

**YALE LAW SCHOOL COMMENCEMENT REMARKS
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**THE GENERATIONS OF JUSTICE
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I wish to use a Biblical story as the starting point for talking to you today about intergenerational justice. In the Book of Deuteronomy, Moses, who has taken his people out of Egypt and wandered with them in the desert for forty years, is shown the Promised Land by the Lord, but told he will never be permitted to enter it. Here is the text:

And Moses went up from the plains of Moab to Mount Nebo, to the top of Pisgah, which is opposite Jericho. And the Lord showed him all the land, Gilead as far as Dan And the Lord said to him, “This is the land of which I swore to Abraham, to Isaac, and to Jacob, I will give it to your descendants. I have let you see it with your eyes, but you shall not go over there.”

Imagine Moses being shown his heart’s desire and then having it withheld from him. He sacrificed more for this promise than any of his people, but he, and only he, is precluded from participating in its fulfillment.

Why is Moses permitted to see the Promised Land, but not to enter it? One answer to this question is that he had disobeyed the Lord and taken credit for one of the Lord’s miracles. I think, though, we can find another answer to this question if we listen to the echoes of this story in our own times.

Five years ago, Justice Sandra Day O’Connor wrote a majority opinion for the Court upholding the University of Michigan Law School’s race-based affirmative action program against a Constitutional challenge. Because Justice O’Connor had taken a stern attitude toward race-based affirmative action in prior cases, many court-watchers thought she would strike down this program. But she did not, maintaining that racial diversity in higher education was a compelling governmental interest to which the affirmative action program was narrowly tailored.

In reaching that result, however, Justice O’Connor characterized race-based preferences as a tool whose days were numbered. She observed that the Court had dealt with its first affirmative action case twenty-five years ago, in 1978. She then stated: “We expect that 25 years from now, the use of racial preferences will no longer be necessary.”

This passage makes me think of Moses on the mountaintop. Even in 2003, it was clear that the Supreme Court in 2028 would be a Court on which Justice O’Connor would not be sitting. I felt Justice O’Connor was saying she could see us moving toward the Promised Land of a colorblind society, but that she would not, as a member of the Court, be able to enter it with us.

Consider another example. Eleven days ago, the California Supreme Court held that the state constitution guaranteed same-sex couples the right to marry. The right, however, is not yet secure—it is almost certain that in November, California voters will

vote on a proposed constitutional amendment to define marriage as between a man and a woman. The vote will probably be close: a poll taken in February 2008 showed that 43 percent of California voters favored same-sex marriage, while 50 percent were against it, and 7 percent were undecided.

When we break down the 43 percent who favor marriage by age cohort, we see stark generational differences. Twenty-five percent of those born before 1940 favor same-sex marriage, while the numbers rise to 41 percent of those born in the 1960s, and 58 percent of those who, like many of you, were born in the 1980s.

No surprise, then, that my colleague Bill Eskridge—who has done more for the cause of same-sex marriage than anyone in the academy—said when I was his student that he thought all fifty states would permit same-sex marriage someday, but that he did not expect that day to fall within his lifetime. That was a dozen years ago, when things on this front looked much less hopeful. But that, too, was a Mosaic moment, in which Bill spoke of striving to bring the country to a place he thought he would never live to see.

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Because this is the Yale Law School, I know many of you are listening critically, and I would not wish it to be otherwise. When I was speaking of Justice O'Connor, I suspect many of you were thinking—wait a minute, Justice O'Connor's reference to the twenty-five years was not an elegiac literary reference. She was just appeasing conservatives by putting a temporal limit on state-based affirmative action, much in the way she had placed other limits on its exercise in prior cases. Moreover, I suspect many of you resisted the characterization of a colorblind society or a society that condones same-sex marriage as the Promised Land.

But I am not here today to defend a particular vision of paradise. Nor am I defending the Whiggish view that each new generation is wiser than its predecessor. What I am saying is that sometimes the older generation understands—or, in Moses's case is made to understand—that the work of justice can only be completed by the younger one.

I intuit that Moses was barred from the Promised Land less because of what he did than because of who he was, which was a product of his times. I think he was too exhausted and fallen and experienced and wise in the ways of his generation to be the leader of a new society. Along one narrow dimension, his story is the least noble of the three, because the Lord simply forbade him from exercising any agency in the matter. It was nobler for Justice O'Connor to say that although she could abolish affirmative action on that day in 2003, she was not going to do so. And it was nobler for Bill to work so hard for a goal he believed—though now it is evident to me his belief was erroneous—would not be attainable in his lifetime.

Sometimes it is important for the generation in charge to realize that the younger generation is more capable of achieving justice, and for the older generation to defer to the younger one with a kind of righteous humility. To grow older is not necessarily to grow wiser. I insist on this truth because Yale Law School's embrace of it has

contributed so much to my flourishing. In my fifteen years here as a student and teacher, I have repeatedly experienced the powerful dynamic through which the younger generation leads the older one, or, put more plainly, through which students teach their teachers.

I graduated from this law school in 1996 and returned a short time later to begin teaching here. I had not been back long before Owen Fiss, who had been one of my mentors, saw me in the Faculty Lounge and emitted what I can only describe as a guffaw. “I’m sorry,” he said. “It’s just that I can barely get my head around the fact that Reva Siegel, who was my student, is now on this faculty. Now here you are, a student of Reva’s, on this faculty.” In case I was having a slow day, he paused and clarified: “She still seems like a child to me. So you, you are barely a fetus.” I found myself wondering when Owen thought life began.

