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A Conversation with Justice Sandra Day O'Connor and Judge Judith S. Kaye

Hon. Sandra Day O'Connor

Hon. Judith S. Kaye

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**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE**

**A CONVERSATION WITH
JUSTICE SANDRA DAY O'CONNOR AND
JUDGE JUDITH S. KAYE***

MODERATOR

John D. Feerick

Norris Professor of Law, Fordham University School of Law

PANELISTS

Hon. Sandra Day O'Connor

Associate Justice (Ret.), Supreme Court of the United States

Hon. Judith S. Kaye

Chief Judge (Ret.), New York Court of Appeals

DEAN MICHAEL M. MARTIN: Good evening. Welcome to the 2012 Robert L. Levine Distinguished Lecture. It's wonderful to see so many members of the Fordham Law community here this evening. I really thank all of you for coming tonight.

The Levine Lecture is one of the Law School's premier annual events. Its history represents the best traditions of Fordham Law.

The series is named for Robert L. Levine, who was a prominent member of the Class of 1926. A few years after graduation, he joined with another Fordham Law grad, William F. Walsh, and they established their own law firm with practices in entertainment, commercial, banking, and international law. And then, during World War II, Mr. Levine helped found several companies that assisted in the Allied efforts in Europe.

Throughout his entire sixty-two-year legal career, Robert Levine displayed a generous spirit, a nimble legal mind, and a commitment to excellence, typical of the Fordham lawyer.

* This Conversation was held on April 17, 2012, at Fordham University School of Law. The transcript has been lightly edited and augmented.

When he died in 1992, his friends and family wished to ensure the continuation of his legacy and created this outstanding lecture series.

For the past twenty years, the Levine Lectures have celebrated Robert Levine's abiding dedication to the legal profession. The impressive roster of lecturers in this series is proof enough of Robert Levine's lasting impact on the Law School.

We are extremely grateful for the generosity of Dr. and Mrs. Eric P. King, Mr. and Mrs. Jay Levine, and the late Lawrence W. Levine. Please join me in thanking our benefactors.

It is now my great pleasure to introduce our honored guests this evening: Justice Sandra Day O'Connor, former Associate Justice of the United States Supreme Court, and Judge Judith Kaye, former Chief Judge of the New York Court of Appeals. In fact, if there were ever two women for whom no introduction is necessary, these would be them. I'll just say how pleased and honored we are that they are with us this evening.

I am also pleased to introduce the moderator of tonight's lecture—or conversation actually—one of my predecessors, a great mentor and friend, John D. Feerick. I'll turn it over to John.

DEAN JOHN D. FEERICK: I thank Dean Martin for the privilege of serving as host and moderator for this conversation—in fact I don't think it needs a moderator—with Justice Sandra Day O'Connor and Chief Judge Kaye.

I recall the Justice's and Chief Judge's early visits to this law school, and to this amphitheater as well, which are among our fondest memories here at Fordham.

You, Justice O'Connor, on October 24, 1984, dedicated this very room and adjacent facility. It was your first visit to Fordham Law School. What I recall most vividly is that more than a thousand people stood in a line outside the Dean's office to ask you to sign the program, and you were with your husband, and signed every single program.

You, Chief Judge Kaye, I remember, when you were a very young associate judge on the New York Court of Appeals, coming into the Dean's office from time to time to describe a remark or experience, or use our library stacks and other parts of the library. On almost every occasion, a student would ask you what year you were in.

CHIEF JUDGE JUDITH S. KAYE: Those were treasured memories.

DEAN FEERICK: Thank you both very much for coming here to our school and for accepting the invitation to have a conversation.

As to the format, we will have a brief discussion. I will introduce different subjects and move from one subject to the other. We will leave at least ten or fifteen minutes for questions from the audience, and the program should come to a conclusion around 8 o'clock, maybe give or take a minute.

Now, I'm sure, Justice O'Connor, and you, Judge Kaye, are wondering why I have this book.

JUSTICE SANDRA DAY O'CONNOR: Well, I hope you're going to teach us something.

DEAN FEERICK: Here's my question. This is a book by the Commission on Government Integrity here in New York State,¹ coming at a time with a lot of corruption in the 1980s. It had on the Commission some of the greatest Americans I've ever known—just a great group.

JUSTICE O'CONNOR: What were you asked to do?

DEAN FEERICK: We were asked to look at every area that raised ethical issues in New York State, the whole campaign finance system, the system by which we elected judges—and that's the question I will start the conversation with—and to look at state and local government. We had a staff of a hundred people. We did twenty-three investigations, and all the investigations are in this volume.

JUSTICE O'CONNOR: Just one volume?

DEAN FEERICK: It's called *Government Ethics Reform in the 1990s*.² And I remember when we put together the title, I said to Professor Bruce Green, who was the editor, certainly by the end of the 1990s, this agenda would be done, and we shouldn't need the book. But the reality is that the agenda's still there.

When we concluded an examination of the selection of judges in New York State—we looked at the appointive systems in the state, we looked at the election systems in New York State—we then had many recommendations regarding judicial selection in New York State.

