
SPEECH DELIVERED BY HON. JUSTICE SANDRA DAY O’CONNOR (RET.) AT THE SIDNEY SHAINWALD PUBLIC INTEREST LECTURE ON APRIL 6, 2010

Thank you very much for two wonderful introductory speakers. It’s been a delight to meet Sybil Shainwald and to see with my own eyes the good institution she has developed here with the Public Interest Lecture Series. I used to see Ken now and then and I haven’t seen him for a long time, so it’s great to be here today at the Law School and to have the privilege of speaking to you, and I think that promotion of public interest in law is a very important function for any law school.

Lawyers since the start of our country have played a key role in developing what we have, and we certainly need them today in sustaining a system of government. I think that it’s an opportunity to share a few thoughts with you on the important role of civic education in our participatory democracy.

Our government was certainly an experiment at the time. The success of it depended upon the participation and the self-governing instincts of our citizens in those days. In order for that experiment to work, American citizens needed to be educated—they needed to know what the system of government was—so they could discharge their responsibility to participate in the democratic process, as well as to be able to recognize and avoid threats to our system of government. Thomas Jefferson knew this. He believed that an educated citizenry would provide the nation with the widest possible pool of citizens to become wise and honest lawmakers, and to help combat tyranny whenever it might arise. Now he was a pretty smart guy. He didn’t include women in that thought, as you may know, but aside from that, I thought it was a good idea. But Jefferson’s ideas did not catch on right away. In the early years of our republic, public schools didn’t exist or were very limited. Where education was available, very few members of the lower economic sector in our country were able to take part.

During the so-called Antebellum era, reformers such as Horace Mann picked up where the founding fathers left off. They led the “Common School” movement, as they called it, to create free and compulsory public education across the country. That movement’s lasting achievement lives on today: free public education, at least through high school, has been enacted in every state, and often by a requirement in the state constitution. While the founding of public schools was an important step toward ensuring an educated bunch of citizens, and civics was a critical part of Horace Mann’s vision, robust civic education programs did not immediately emerge in our new public school system.

Most early public school curricula focused on the three Rs: reading, writing and arithmetic. In the early 20th century, political leaders and educators began to talk about the value of civic education as a way to assimilate the massive numbers of new immigrants to our country. As a result, civics curriculum and initiatives proliferated and, today, 40 state constitutions mention the importance of civic literacy among

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students. Thirteen state constitutions point to civic education as the primary purpose of public schools.

For many years, public schools served this purpose pretty well. As late as the 1960s, the typical public school student took three different courses in civics and government to learn about citizenship and the rights and responsibilities that come with it. Of course we can't romanticize the instruction and quality of civics education in the past. It often sugarcoated American history; also it idealized the development of our nation's government and it omitted many of the darkest moments in our American history.

Teaching techniques have improved in this country in the last half-century, but even the flawed civics teaching of the past is better than what we have today, where civics has almost vanished from the public school system. Half the states no longer make civics and government a requirement for high school. Many students' only exposure today comes through a one-semester class, if at all, in high school. Only 29 states require students to take any civics or government course for graduation from high school. In middle school, only three of the states include a separate civics course as part of their standards. So, you know, we need some work here. That's why I'm here today.

One reason for that recent decline is an unintended consequence of the No Child Left Behind Legislation. Those programs—No Child Left Behind—provide some federal money to school districts based on test scores of students in math, science, and reading. Why did they do that? Because we had a number of our high school graduates tested alongside those of many other Western nations. We came in near the bottom. Our kids did not know math and science and presumably could not read, or they would have scored higher. So I don't know how that came about, but what happened is that to get the federal money, children are tested on math, science, and reading. If they test well, the school gets the money. Well, most schools have stopped teaching history and civics. Why would they? They don't get any federal funds. We're really in a dilemma here, right now. That's why I want to talk to you about it today.

