



5-24-2019

Address by Professor David B. Wilkins, Washington and Lee University School of Law Commencement Exercises, May 5, 2018

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Recommended Citation

David B. Wilkins and Brant J. Hellwig, *Address by Professor David B. Wilkins, Washington and Lee University School of Law Commencement Exercises, May 5, 2018*, 76 Wash. & Lee L. Rev. 1 (2019).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss1/3>

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of Law Commencement Exercises
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Introductory Note

Brant J. Hellwig, Dean of the School of Law

Professor David B. Wilkins of Harvard Law School delivered a phenomenal address to the Washington and Lee Law Class of 2018 at their commencement ceremony. Following the conclusion of the ceremony, I asked if I could pursue publishing the speech with our *Law Review*, and Professor Wilkins graciously agreed.

Professor Wilkins undertook considerable research in crafting a commencement address that incorporated several prominent figures from the history of our Law School and our University. His speech highlights not only the contributions of George Washington and Robert E. Lee, for whom our University is named, but also two of our most prominent Law School alumni: John W. Davis, former Solicitor General of the United States, President of the American Bar Association, and founder of the Davis Polk law firm; and Supreme Court Justice Lewis F. Powell, Jr. Rarely have I witnessed an external speaker deliver a speech so versed in the history of our institution. Incorporating prominent figures from our University's past not only demonstrated profound respect for our school, but also provided a platform for Professor Wilkins to connect with our students on his larger message.

I found Professor Wilkins's remarks particularly appropriate for our time. To provide modest context for the sake of posterity, we find ourselves in a period in which civil discourse generally is degrading. The proliferation and accessibility of opinion editorials through cable news, talk radio, and social media has ironically reduced society's tolerance for opposing views. As the extremes on both sides of the political spectrum have proven more comforting, those holding differing views are increasingly discredited or dismissed out of hand. Respect for difference is a declining

commodity. Professor Wilkins uses the interactions between John W. Davis and Thurgood Marshall (prior to his appointment to the Supreme Court bench) to demonstrate that respect need not be discarded but indeed can flourish among individuals holding opposing social views.

Furthermore, we find ourselves in a time when the contributions of our forbearers are being examined in light of their shortcomings—particularly as historical figures are being coopted as symbols for current ideological causes. The invocation of confederate imagery by white supremacist and other hate groups coupled with their defense of confederate statuary has focused attention on the naming of our school for the contributions made by Robert E. Lee as President of Washington and Lee following the conclusion of the Civil War. In August of 2017, originating in defense of a public statue of General Robert E. Lee in our neighboring city of Charlottesville, Virginia turned violent and, tragically, deadly. Shortly thereafter, Washington and Lee University President William Dudley formed the Commission on Institutional History and Community and charged the body “to lead us in an examination of how our history—and the ways that we teach, discuss, and represent it—shapes our community.”

At the time of the commencement ceremony at which Professor Wilkins delivered his remarks, the work of the Commission had not concluded. Professor Wilkins in his address demonstrates that complicated institutional histories need not be avoided or scrubbed. Rather, those histories can be critically engaged, and we can recognize that ideals to which individuals may not have lived up to in their times (a phenomenon not relegated to the past) can flourish in the future. Professor Wilkins does so in an uplifting and optimistic manner in his commencement remarks. For that, I am most grateful.

Commencement Address

President Dudley, Member of the Board of Trustees, Dean Hellwig, Faculty, Graduates, Parents—and especially Grandparents, and friends. Thank you for giving me the honor of sharing this most special day in this most beautiful place. They call this day commencement, which means beginning, but when I was a student I could never understand why. Because when you

are a student you are not thinking about beginnings on this day but endings—like “Thank God School Is Over!!” This is especially true for the graduates here today. Because for most of you this is the end, not just of your time here at Washington and Lee School of Law, but of your time as a full-time student in any educational institution—or at least that is what your parents hope!

But after you return your cap and gown and say your tearful goodbyes to the friends you have made here, promising to keep in touch—which I hope you do!—it will hit you that this is indeed the beginning of your real life—and even more, of your career. It is your careers as lawyers that I want to talk to you about today.