At the end of the summary of the recommendations, this statement appears:

In urging these recommendations, we do not suggest that an appointive system necessarily produces more qualified judges or fewer corrupt ones. We have found no persuasive evidence correlating systems of judicial selection with the quality and integrity of judges. Nor do we believe that politics can be banished completely from the selection of judges. What our investigation has shown is that [the elective system is certainly infused with politics].³

My question is this: Is there any empirical data that one could quote that we did not find in New York State to say that the judges who are appointed are of a different quality and integrity than those judges who are elected? We couldn't make that conclusion.

So why, therefore—if one accepts a commission of diverse people—why do we spend so much time on the subject of judicial selection when we

1. N.Y. STATE COMM'N ON GOV'T INTEGRITY, *GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY* (Bruce Green ed., 1991).

2. *Id.*

3. N.Y. STATE COMM'N ON GOV'T INTEGRITY, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, in *GOVERNMENT ETHICS REFORM FOR THE 1990S*, *supra* note 1, at 271, 274.

have so many systems and it doesn't seem to make a difference in terms of the quality and the integrity of the judges?

JUSTICE O'CONNOR: Well, I think there is a difference. With all respect to your considerations there, it seems to me that the popular election of judges that involves campaign contributions and money flowing into the courtroom, in effect, is a very poor way to pick judges. I just cannot believe that that is equivalent to an appointive system. You may end up getting very good judges from an elective system. Some of them certainly are going to be.

My home state is Arizona, and when I started practicing law there we elected the judges. I knew them. You know, we had some very fine judges.

But we had some that weren't so fine. I remember one who used to go out and play some little instrument on the street corner and had a monkey. Is that what you want the judges doing? That's not what I want my judges doing.

I remember going into his courtroom one time with a woman who was there on a matter relating to a marital breakup, and the judge spotted me out of the courtroom with my client—"Oh, Ms. O'Connor, bring the little heifer in." Maybe you think that's okay. I don't.

I thought he was a disaster and that we shouldn't be electing people of that caliber—they shouldn't be elected. If they were appointed, we would never have had that man on the bench. And he's not the only one. It was a bad situation in my opinion.

I am not in favor of the election of judges. You still elect some in this state. I wish you didn't. We got rid of it in Arizona, I'm happy to say, and it has been much improved.

DEAN FEERICK: As you know, if you look at New York State, the Court of Appeals, of course, is an appointive court. Our basic trial court, the Supreme Court, is an elected court. And we have a family court outside New York City that's an elected court, and we have civil courts that are elected courts. So we have probably more than a thousand, maybe two thousand elected judges in the State of New York.

So what about the question, Chief Judge, that I posed? That is to say, if one can't demonstrate that there is a different quality, a different integrity level, why shed as much light as we have on this subject?

JUDGE KAYE: First of all, I think it is extremely important that we put a lot of time into this subject because it is a hugely important question to our great democracy. We want to be certain, always, that we have a judiciary with independence and integrity and the very best people of all.

Naturally, we are very much a product of our own experience. For me, in New York State, having the highest court in the state removed from the electoral process, it definitely changes the picture. That has been true since the year 1977. We have had our judges appointed by the governor, coming through the Commission on Judicial Nominations. Indeed, I happen to be the Chair of the Commission, so I think the Commission's great.

I agree very much with Justice O'Connor when I see the care that we are taking to assure that the person who will be appointed by the governor will be of the very utmost high quality.

Now, that still leaves many courts in the State of New York, as you have pointed out, with elected judges. John, you can't deny we've been right in the middle of the whole thing because what we have done—and I'll turn the clock all the way back, because Justice O'Connor, you might want to thank us in New York for the fact that we have elected judges all over the place. I think we all got it started in about 1846 with our People's Constitution of 1846,⁴ when we started with elected judges.⁵ But now we have, except for the high court, about 75 percent of our judges elected. And our wonderful dean spent a couple of years of his life working with me and with all of us to assure the greatest integrity in the electoral process.

I speak from my experience in New York, but I also read the papers and see what's going on in other parts of the country, which does not make me proud at all. I think we have at the moment thirty-one or more states that have judges on their high courts elected. I think I read somewhere recently that more than seventy judges are standing for election, and I'm watching millions of dollars being poured into those campaigns. I'm worried, I'm really worried.

JUSTICE O'CONNOR: You should be. I just think it's terribly important. No other nation in the world elects its judges. This is something we invented, and we didn't even invent it when we started this country. The judges were appointed when the colonies began in the original states. It was in the early 1800s when Andrew Jackson started wandering around the South and tried to convince those states they ought to elect their judges. Unfortunately he succeeded in large measure. They decided to do that; they did not trust the appointment process.

But as I told you, Arizona used to elect all its judges at every level. I ended up serving in the legislature for a few years, and one of my projects was to put on the ballot for voters in Arizona a repeal of the electoral system and moving to an appointive system with a citizens' commission that would make recommendations to the governor for appointments. Happily, the voters approved that—not by a wide margin by any means; there was divided opinion, but they approved it.

I lived in Arizona long enough to see the changes, and they were so obvious. It was a far better system and it still is. I am very grateful that we made that change in Arizona.

JUDGE KAYE: But we do have excellent judges throughout the judiciary. We really, really do.

JUSTICE O'CONNOR: Well, you can get good judges in either system.