An entire generation of American young people who were not taught civics have now grown up, and the results are pretty dismal and not surprising. In the last nationwide civics assessment test administered in 2006, more than two-thirds of the students scored below the level of proficiency. Not even one-third of eighth graders surveyed could identify the historical purpose of the Declaration of Independence. It's right there in the title! They couldn't do it! Less than one-fifth of high school seniors could explain how civic participation benefits democracy. Only one in seven Americans knows that John Roberts is Chief Justice of the Supreme Court, but two-thirds can name at least one judge of "American Idol." Barely one-third of Americans can name

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the three branches of government, much less say what they do. Now that’s the scariest of all to me. Two-thirds of Americans can name at least two of the Three Stooges.

There is a civics achievement gap between students from disadvantaged backgrounds and their better-off peers, starting from the fourth grade through the twelfth. The lower-income students score significantly worse on the civics test than the middle-class and well-to-do students. The same students are most likely to face most of the civics problems: crime, drugs, failing schools, poverty. When it comes to civics education, our schools’ failures are especially stark in the communities most in need of effective civics education. Now that’s pretty bleak, but there are a few little glimmers of hope out there.

The 2008 presidential election saw a higher percentage of youth aged 18 to 29 voting than any election since 1972, when 18-year-olds were first given the right to vote. In 2009, one-third of college freshmen surveyed by UCLA said there was a “very good chance” they would engage civically by participating in community service or volunteering in projects during college. That’s an increase of 82 percent in 20 years. That’s pretty good, I like that. We’re hearing at least that students are more interested in volunteer service.

Two-thirds of Internet users under the age of 30 have a social networking profile. Half of them use social networking sites to get information and share their views about politics and I guess a few other things, too. We have to use that indication of renewed interest in civics and politics to convey the information that young people need to be responsible citizens. To improve civics teaching, we need to improve the curricula and the teaching methods, so that in the little bit of time that is now given in school to civic education, students can gain the core skills they need. We need to bring civics education into the 21st century.

Today’s civics curricula are regarded by most students as dull and boring and irrelevant to their lives. Study after study shows that civics is the students’ least favorite subject in school. It is an active subject about getting out in the community and making a difference through political process and other things, but it’s usually taught—in the schools where it is taught—by having the students read a textbook. The nation’s bestselling civics textbook is 844 pages long. It’s awful! You can barely pick it up, much less read it. Now imagine. It’s longer than the size of an average textbook in college, and no middle school student wants to read that thing. They hurt their backs just carrying it around.

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Today's students are growing up in the digital age. They have far more avenues of learning than textbooks and paper worksheets. Our surveys show that students spend more than 40 hours a week in front of a screen. That's more than they spend with their teachers, and more than they spend with their parents. We can take a big step in the right direction if we use a little bit of that 40 hours a week to direct some of that enthusiasm for technology in getting students thinking, learning, and engaging in civic life. It seems that every few months we learn of another innovation in digital media—first it was MySpace, then Facebook, and now Twitter. Don't ask me what those are because I'm not sure. I don't use them, but I do believe that each new way of communicating offers perhaps another method of civic engagement, and to make civics relevant to students, our teaching tools have to be aligned somewhat with these new techniques.

I teamed up with some experts in education and technology at Georgetown Law School and at Arizona State University, in my home state of Arizona, to design a way that students can use their technological skills while learning civics, and together we launched a Web site. It's called "Our Courts": www.ourcourts.org. It features free, interactive, online games about civics, and the games include "Supreme Decision," "Do I Have a Right?" and "Argument Wars" and we're getting more. In "Supreme Decision," the students work for a Justice of the Supreme Court in deciding a fictional case about students' First Amendment interests. In "Do I Have a Right?" students play the role of a lawyer, determining if fictional complaints have some base in the Constitution. In "Argument Wars," students play the role of a lawyer in arguing famous Supreme Court cases and they have to point out the significant legal arguments to defeat the other side and earn points.

These games are targeted toward middle school students: sixth, seventh, and eighth grades. We found though, that they're appropriate and engaging for many high school students as well, and all of the games are really fun to play. The kids love them. They get addicted. They're shown—introduced—in a class and the students see them, and studies have shown that well over half go home that same night and start playing them. This is great. They learn and don't even know they're learning because it's fun, and so our hope is that these activities will be engaging enough to bridge the gap between classroom time and at-home time.