Let’s face it, there has been a lot of doom and gloom about legal careers lately. The press is full of stories about the shrinking job market for lawyers, with some even projecting that technology is going to lead to “The End of Lawyers” (although Richard Susskind, the UK academic who wrote the book with this title, always reminds me that there is a question mark at the end so maybe there is hope!). I have spent my career studying yours, and the careers of those who have graduated from law school before you. And there is no doubt that this is an important time of transition for the legal profession. This transition is being driven by the same forces—globalization, the rise in the speed and sophistication of information technology, the blurring together of traditional categories of organization and thought—that are transforming the whole world. Why wouldn’t they transform the legal profession? Law is a lagging, not a leading, indicator of change: it follows broader trends in the economy, in politics, in society. As the graduates know, in the common law world, you cannot say anything new unless you definitively prove someone said it before! That’s called precedent.

But it is precisely because of these broader trends that I believe that the world needs lawyers like you more than ever. All we need to do is to look around us to see how complex our world has become—and how central law and lawyers are to understanding and resolving this complexity. There are now whole fields of law that barely exist when I graduated from law school in 1980: human rights, internet law, alternative dispute resolution, health law—and the many others that have been remade by globalization and technology: family law, privacy law, commercial transactions. All of this has created enormous opportunities for

building new careers that cross traditional boundaries of law, technology, science, business, politics, philanthropy, medicine, entertainment—both here in the United States and around the world.

As graduates of W&L you are uniquely positioned to take advantage of these opportunities. As first year students, all of you have taken courses in American Public Law Process, Transnational Law, and perhaps most importantly in my view, Professional Responsibility—courses that in most schools students do not take until their second or third years. And all of you have gone through W&L's pioneering experiential learning curriculum, participating in a vast array of clinics, externship, and simulated learning courses in your second and third years. And all of you have had the benefit of attending a school that has deep connections with the bench and bar. This is a school, after all, that has produced seven ABA Presidents, including the Association's immediate past-President, Linda Klein.

All of this will help you to build satisfying and successful careers in the law—career that will undoubtedly span many different “jobs” across many sectors of the profession, and many locations in the US and around the world. In the *After the JD* study, a nationwide longitudinal study of over 4,000 law school graduates who entered the bar in 2000, for example, we found that twelve years after law school, those in our sample had already held an average of close to four different jobs, often in different sectors and geographies. Your generation will undoubtedly be even more mobile.

To flourish in this new environment, you will have to understand that while you are most likely concluding your time as a full time student, you are just commencing your career as a life-long learner. If you apply the curiosity and openness to the world that you learned here at W&L to this task, I have no doubt that you will continue to learn what you need to know to navigate the shoals of building brilliant careers wherever your interests and talents will take you.

But the most important thing you need to take with you as you commence this life journey are your values. And the value that you will need most in the coming years is openness, and the willingness to reach across difference.

I don't have to tell anyone in the audience today that we are living in very fractious times. No matter what side of the political aisle you are on, no one can be happy with the way that our politics—and indeed, our very society—is increasingly polarized into warring camps with little understanding or appreciation of the hopes and dreams—or fears and concerns—of their fellow citizens. Tragically, we as a country have seen the catastrophic consequences when deep divisions are allowed to fester and grow unattended. It is therefore incumbent on each of us to do our part to reach across our divisions to build bonds of community and trust with all Americans. Lawyers have a special responsibility, as both professionals and as citizens, to engage in this work.

As professionals, lawyers have been given special responsibility for the laws and institutions that our founding fathers believed would hold this country together. But lawyers are also citizens who often assume important leadership roles throughout society, including, of course, as elected and appointed officials, often at the highest levels of our government. Given these important positions of trust, it is especially critical that lawyers in their professional work, leadership roles, and private lives work to preserve and extend the legal framework and fundamental rights that are so essential to our constitutional democracy. Once again, your time here at W&L has uniquely prepared you to play this important role.

The very name of this august institution underscores both its complex history, and its unique perspective on finding a way to work through difference. As you know, Washington & Lee is named for two leading figures in American history: George Washington, who led the army that established the United States as a sovereign nation, and Robert E. Lee, who led the army that attempted to sever the confederate states from this union. At one level, there would seem to be no deeper division than this. And yet, from these seemingly intractable opposites has grown a university and law school that, as the law school's mission statement underscores, "seeks to cultivate broad-minded, highly skilled, and honorable practitioners of law . . . within a diverse and collaborative intellectual community exemplifying rigor, trust, and civility."