4. N.Y. CONST. of 1846.

5. *Id.* art. VI, § 12.

JUDGE KAYE: John, you lived in the middle of this and gave us a report the size of that book. I'm still reading it. [Laughter] We wanted to assure that we did everything, so that within the elective system we were assured the very best. I am confident that we put all your recommendations into action.

DEAN FEERICK: Just on a historical note, Justice, I think you started as a Judge on the Superior Court in Arizona.

JUSTICE O'CONNOR: I myself had to run for an election. Therefore, I know what I'm talking about. I was there, and I had to raise funds for that campaign. And who gave me the money? It was the lawyers that were most likely to appear in my court. I thought it was horrible. I was embarrassed. I didn't like it. I made very strict limits on how much money I would accept from any source. But I've been there. I've been in the trenches. I've seen it up close. It is not a good system.

DEAN FEERICK: Let's go backward. This thick volume with many recommendations for improving judicial selection in New York State recommended the abolition of the elective process in New York State. Nobody's acted on this in the last twenty years. A few years ago, Chief Judge Kaye said "let's take a shot," so to speak. How can we advance the elective system on the assumption that we're not going to change to an appointment system? So that leads to the question: If across the country you have embedded in the legal culture of a lot of states, such as New York, an elective system, what can we be doing to protect the judicial function in the context of elective systems? What are the kinds of things that we ought to be doing to enhance, if I can put it that way, even if one accepts a different approach to selecting judges, the responsibility to protect it and improve it, and so forth?

JUDGE KAYE: Well that's a very hard question to answer since I premised my first answer on the fact that our highest court is not an elective court. Our highest court is an appointed court, and if you look at the experience across the nation, there really are huge amounts of money being spent on electing judges of the highest state courts. So we are spared that in New York State, and if you are willing to take that out of your question, then I will try to answer your question. So you do, I presume?

DEAN FEERICK: Yes, just to agree with you, yes.

JUDGE KAYE: So, I say I do think we do have, really, a fine judiciary. We have 75 percent of our non-Court of Appeals judges elected. The first thing I would tell people would be to get a hold of the report⁶ by the Commission that was chaired by John Feerick. They did their work for two years, and then asked for yet another, third volume. I think they reached

6. COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006); *see also* COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, INTERIM REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2003); COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2004).

into every conceivable part of the system and recommended excellent reforms which we assiduously followed, finding ways to inform voters—this is really important. I know we're going to talk about iCivics,⁷ because we should be informing people about the system generally, because voters should know about who it is they're voting for. There were many recommendations about getting that information. There's an ethics committee that's established for judges, accessible 24/7, if there's ever any question. There's an administrative rule about limiting the amounts of contributions to very small amounts. So I think there are any number—dozens of steps that were taken within the confines of the non-high court of the State of New York to assure that our judges are indeed the kind of people we all want to entrust our disputes to.

DEAN FEERICK: The recommendations were adopted largely because of you and the Court of Appeals. The system of improvements that were put in were essentially a judicial action because of the difficulty for political change in the legislature. So, commitment by someone in a position to make a change is really what happened in New York, and you were that person.

JUDGE KAYE: Well I thank you for saying that, but in fact I was having a conversation with one of your professors just before we entered the room about statutes and the proliferation of statutes. And the comment I made to him is that within the independent branch of government, the judicial branch of government, not everything needs to be statutory all the time. There's so much we can do administratively. And I know that Chief Judge Lippman feels the same way, and we don't have to turn to the legislature for everything, do we, Justice O'Connor?

JUSTICE O'CONNOR: Well, I think it's better not to.

JUDGE KAYE: I like the idea of fixing our own problems whenever we can, involving people like you, helping us with problems, helping us find solutions, and then implementing them. We don't need a statute to do everything.

JUSTICE O'CONNOR: We need standards for performance, and we need a mechanism for anybody to make a complaint, and to investigate it and handle it properly.

DEAN FEERICK: Justice, we may note that you served in the Legislature. It should be noted in the record that you were chosen to be the majority leader of the Senate in your state, the first woman in the history of the country to be majority leader of a house of the state legislature.

JUDGE KAYE: Bravo.

DEAN FEERICK: We touched a little bit on judicial selection, which is important for this lecture. The *Law Review* was hoping that there would be a discussion, which there has been, and we may return for a question or two later, and I notice that we have a lot of *Law Review* students sitting over to

7. <http://www.icivics.org> (last visited Nov. 16, 2012).

my right, I can see them on the edge of their seats. You made reference to the judicial branch of government, but whatever the problems are with judicial selection, don't we have a greater problem in the country? I understand from a website, Justice, that you put together, that one third of the people in the country don't even know we have three branches of government.

JUSTICE O'CONNOR: They know there may be three, but they can't name them. That's pretty pathetic. It really is. So there's a lack of knowledge among our citizens. When we got public schools in this country—we didn't start out with them, you know; when the framers came along, they did a lot of good things, but they didn't know about schools. And it was a few years later when people started saying, well, now we have a pretty good system of government that the framers devised. We need to have public schools to teach our young people what this system of government is, and how people can get involved with it and make it work for them. We need to do that through public schools. That is when all the states began proposing to have public schools. It was a good development.

