."

**Audience Member:** She's a New Yorker.

**Taunya Lovell Banks:** All three of them are New Yorkers.

**Audience Member:** Thank you for speaking with us today, I'm going to ask you to speculate a little bit. Do you see the appointments of Justices Sotomayor and Kagan as being indicative of women rising in the legal field generally or more as an intentional effort from President Obama to boost the role of women on the court? And if so, does that intentional effort maybe relate to the role women play in his personal life?

**Taunya Lovell Banks:** Well I really can't talk about the role women play in his personal life other than that his wife is a very strong woman and a lawyer. I mean, when I graduated from law school in 1968, before most of you were born, women comprised less than two percent of all the professions and very few law schools, I mean there's no critical mass of women. And when you're talking about women who were partners or women who were judges, they were the exception. So a lot has changed, but the studies that have been done by the ABA and others still suggest that there is a glass ceiling and its especially in terms of partners, especially in white-shoe law firms. There has historically been a ceiling, less so in terms of the district judges, it gets a little thin when you get to the appellate judges, and it was very thin. I think its 1981, that's almost 300, it's close to 300 years, since the court was founded, but also Ginsburg and O'Connor were rare in their class. So it's only ben since the 70's that you have a critical mass of women in law school that could work their way up. And so, in that sense, Kagan and

Sotomayor are the first wave of the first wave of women and so, hopefully, since the number of women is about fifty-fifty now in most places, we will see an increase and maybe we will get, not nine women justices, but maybe four, five. Who knows? But it's something in which women can now aspire.

**Audience Member:** Speculative question also, feel free to say you can't speculate, but there has been some talk in the press about Justice Kagan being someone who might become, maybe post-Ginsburg, the leader of the so-called "left" of the Court. Partly because, I think, what I've seen is the argument being that you know, when she was the dean of Harvard Law School she hired some liberals, she hired some conservatives. She's able to work across some of the typical ideological lines. Any thoughts on that or too premature at this point?

**Taunya Lovell Banks:** I mean, there is a potential, especially if you're a woman and you're dean of Harvard Law School, that you're a pragmatist but O'Connor was a pragmatist. In that sense she may end up having, you know, O'Connor was thought to have more power than Ruth Bader-Ginsburg when the two were on the court together. In that sense I may speculate that Kagan may end up having more power within the court than Sotomayor who comes across, at least she same across when she was a district judge and an appellate judge, to many of the lawyers who appeared before her as somewhat abrasive. Making her, I think a broadsaxon or something, but so that may play out. So we may see sort of a second generation replication of the O'Connor-Ginsburg sort of impressions although, the two will probably be more in tune. The question the gentleman in the green asked, they are very conservative on criminal justice matters across the board.

**Audience Member:** If I could add one thing—on the point about Justice Sotomayor having a reputation of being abrasive. I had the privilege of interning for her the summer after my first year of law school and she was on the Second Circuit and she did have a bit of that impression, or that reputation I think with some of the other judges in the circuit and some lawyers, but she was really a warm, wonderful person, but she did have sort of New Yorker assertiveness that most people—most of us found endearing — but could rub some people the wrong way. One of her law clerks who I became kind of friendly with said he used to go to the courthouse gym early in the morning to work out before going to work and he would run into her there often, but he stopped going because she started telling him he needed to do more sets of stuff. So she certainly is not a shrinking violet as Professor Banks said.

**John Eastman:** So two questions: I wonder if some of the speculation about President Trump's next nominee being Diane Sikes ends up bearing out, how do you think that will change the women-dynamic on the Court? And second, what do you think of the Court's recent elimination of the women's only yoga class up on the highest court of the land, the basketball court above the Court? There's a fun story about the day after the 1996 election, Justice O'Connor, who ran those classes for the women clerks in the Court, began the session that Wednesday morning with "well I guess there's a renewed sense of urgency for these sessions this morning." What do you about their canceling that program because of its gender discrimination, but also how do you think Diane Sikes would affect the court?

**Taunya Lovell Banks:** Well, okay Sikes first. I think that it depends upon how active she, I mean my focus primarily is on women's voices because I don't have enough evident to speculate on impact. But is she going to be as active in oral argument as—assuming she is replacing Ginsburg—as Ginsburg? If she is, then I think that things will be different. Her appointment certainly will, will certainly shift the five person majority in, you know, right of center. As to the yoga classes, I think that's very consistent with Justice O'Connor. You have to remember that Justice O'Connor was the one who said that you couldn't have women-only colleges if you deny males access to the nursing program at Mississippi College for Women. This is very much who she was and her notion of how discrimination impacted women and conversely, in that instance, men.

**Audience Member:** Professor, you know, certainly the vision of the women changed the nature of the oral argument. I guess my question is, what difference does that make? Do you think that it might have changed the views of the male Justices towards those cases or do you think it's primarily a change in the way the public perceives the issues during oral arguments?

**Taunya Lovell Banks:** I think it's two—I mean one, optics certainly. Which is why Dahlia Lithwick made so much of it. Also Justice O'Connor, talking about the optics of seeing three women sitting up there. But I think it's a cultural thing. What I'm hoping is that it will be seen as *normal*, not exceptional, to appoint a woman to the Supreme Court and that further integrates women as equal participants in all branches of the government. Now we just have to get a woman elected president but I'm saying I'm agreeing with the guy in green. I don't think, nor do I think it should make a difference ideologically, because you know, women have diverse views and I think it's stigmatizing to suggest that we don't.

**Audience Member:** I don't want to abuse the privilege, but the gentleman that asked about Judge Sikes, you were prognosticating about Judge Sikes being a nominee, are you assuming that she would be replacing Kennedy?

**Taunya Lovell Banks:** No, I think she's going to be replacing Ginsburg.

**John Eastman:** Yeah, but either Kennedy or Ginsburg.

**Audience Member:** It won't make a difference who she's replacing.

**Taunya Lovell Banks:** Well, Kennedy now is considered the center, which is really kind of interesting, and Kennedy has, in a couple cases, voted favorably in race cases. Which is something that he hadn't done in previous years, so I don't know what's going on with Kennedy.

**Eric Berger:** I don't think any of us has ever known what is going on with Kennedy.

**Taunya Lovell Banks:** So, I mean, the point, I mean, if she replaces Ginsburg, yes, that will be significant. If she replaces Kennedy, I think we're going to have to wait and see.