One can see this legacy throughout the complex history of this institution. In 1796 George Washington gave a gift to the university so generous that it still pays part of the cost of education

for every student—including the approximately 18% of the law school’s student body who come from racial and ethnic groups that were not recognized as full citizens in the country where George Washington was then serving as the nation’s first president. As the brilliant musical *Hamilton* which has perhaps done more than any other recent cultural event to allow all Americans to embrace the complex and contradictory—but in the end triumphant—legacy of our founding fathers, it truly is “nice to have Washington on your side!”

But Robert E. Lee’s complex legacy is here as well. One of Lee’s first acts after assuming the Presidency of the University in 1865 after his surrender at Appomattox was to reach out to Judge John W. Brokenbrough to make the Lexington Law School he had started a part of what was then called Washington College. In the remaining decades of the 19th century this new law school would go on to graduate many distinguished lawyers, including one whose impact on the legal profession and the country in the twentieth century further exemplifies the important but also complex legacy of the two founders of this institution.

John W. Davis, class of 1895, would go on to become one of the most important lawyers of his day—or indeed, any day. Over his six decade career, Davis would serve as United States Ambassador to the United Kingdom, Solicitor General of the United States, a member of the United States House of Representatives, and in 1924, the Democratic Party’s candidate for President of the United States. But Davis’s most lasting legacy is as one of the most successful Supreme Court advocates in history. Davis argued 140 cases before the Supreme Court, the second most by any lawyer. Among these were many impressive victories. At the top of this list is the Supreme Court’s landmark decision in *Youngstown Sheet and Tube Company vs. Sawyer* decided in May of 1952, in which Mr. Davis persuaded the court that President Truman had violated the Constitution when he seized the nation’s steel plants in order to prevent a strike that the President believed would cripple the nation’s fighting readiness during the Korean War.

In successfully arguing that not even the President of the United States is above the Constitution, John W. Davis established a precedent that is still vital to our democracy. But it was an argument Davis lost in the Supreme Court two years later that

would ironically ultimately ensure that the Constitution itself guarantees the equality of all citizens before the law.

In 1954, John W. Davis was the lawyer for one of the five school boards defending the doctrine of “separate but equal” in *Brown v. Board of Education*. Fortunately for our country’s future, this time the Supreme Court unanimously rejected Mr. Davis’s argument, thereby rescuing the promise of equality and due process of law enshrined in the 14th Amendment to the Constitution adopted following the end of the Civil War from the continuing legacy of slavery and discrimination that denied these noble ideals to millions of citizens. As the graduates undoubtedly know, Mr. Davis’s opponent in *Brown* was Thurgood Marshall, who in his illustrious career as a lawyer at the NAACP Legal Defense and Education Fund and as Solicitor General of the United States from 1965 - 1967 also was one of the most successful advocates in the history of the Supreme Court. What most people do not know is that one of Marshall’s models for great advocacy before the Supreme Court was none other than John W. Davis.

As Marshall’s biographer Juan Williams recounts, when he was a student at Howard Law School where he learned from the brilliant Charles Hamilton Houston how to build the “step-by-step” litigation campaign that ultimately culminated in *Brown*, Marshall would skip class to go watch Davis argue cases before the Supreme Court, dazzled by Davis’s brilliance and eloquence. As is clear from a famous set of photographs taken before the oral arguments in *Brown*, notwithstanding representing diametrically opposing positions in one of the most important cases in the Court’s history, these two legendary advocates were able to see beyond their profound disagreements to recognize their shared professional excellence. Indeed, this shared sense of professionalism can be seen in the way that the two men arrived at their respective positions at the counsel table in *Brown*.

Once again, at first blush their paths to this historic moment could not seem more different. Marshall had spent virtually all of his career as civil rights lawyer, representing poor black individuals who otherwise had no access to the legal system. Davis, on the other hand, was the founder of the Wall Street law firm of Davis Polk, where he spent his career in private practice representing some of the country’s wealthiest and most powerful corporations, whose ability to access—and indeed shape—the legal

system was knew (and knows) few bounds. But in *Brown*, Davis's client was not a powerful corporation: it was a local school board. And rather than charging the kind of handsome fee that he undoubtedly received from his typical corporate clientele, Davis, like Marshall, agreed to represent his client *pro bono publico*, donating his services to the Board "for the public good."