Today, half of our states are now supporting a reduction in the use of public schools. And it's just amazing. We have real problems coming on. And we need to teach every youngster how the government works, both at the federal and state level, and how they can be a part of it. This is critical to our country, I think. In an effort to help on that, I managed to get a little nonprofit entity organized: iCivics, we call it—iCivics.org,⁸ trying to teach young people how government works and how they can be part of it. And we do it by games that the young people play on the website, and it's really doing extremely well. I have chairpeople in America, in all fifty states, and all fifty states have at least some of their schools using it, and I'm not going to stop until all of them use it.

JUDGE KAYE: You should know that, in our state, I think we're now above 500 teachers using it, and we're very proud of that. I just wanted to circle back for a minute, because I mentioned that our People's Constitution of 1846 put elected judges into the active world of state constitutions. I might point out with greater pride that our state constitution today, which was adopted in the year 1938, contains its own article guaranteeing the right to a free public education.⁹ So we should do really well with iCivics in this state. We did have many years of controversy with the Legislature over exactly what that constitutional provision meant, but that's the beauty of our three-part system, isn't it?

DEAN FEERICK: Somebody asked me recently, what are we going to talk about in this conversation?

JUDGE KAYE: I asked you that!

DEAN FEERICK: Yes, but you are not the person who put the following question to me: Why is civic education relevant to lawyers? I'm

8. *Id.*

9. N.Y. CONST. art. XI, § 1.

surprised by the person—not you—that I spoke to who asked, why is it important for us to have a conversation like this at the law school, with those present being law students and lawyers? What is it about civic education that we as lawyers should address?

JUSTICE O'CONNOR: Well, if you're going to have a functioning state government and national government that works well, you have to have citizens who are part of making it work well, who themselves are engaged in it, who understand they have obligations to vote, to be informed about voting, to be informed about how government works, and to know enough to work with it and through it to make things happen. This is critical. In the early days of the country, we really did have every state start a public school system and they taught civics. Today, half the states have stopped making civics a requirement for middle school and high school. That is a terrible thing to have happen. We absolutely have to be teaching how our government works. I remember thinking it was kind of dull. Nonetheless, you need to know, as you get educated, how our government works and how to be part of it. That is critical.

JUDGE KAYE: I couldn't agree more heartily with that statement, and we're really talking about public school people. But I just want to add a tiny footnote to that, as well. Some years ago, I gave a speech at the City Bar Association about our state constitution, and a lawyer came up to me afterward and said, "That speech was great," which I appreciated. Then he said, "I never knew we had a state constitution, I feel like I'm swimming in a whole new sea of culture." That is a quote. We're not talking only about young children, teenage children, college people; we are talking about preservation of our democracy, preservation of our great nation. We need to know how it works. We need to know about it, and regrettably, we're not really up to snuff.

JUSTICE O'CONNOR: And about how we, individually, can participate.

DEAN FEERICK: What I'm hearing you say is that lawyers need to know about their state constitutions, but don't we have a responsibility far beyond our own state knowledge to convey our understanding of government, of the system, to young children, to people? I had a conversation with Benton Becker the other day. Benton Becker was counsel to Gerald Ford when he was minority leader in the House of Representatives and he was his counsel to the White House and to the Vice President. And he said to me that he gives something like fourteen lectures a year in Florida, to an adult population, and he is stunned by the need for understanding, the need for information. And he, for example, said to me, people don't understand the judiciary. You look at the Constitution, you look at Article III of the Constitution, you have a few provisions on the court, the jurisdiction of the court, people know other parts of the Constitution, Supremacy Clause, but he says people just don't know where it comes from. They don't understand judicial review. And we lawyers,

more than anyone, he suggests, have the knowledge, training, and education to be able to explain it.

JUDGE KAYE: Absolutely, John. I am not that fond of footnotes, I really am not, but I have another one to add. I had the privilege some weeks ago of realizing a passion of mine, or moving it forward, which is to keep kids out of court and keep them in schools. And we had a wonderful nationwide summit and I was very pleased to be able to put that together, of bringing educators and judges together, I think it made me feel really good, but what makes me feel absolutely best of all is that every single law school in the area sent students. And I hope some of them are here today, because at every table of educators and judges, there were students. Now I finished law school fifty years ago, which is hard for me to believe. I would never have thought of doing something like that. I just so appreciated and admired the moral compass of these law students who came there, from law school, don't you sense that as well?

JUSTICE O'CONNOR: I have met some wonderful law students across the country who care and really want to be good citizens.

DEAN FEERICK: I'd like to move to another area that both of you have unique qualifications in: women in the legal profession. Let me just frame my question and eventually get to a question. Now, Justice O'Connor, when you graduated from law school in 1952, third in your class, you couldn't find a job at a law firm.

JUSTICE O'CONNOR: I couldn't even get an interview at a law firm. I was female. They wouldn't talk to me.

DEAN FEERICK: So you worked for a little while, and then at some point you opened up a firm in a shopping mall.

JUSTICE O'CONNOR: In Arizona.