Ninety-seven percent of teenagers, ages 12 to 17, play some kind of computer, Web, portable, or console games. Some of those commercial games have a few civic concepts in them, but they're pretty generalized. A recent study showed that teenagers with the top 20 percent of civic gaming experiences are more likely to report interest and

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engagement in civic and political activities than students at the bottom. The games in the “Our Courts” project offer a lot of overt civic content, and I think this increases the potential for good civic outcomes in a medium that’s very attractive to the students. They’re motivated to do it on their own, even at home. The games are so much fun that in a recent evaluation of the game “Do I Have a Right?” more than half the students who first saw the game at school went home and played it on their own in their free time. So, you know, this is really encouraging to me. The “Our Courts” project offers special resources for teachers too, including civic lesson plans designed for interactive learning, and entire civics units, if they want, that can be reflected in the online games. The Web site provides online videos, information for students, gives the students a chance to post their own comments on the Web, and even ask me questions about a rotating series of topics.

I think that this “Our Courts” project is engaging enough to really bridge the gap between classroom time and at-home time. We have a long way to go to rejuvenate our nation’s commitment to building strong citizens, but we can all get involved. We have a team of student volunteers at Georgetown Law School that go into middle school classrooms to teach the “Our Courts” games, and they take as little as a single class period. That could happen here also, if your school wanted to. If you’re interested, I encourage you to get in touch with us. You can do that through the Web site, and we can help recruit a network of volunteers to convince schools across the country to adopt this program, and if you want to help, we’d be thrilled to have you. I hope I’ll stimulate some here in New York.

Our children—or grandchildren in my case—are the experts in the digital means of civic engagement, but we have an obligation to try to get them to use the tools they need wisely, and to take seriously their role in being part of our country in the future. Recently, there were two Georgetown law student volunteers who were conducting an “Our Courts” lesson in an eighth grade classroom in a Washington, D.C., school. They were introducing the Bill of Rights to the students who were about to play the game “Do I Have a Right?” One student raised her hand and said, “What if someone more powerful than the President, more powerful than Congress, and more powerful than the Supreme Court came and tried to take these rights away? What then?” The volunteer thought for a minute, and then she said, “Well, the only people more important than the President, Congress, and the Supreme Court, are you. We are a government by the people, and you are the people.” This answer was very satisfying to the student, who said, “Well good, we’ll never let that happen.”

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As Thomas Jefferson once said, “We in America do not have a government by the majority. We have a government by those who participate.” I hope that the “Our Courts” volunteers helped foster some more participants that day, but we have a long way to go. Today’s young people are going to create tomorrow’s government, and by understanding how our government works—knowing its strengths and its weaknesses and sharing ideas and solutions—they can make it a government that truly is by the people. We need your help, so that these young people can make a real difference in this country.

Thank you very much.

Question and Answer Session

Justice O’Connor: Okay, I’m told there are 10 minutes for questions. I don’t promise to answer, but I promise you can ask. Anybody? You monitor, Dean. You see if anybody has—there’s a hand.

Q: Well, I’m just going to repeat Ken Feinberg’s question and ask if you can elaborate a little bit about his thoughts on having legislators in addition to appellate judges on the Court?

Justice O’Connor: What’s your thought Ken?

Ken Feinberg: Is it a good idea to have a diverse Court?

Justice O’Connor: Boy, is it ever. Yes. You know, in the past we’ve had a very diverse Court at times and, typically, we’ve had people on the Court who didn’t serve one day as a judge. Sorry, you know, I’m a judge; I like judges, but we don’t need them all on the Court. We need people of different backgrounds. When I served during the years I was there, we had Lewis Powell from Virginia. He never served a day as a judge until he got to the Court. We had Bill Rehnquist, who ended up Chief Justice. He never served as a judge a day in his life until he thought, “Oh gosh, I probably missed something. I should go try being a judge someday.” He went down to the Fourth Circuit and sat as a judge on a criminal case in the Fourth Circuit District Court. Tried the case, ended up it was a criminal case, guilty verdict, etcetera. It went on appeal, and he was reversed. That was the last time he decided to sit on a court, but he did a great job as Chief Justice. I mean, we do not need all people from the lower federal courts and all nine, today, are from that background. We can do better, probably, to have a bigger mix on the Court. Yes, I agree with you, Ken.