In seriousness, his comment made me wonder if I should have returned to teach at the institution where I had been a student. I worried I would never be taken seriously by the larger-than-life figures who had taught me. But as it turned out, it was precisely because my teachers were larger than life—not just as scholars, but as human beings—that for them, saying that I was young was not the same as saying I was ignorant. I should have remembered that Owen began mentoring me when he handed back a paper I had written with the comment: “I wish I could write like this,” before he tore it apart. If I had, I would not have been surprised when, while serving as the chair of my mid-tenure review committee, he told me to stop being so deferential to received wisdom, including his own. “Say what you think is right,” he said, “and the law will shape itself around you.”

I do not have time today to honor the many other faculty members who helped me in this way. But taking Owen’s own genealogy as a limiting principle, I wish to mention Reva Siegel. Reva has been an extraordinary mentor to me, not just in the fields of constitutional law and antidiscrimination law, but also in life. Her mind has no ceiling, and it has no walls. She has brought me to a much deeper understanding of the meanings of dignity, equality, and liberty, and she has also taught me how to mix the perfect vodka martini. “The vermouth should hang in the vodka like a lace,” she once opined, “so that the result is as clear and as bell-like as the early U2.” And in case you were wondering, yes, she talks like this all the time.

Two years ago, I published a book that departed from the conventions of most legal scholarship by combining memoir with argument. I was anxious about what Reva, in particular, would think of this autobiographical turn. I feared that she would think I had tarnished my reputation as a serious scholar and as her protégé. But here is what she said: “I want you to teach me how to write for broader audiences like this, because non-lawyers need to be in our conversations, too.”

Having had teachers like this, I resolved that I, too, would be taught by my students. This, as it turns out, was a resolution I could not help but keep. Every year, I have been shocked at how many students I have who understand certain issues in constitutional law more intuitively than I do. It is not just that you understand these issues better than I did at your age. It is that you understand them better than I do now.

I also depend on you to teach me about technology. You have taught me that on issues of fact in the classroom, you are never wrong, because you have access to Google

while I do not. You have taught me about instant messaging and YouTube and Facebook and all the other mysteries of what I still call “The Interweb.”

Lest that seem like too trivial an example, I wish also to say you have made me into an irrepressible optimist with respect to civil rights. I see that you have grown up in an environment with fewer psychological toxins in it with respect to many forms of social prejudice. As a group, you are gloriously less racist, less sexist, and less homophobic than my age cohort.

For these reasons, I find myself saying to you stronger versions of what my teachers said to me: “I cannot see what you have seen, but I can see that you have seen.” Or: “Don’t be afraid to go far, far beyond what I can do. It is what I want.” Put simply, I want to leave the world in your hands as quickly as possible.

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To be sure, the young do not always teach their elders. Sometimes this is because the older generation does not have the grace or wit to listen. But sometimes it is because the younger generation has less to say. The world does not only spin forward—as Justice Antonin Scalia rightly reminds us, “Societies can rot as well as ripen.” This is why your decisions are going to be crucially important, and I wish to give you one—and only one—piece of advice about your future.

Strive to have a career rather than a job, and strive to have a calling rather than a career. Because advice often replicates autobiography, people sometimes think I am telling them to go into public interest law or into academia when I tender this advice. But that is not what I mean. Many of you will go work for large law firms. If your passions take or keep you there, I would be the last to fault you for that. But if you do not have a devotional attitude toward your work, I hope you have the courage to leave—not just the world of the firm, but even the world of the law. If you can surrender the millions of dollars you can make as a law firm partner to live a life that is more your own, that means your life was worth those millions.

That is all the advice I have for you today, because I suspect you have more to teach me now than I have to teach you. I suspect this because of the most recent insight you have given me.

For personal reasons, I am leaving Yale Law School. When I decided to leave the school, the first people I talked to were my former judge, Guido Calabresi, and my dean, Harold Koh. They both gave me their blessing. Even more generously, they both still wanted me to give the inaugural lecture for the chair I hold, which is named after my judge. I declined. I feared such an occasion would force me to attempt the impossible task of trying to sum up what this institution has meant to me. And frankly, I felt saying goodbye would be too painful.

I asked my assistant Karen Williams to help me leave quietly. For the past eight years, Karen has been a principle of kind efficiency in my life. She is the one who processes your recommendations, who files my reimbursements, who orders our coursebooks, and who accomplishes a myriad other tasks with tireless good cheer. She has this amazingly comforting phrase: “You are all set” that she puts at the bottom of

any e-mail where she has taken care of something. When I asked for her help in leaving Yale, she came in on weekends to pack up my office. She sent fifty-two boxes to my new address in New York. Each box was numbered so none would go astray and each was carefully labeled with its contents. She then emailed me the tracking numbers and the familiar four monosyllables: “You are all set.”

So I thought I was all set until your class representatives told me you had elected me your graduation speaker. I felt the house had spoken, and that the house believed I should come back and say goodbye. And so I am making the most honest graduation speech I will ever give, because I am not standing here saying goodbye to you, but standing here saying goodbye with you, to an institution—a community—I love.

I still believe that I cannot, and should not, try to sum up what my time here has meant. But I realize now that this is not what Guido, or Harold, or you as a class, were asking me to do. I think you were asking me to stand before you and say what is in my heart.

Today, my heart is full of gratitude. I thank my teachers who sit behind me for letting me learn from them, and my students who sit before me for letting me teach you. Less intuitively, but perhaps more importantly, I thank my teachers behind me for letting me teach them, and my students before me for letting me learn from you. I thank you most particularly for this last lesson—that it is important, though painful, to have the courage to say goodbye. If this wisdom is any indication of who you are as a cohort, I feel my generation can fall with complete trust into the loving arms of yours.