DEAN FEERICK: In Arizona, with another person, and you balanced raising a family with having a life as a lawyer, and in 1981, essentially thirty years later, you were a Justice of the United States Supreme Court, having started in 1952 with the experience that you describe. Now you, Chief Judge Kaye, graduated law school also at the top of your class, ten years later, in 1962. And, in that time period, you worked at two different firms—worked part-time so you could balance raising a family with having a career as a lawyer—and then in the year 1983, having graduated in 1962, you went directly to the New York Court of Appeals as an associate judge without any background in partisan politics, and right from a law firm.

JUDGE KAYE: That's a pretty remarkable summary.

JUSTICE O'CONNOR: I think he's coming along.

DEAN FEERICK: I haven't gotten to my question yet. [Laughter] Justice O'Connor, you reached the United States Supreme Court, the first woman in the history of the country. You, Chief Judge Kaye, reached the New York Court of Appeals, the first woman in the history of New York to serve on the Court of Appeals. Given what each of you have done, one might be able to say that all the barriers have been removed for women in

the legal profession. So, my question is, what do you make of the gap left in terms of women in the legal profession.

JUDGE KAYE: And here I thought you were so astute. [Laughter]

JUSTICE O'CONNOR: I think we need to continue to be very aware of the needs for both young men and young women to have good conditions for work in the legal profession. We want it to be workable for both of them. It's not just that entry-level job. We'd like to see women at all levels of the profession. They are getting entry level jobs, but if you look at the statistics on who becomes senior partners and how they differ later on, as time goes on, it's not as encouraging at all. We still have work to do in that area. You certainly see it in corporate America. Maybe some of you own stock in a few companies of some significance, some of you do. The companies send their stockholders a list each year of names for election of directors for the company, and they send a list to vote for, and these days, many of the companies will include at least one woman on a list of fifteen different people. And the opportunities in that way are slow still to develop. So I think we have work ahead of us still in various areas and also in the legal profession itself. It's better than it ever was, but to find women at the top levels of management in law firms is not quite what it might be if it were evenly spread out. What do you think, you probably know as much or more about that than I do, Dean Feerick?

DEAN FEERICK: I agree with what I've heard you say, and obviously as a preface to my question that all the barriers have not been removed, despite the great accomplishments and role modeling of the two of you.

JUDGE KAYE: I think absolutely, that is so. I would refer you to two articles I've published in the *Fordham Law Review*. One was in the year 1988,¹⁰ and then I followed it up in the year 2008¹¹ to measure again what I thought was not really satisfactory in 1988, followed it up in 2008. And I spoke not long ago with one of your *Law Review* people saying that I think I'd like to return to the subject again, because as is true with judicial ethics, and judicial selection, and practically every other subject on earth that you can measure, people do what you inspect. People do not do what you do not inspect. And I think we need to keep our attention focused on precisely the point that Justice O'Connor has made, which is the woeful rise into leadership positions of qualified women. That is one thing we can measure, and another thing we can measure is that a lot of women leave the law, and this is maybe a newer phenomenon, and we can measure that too. So, I think we have to continue to inspect because the issue definitely needs improvement for women, and may I say, for nonwomen.

JUSTICE O'CONNOR: Whoever they are. [Laughter]

DEAN FEERICK: Any suggestions of strategies?

10. See Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *FORDHAM L. REV.* 111 (1988).

11. See Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied, or Simply Studied?*, 76 *FORDHAM L. REV.* 1941 (2008).

JUDGE KAYE: Well there's one I always think comes first. And, my own daughter is seated in the audience, so can I tell you I feel a little uncomfortable, and she's a lawyer—might I say one of the happiest days of my life was when my daughter became a lawyer. And one message I do try to reinforce again and again is that, first of all, your life should be meaningful, and the things you do should be meaningful to you. But also I think you have to persevere; you can never get on the Supreme Court of the United States or the Court of Appeals of the State of New York, or be the dean of the Fordham Law School if you leave—none of those things are possible. And there are so many opportunities to do something a little different, to do something more or less, but don't go! Don't go! I have these conversations many times with young women in law who feel that they have no alternative but to leave, and there are alternatives, and they shouldn't leave. Reentry is very, very difficult. I mean, really, if you don't want to continue in the law, you don't have to, but you shouldn't leave because you feel you have no alternative. Because once you go, I think the consequences of coming back are really difficult.

JUSTICE O'CONNOR: And there are alternatives in terms of the amount of work that you can get into.

JUDGE KAYE: But I think I still have a good article. Doesn't the *Fordham Law Review* agree? [Applause]

DEAN FEERICK: This takes us—we've moved along maybe a little more quickly than I anticipated—so we will have more opportunity for questions, but there's another phenomenon going on right now in America, right now in the legal profession: growth of the number of senior lawyers. The American Bar Association estimates that in the next few years, nationally, 40,000 lawyers will either retire completely or partially or do something else. And in New York State right now, 27,000 registered attorneys list themselves as retired. We have a growing population of lawyers in New York State fifty-five or over, who qualify for programs that are there for attorneys over fifty-five.

I mention all those statistics because I think we have a world out there in the legal profession of people in transition. Now, the two of you have experienced different transitions in your careers. It's my sense that there are issues with transitions, for people who are in transitions, and with so many lawyers contemplating transition, what advice would you have for people to consider who are in transition as lawyers and want to continue to have meaning and purpose in life?