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Q: What, if anything, do you miss about being on the Supreme Court on a day-to-day basis?

Justice O’Connor: Well, I did that for 25 years, so I’m not sitting around saying, “Oh my gosh, I miss it, I’m not there.” Sometimes there’s a really interesting case and you say, “Oh that would have been fun to be involved with,” but on a day-to-day basis, I don’t think so. I was there and did that, and felt very privileged to have had that opportunity, but nothing goes forever. Even that, and I think it’s better if Justices know when it’s time to step down. I had a little nudge from the outside because my husband was very ill and needed help and we were married one month shy of 57 years and when he needed help, I wanted to be there to give it and I’m glad I could.

Q: I thought your subject matter was extraordinarily important. I was wondering if you had any suggestions of programs for legislation to further advance that program?

Justice O’Connor: I don’t think we need legislation to do it. We need the schools to do it. You talk about a bureaucratic mess, you try looking at a state school system. There’s no one person in any state you can go to and say, “Here, here’s this great thing for your school. See about it,” because they’re divided into little school districts. Separate ones. There’s no uniformity. There’s nobody really in charge of everything. It’s the darndest thing you’ve ever seen. Each state is a bureaucratic nightmare, that’s why I need your help. Now you can provide a lot of volunteers here, some get schools in New York City to do it, some up in Albany. I don’t know, everywhere. We don’t need legislation. We need schools to cooperate and that’s hard to come by. You’re all in some sort of school district. Go make sure your school district uses this, okay? Is that a deal?

Q: As the first woman appointed to the Supreme Court, many of us would be pleased if you were reappointed to the Supreme Court.

Justice O’Connor: Can’t happen. Won’t happen.

Q: Could you comment on the importance of having women in those positions?

Justice O’Connor: Well I’m the last one to comment on it. I think it’s good or I wouldn’t have been there. Now our nearest neighbor, Canada, has four women on its nine-member Court; one is their Chief Justice, and they’re a great group. What’s the matter with us? You know, we can do better.

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Q: Can you just talk a bit about the consistent diminution in the number of cases that the Supreme Court addresses every year?

Justice O’Connor: Oh yes, the smaller number of cases the Court takes. You ought to be grateful. The Court can really mess it up. They don’t need more. Believe me, they apply the same standards today that they did 40 years ago before I got on the Court and when I got on the Court. It takes four members on the Court—four of the nine—to say, “Yes, this is a petition the Court ought to hear.” That’s all it takes. Not a majority. We get more and more petitions. The great majority are in criminal cases and the majority of those are written by prisoners sitting in jail with nothing else to do but writing petitions, so it doesn’t take that long to read some of those. I think the process of requiring only four of the nine to take a case is a good one. That’s smart. So it’s the same standard being applied. I’ve tried to figure out why there are fewer and I like to think it is because the lower federal courts are getting it right more often. Don’t need to take them.

Q: I’m going to come back with a woman question in terms of, do you think that women process things differently, think differently, evaluate differently? Do you think decisions would be different with women on it?

Justice O’Connor: I don’t. No, I don’t. I think at the end of the day, a wise old woman and a wise old man are going to come to the same conclusion on a legal issue.

Yes, there’s a young man with his hand up. That young man right there, stand up.

Q: Do you think the law will ever change so that a person who was not born this country could become President?

Justice O’Connor: I don’t know. Will the law ever change so somebody not born in the country can be President? We’d have to change the Constitution. Boy, is that hard to do. Have you looked that that? To get an amendment to the Constitution takes a lot, but it might happen, and so maybe you ought to grow up and propose it, and we’ll see if we can get the votes.

Dean Matasar: On behalf of all of us, I want to thank all of you for coming out today and spending some time at New York Law School. To our speakers, thank you once again. To Justice O’Connor, those are inspiring remarks. Have a great afternoon everyone. Thank you.