The fact that Mr. Davis believed that defending racial segregation in public schools was "for the public good" sadly speaks volumes about the mores of the day among Wall Street lawyers. At the time *Brown* was argued, there were virtually no minorities or women working in any of the established Wall Street law firms, and only a handful accepted Jewish or Catholic lawyers. Thanks in no small part to the revolution in consciousness that Davis's defeat in *Brown* engendered, today the great law firm that bears his name is one of the leaders in providing a broad variety of *pro bono* legal services, including to organizations such as the NAACP Legal Defense and Education Fund and the Lawyers Committee for Civil Rights Under Law that continue to champion Thurgood Marshall's vision of equal justice under law for all Americans.

And this service is provided by Davis Polk lawyers who are themselves increasingly diverse—although nowhere near as diverse as the profession should be more than six decades after *Brown*. Women now constitute more than 50% of all law students, with students from traditionally underrepresented groups constituting close to 20% of law school graduates—including here at Washington & Lee. And when one takes account of other forms of diversity that were not even discussed at the time *Brown* was decided—sexual orientation, disability—the important, albeit still imperfect, progress we have made on bringing the promise of *Brown* to the legal profession itself is even more apparent. This too is due in no small measure to the legacy of this law school.

Forty years ago next month, the Supreme Court issued another landmark decision in another case involving race and education entitled *Regents of the University of California v. Bakke*. The pivotal opinion in *Bakke*, as the graduates will also undoubtedly know, was written by Justice Lewis F. Powell. Justice Powell's opinion upholding the use of race as one of many factors in admissions is widely credited with preserving the slow but important process of integrating America's great universities and professional schools—including at Justice Powell's *alma mater*

the Washington & Lee School of Law. The fact that neither George Washington nor Robert E. Lee could have foreseen this result—or perhaps would even have approved of it—is just one more way that the great ideals of freedom and equality upon which this country was founded can and must evolve beyond the limitations of the historical circumstances in which they were first conceived.

We can—and should—continue to debate precisely how these historical circumstances should be remembered. But we should never forget that it is the very right to have these debates that is the genius of the system that our founding fathers created. And, as lawyers, we should never fail to take pride in the fact that the primary mechanism for preserving these freedoms is the law—just as we should never shrink from our duty as lawyers to ensuring that the legal system that protects these precious liberties is open, accessible, and fair to all.

There is no better place to speak about these vital matters than in a law school. And no better time than at the moment in which a group of lawyers are about to commence their careers as professionals and as citizens. And, at a time when it is hard for many Americans to see beyond our current divide, there can be no better law school commencement ceremony to address new lawyers than here at Washington & Lee. Since the university changed its name to reflect the role that both Washington and Lee played in its founding, this law school has worked hard to navigate the divisions implicit in this dual legacy to create an institution of excellence *and* equality—one that can be proud to have graduated outstanding lawyers from every background. Lawyers like Robert J. Grey, Jr., class of 1976, who have not only become leaders of the profession (in Grey's case, becoming only the second African American to serve as ABA President), but also to lead the charge to bring equality to the profession (in Grey's case as the President of the Leadership Council on Legal Diversity). Lawyers, like those in the class of 2018, who are determined to leave the profession and the law, to quote John W. Davis's eloquent words, "a better instrument of human justice" than they found it.

The motto of this great university is *non incautus futuri*: not unmindful of the future. At first I thought that this maxim was too modest for a university with such a long and distinguished past. But then I realized that is precisely because of this rich history that it is critical that those who matriculate at Washington & Lee

remember that its past must always be put in service of a future that those for whom this great institution is named could never fully have imagined.

So as you go out from this beautiful cloister to commence your lives as lawyers and as citizens, always remember to be mindful that every day you have the opportunity to be a “better instrument of human justice” than you were the day before. Just as I am now mindful that I am standing between you and beginning this glorious future. But rest assured that for all of my future days, I will always be mindful of the privilege of having been allowed to address you on this joyous day of your commencement. Thank you.