JUSTICE O'CONNOR: I think there are so many constructive things that a person with a legal background can do. I like the nonprofit segment of society. I've been involved as a volunteer for most of my life with various community organizations that are trying so hard to provide services to people in a whole variety of ways. All of them welcome help from lawyers. You can think in your own community how many of these organizations there are. You can start with health care institutions that need all kinds of help, educational groups, everything. I can't tell you how many

such organizations there are in every state. And they welcome the help, and it's fun to do it. You can get active and go up the ladder in their organization as a volunteer. I think it's great to do so. Lawyers provide better technical help.

DEAN FEERICK: Chief Judge, when you left the Court of Appeals, we got into a discussion of the challenges faced by those in transition, who leave the public stage or leave a position very much at the center of society, and who are now in the background. And therefore, that presents challenges for those who are in transition in such circumstances. Now you've been through a transition, Chief Judge, and you find yourself no longer Chief Judge of New York State. How did you deal with that?

JUDGE KAYE: Well, I think you put your finger on a really significant subject, even larger than the Chief Judge question, and wouldn't it be nice if people could put their heads together and think of a different word than "senior"? The last time I enjoyed being called "senior" I was in high school.

JUSTICE O'CONNOR: Then it was good. Then it had privileges.

JUDGE KAYE: So, I wish there were some different way to conceive of this point that we've reached. And you're absolutely right, more and more of us are reaching that stage where we are active still and we spent our careers essentially as problem-solvers, and the world is filled with problems—and how do we connect? And I think that is just an enormous modern-day problem. I've been very fortunate, when I came off the greatest job on earth, being Chief Judge of the State of New York—honest—I was greeted by your former law firm, John, Skadden. And I understand my next move is, you go from Skadden to being the dean of the Law School? [Laughter and applause] No, no, I'll do it when I'm 100 years old and your current dean is ready to move on. [Laughter] I was invited to Skadden to come and do whatever I wanted, which is really a great privilege, you would think, wouldn't you? Except, figuring out what you want to do when you have the opportunity to do whatever it is you want to do, that's challenging. And I've had many things; I've mentioned a few moments ago that I'm passionate about adolescents and keeping kids out of courts and not wasting the next generation of our nation's future.

JUSTICE O'CONNOR: And my project is to try to educate young people about how our government works and do it with my iCivics program. I am trying to get it in use in every state in this country, widely used. And we're getting about five million hits a day now—that's not nearly enough, and I have lots more that we can do.

JUDGE KAYE: And we're talking about the same people, it's really our nation's future.

JUSTICE O'CONNOR: And we can use lawyers. "Retired" lawyers, so to speak.

JUDGE KAYE: And that's another word we might need to improve. Public relations. Because I look at your "retirement," Justice O'Connor, and it's just mind boggling.

JUSTICE O'CONNOR: Yes, there's a lot going on. Plus, I'm sitting on the Federal Courts of Appeal. They still welcome help now and then. I'm heading down to Philadelphia tomorrow where I'm sitting on the Third Circuit for a couple of days. Then I'll be back in a few months and sit up in New York for the Second Circuit, and I'm getting back from sitting with the Fourth down in the Carolinas so I've got plenty to do. I have a book out pretty soon, too.

JUDGE KAYE: So, what do you do in your spare time?

JUSTICE O'CONNOR: That's what I'm working on.

DEAN FEERICK: When Chief Judge Kaye and I had dinner, we talked about maybe the two of us putting a book together on transitions. And she said, John, maybe you can contribute a chapter? And I said, sure, I'll contribute a chapter—

JUDGE KAYE: Have I missed something on my email? [Laughter]

DEAN FEERICK: Now, on transitions, it was not exactly clear to me exactly what to do when I left as dean of the Law School. I had served for twenty years. I said to the president of the university, it really is time for me to go and figure out what to do with the rest of my life. I was turning sixty-six, I had become dean when I was about to turn forty-six, and for me, it seemed that the world beyond the law school was where somebody in this position should go. Two of my very dear friends in the judiciary said to me, "John, why don't you explore a federal judgeship?" I was very touched by that, but I said, "Too old," and I really didn't have any interest going into a difficult confirmation process.

JUDGE KAYE: Well, you could have gotten elected. [Laughter]

DEAN FEERICK [holding a copy of *Government Ethics Reform for the 1990s*]: This Commission advocated the abolition of the election. But seriously, I was playing with different possibilities. Maybe something in Westchester, maybe going back to Skadden Arps. Then, the dean of the Law School, Dean Treanor, whom I miss greatly, said to me, "I want you to stay. I want you to stay, and I want you to create a social justice center." I said, "Bill, it makes no sense, you can't make me that kind of promise. I've got to be obscure, and I want my office away from the building." So, I suspect that there are a lot of us out there in the legal profession that have really struggled in dealing with a transition. From my experience, and in my life, I've been fortunate to have two transitions, one to leave Skadden to come here as Dean and then from Dean to being a teacher, and I think as to those who are in transitions, one has to start thinking about it much earlier than when it happens. Unless you have no choice.

JUSTICE O'CONNOR: I think one of the nice things that people can do as they mature and get some knowledge of the community is to go on a board and be involved with some nonprofit organization in your community

that is doing good things that you would enjoy helping with. In Arizona we have all kinds of things—and I'm sure you do too. I remember being on the board of the Salvation Army for years and doing all kinds of projects, and being on the board of a women's organization that did a lot of volunteer work.

In Arizona, the house that my husband and I built back in 1957 was an adobe house—sun-dried adobe—and I love sun-dried adobe. That was an effort. We had to find somebody to make it out of the Salt River bed in Arizona, make the adobes, we got a starving young architect to do a great design, and we put up the basic part of the house. It was wonderful for that part of the world. We had to sell it when I went to Washington, D.C., and it had various owners. More recently, the owner was a single man and he decided to tear it down and build a big place for himself. The people in Arizona said, "We can't let the O'Connor House go." They moved it! They had to pull it apart adobe by adobe, and it's now out in Papago Park in Tempe, Arizona, with a beautiful view, rebuilt, and we're using it as a place where civil talk leads to civic action.¹² What I see today in Arizona, and perhaps you don't yet in New York, I see people who act disagreeably instead of talking major issues through and working cordially with people with different points of view. We don't seem to be able to do that anymore.

JUDGE KAYE: Like building adobe.

JUSTICE O'CONNOR: Yes. Find a new way of working together to accomplish common goals. For instance, it has been suggested that maybe Arizona should try a system of having open primary elections so that even if you're not registered as a Republican or Democrat, you can vote in the primary election. Several states are trying that, I think Washington State perhaps is one, and opening it up some way. And so, we're going to explore that. Through O'Connor House, we're bringing people from a couple of states to come and speak at the public library in Phoenix and we're going to talk about the whole thing and see what it sounds like, and we'll get some intelligent advocates on both sides of that to talk about it and see what we should do with such an idea in Arizona. But there are all kinds of exciting things you can get involved with, particularly if you're a lawyer and you enjoy these things.

JUDGE KAYE: You'll never be "obscure," John Feerick. But the message that I derived from what Justice O'Connor just said, and believe to the depths of my soul, is that above all you have to remain positive about your life, whatever stage it is you're in, and think affirmatively and

12. O'Connor House, the historic home of Justice O'Connor, "has become home to a broad-based community effort to drive civic action and an ambitious public policy agenda through inclusive consensus-building. O'Connor House convenes people with disparate points of view to discuss issues, facilitate consensus, and craft non-partisan, centrist solutions to vital public issues, in an environment of mutual respect and shared purpose." *Mission*, O'CONNOR HOUSE, <http://www.oconnorhouse.org/about/mission.php> (last visited Nov. 16, 2012).

positively and find ways to use your talents constructively. I think that is the message.

DEAN FEERICK: I would suggest that we take a few questions from the audience.

AUDIENCE MEMBER 1: My question concerns the role of politics and whether or not you think that politics plays a greater role if the judiciary is elected versus appointed.

JUSTICE O'CONNOR: Well that almost answers itself. Of course it plays a greater role when you elect them—because they want people who are electable parties. You have to raise money, and you have to go out and make speeches, and get acquainted with everybody. It's a very political situation.

JUDGE KAYE: Of course, one basic problem we have is that whatever system, whether it's appointive or elective, it's run by human beings. That makes for difficulty sometimes.

AUDIENCE MEMBER 2: We've all spoken a lot about civic engagement. I think many of us are not living in our hometowns, we're very transient. Do you think that has any effect on civic engagement, and do you have any recommendations?

JUSTICE O'CONNOR: Absolutely. Get involved! There are so many organizations, ones that work with young people, there are the scouting organizations, everything. Pick one out and get involved as a volunteer, and work your way into the structure of it, and play an important role. It's great. You'll like it.

AUDIENCE MEMBER 3: Justice O'Connor, I had the privilege of hearing you speak last month, at 92nd Street Y, about your life. During that conversation, you mentioned that you were not a feminist. And this evening, you're most obviously a trailblazer and a role model for all of us, and you see the need for further advancement for women and women lawyers, and I was wondering why you feel you're not a feminist. And Judge Kaye, I was wondering if you do or don't and why or why not?

JUDGE KAYE: Well, what you've said of Justice O'Connor and the qualities she has expressed this evening and demonstrated in her lifetime, would you conclude that she is feminist?

AUDIENCE MEMBER 3: I would conclude that she was a feminist, but she said she was not.

JUSTICE O'CONNOR: No, I don't think so. I would say the same thing to a group of young men as I would to a young woman. As a young person, male or female, get out there and get involved with some community organizations where you can make a difference, and where you can use your talent and energy and ability to start making the world a better place in some discrete area. And I don't have to say, "young women do it, but no young men."

JUDGE KAYE: The reason I put that question back to you is that I'm not 100 percent sure how you define it. And what we do is resist a label

without totally understanding its circumstances. But what I've heard you describe of Justice O'Connor, sounds pretty good to me.

AUDIENCE MEMBER 4: Speaking about the role of women in the law, and the careers of women lawyers, and how you, Judge Kaye, recommended staying in the law, and not leaving, that really struck me. What kind of alternatives would you offer for women and what suggestions for balancing work and life?

JUDGE KAYE: It is, of course, a very individual decision. And what I put at the top of my list is that what you do should be meaningful to you. That is, I think, above all, important. I would be the last person to advocate staying just to stay in it. The fact is, when I began having my children, I started on a part-time basis, which back then—oh my goodness. I remember it was called the “mommy track,” and very disparaged. I think it is much better now—in fact, we have part-time partners at our law firm today. So, I don't have a particular list of things, if that's what you're asking me, and I don't know, Justice O'Connor, if you do. That said, the only advice I've ever felt comfortable giving across the board about anything is: never buy a wrap skirt. [Laughter] Everything else is nuanced.

AUDIENCE MEMBER 5: All three of you have great reputations as consensus-builders. Do you wish that there was a broader consensus in your courts, and what personal and professional skills did you bring to your courts that you think helped to build consensus?

JUDGE KAYE: I can't wait to hear this one, Justice O'Connor.

JUSTICE O'CONNOR: You make friends, that's what you do. You make friends with your fellow judges if you're on an appellate court. Don't just assume that they have to treat you in a certain way, or be a certain way—just go out of your way to make friends. And one of the things that happens at the U.S. Supreme Court is that on days of oral argument and conference, at least you have an opportunity to have lunch with each other if you want to. And I would round people up and say, “Come on now, let's go to lunch!” I would make sure they would—there were some who weren't so eager to go, and I would kind of push them in that direction. I think when you have friendships, and acquaintances form, and you get used to talking with each other, it gets easier to work on legal issues together and deal with things other than the casual and the personal. That was my experience.

JUDGE KAYE: I would say the same, in this sense. And I've thought so much about this, and read so much about the subject. There are a lot of wonderful pieces written about dissents, and whole books of unpublished dissents. And I might tell you, in my time on the court, we would sometimes circulate unpublished dissents in an effort to improve a single, unanimous opinion. I think the one essential quality has nothing to do with the Chief—you can't beat people into consensus. I was very fortunate in my years on the court that having a single opinion was a value that we shared. There were seven judges, I came into that tradition when I went on

the court in 1983. We thought there was a value in having a unanimous opinion, and we would work to have a unanimous opinion—not that we always did. My goodness, we had rabid dissents, but if all the people around the table felt value in a single opinion, then you can have it. You can work to promote it.

JUSTICE O’CONNOR: But you can’t always achieve it. And that’s all right; you might end up friends, even if you disagree.

DEAN FEERICK: My motto is George Mitchell: Listen to each other. Keep talking. Try to understand each other, and point out the advantages of agreement and the disadvantages of a lack of agreement. And don’t give up. It’s what I do as a mediator, and I suppose you could say as an administrator—everyone is valued, everyone is respected, and it’s your words. You have to practice those words by listening and hearing.

JUDGE KAYE: Yes, but that has to be a shared value. One of the difficulties is, of course, that the press, and the academic world, love conflict.

AUDIENCE MEMBER 6: I notice, in the city, where there are appointed judges, there seem to be a larger number of women, but outside the city, where they’re elected, there seem to be a lower number. And I wonder if that came up in your conversation—

JUSTICE O’CONNOR: Don’t elect your judges!

AUDIENCE MEMBER 6: —in your conversation about what is the best model to follow?

JUSTICE O’CONNOR: Well, I’ve told you what I think the best model is: an appointive system. I know in my state we got a larger percentage of women judges immediately, and it stayed that way. It has been very effective.

JUDGE KAYE: I don’t know. I happen to be looking out in the audience at a couple of great, female, elected judges. So the argument that I hear for a more diverse judiciary—and we sure do need it, we want a more diverse judiciary—the argument I hear is, “Hey, we finally know how the system works. Don’t change it on us now that we have got it working a little bit in our favor.” So, I don’t know which side it weighs on. I’m looking out at very beloved colleagues who earned their seats.

JUSTICE O’CONNOR: I think the system is working pretty well.

JUDGE KAYE: Well, we have great judges. So I don’t know when it comes to diversity and women, to say that that’s an argument in favor of election or appointment, I think there are a million other things that weigh in that, but we have to be working harder for a more diverse judiciary, period, whatever the system.

AUDIENCE MEMBER 7: Justice O’Connor, I’m curious, as I’m sure many people are, for what your views are on the health care case¹³ before the Court?

13. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

JUSTICE O'CONNOR: I wouldn't tell you that if I had to! My heavens. The Court has it under advisement. What business do I have weighing in? I didn't read all those briefs. I'm not sure the people who passed it even read the legislation!

JUDGE KAYE: I'm ruling that question beyond the scope of the conversation.

DEAN FEERICK: To bring this program to a conclusion, there is something I would like to read, Justice O'Connor and Chief Judge Kaye. Justice O'Connor, you have quoted, in graduation remarks, certain words of John Wesley, as follows: "Do all the good you can. By all the means you can. In all the ways you can. In all the places you can. At all times you can. To all the people you can. As long as ever you can."¹⁴ Let me suggest to both of you, that your lives have been models of this homily. Thank you.

14. LETTERS OF JOHN WESLEY 423 (George Eayrs ed., 1915).