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A Comment on the Instruction of Constitutional Law*

The Honorable William H. Rehnquist†

I had the great pleasure of teaching a course entitled "The History of the Supreme Court of the United States" for a period of two weeks at Pepperdine University School of Law in August, 1986. It was my maiden effort at any sort of systematic teaching, and I thoroughly enjoyed the experience. The course was hardly what one would call a "bread and butter" offering, since it did not purport to deal primarily with the decisions of the Supreme Court, but rather with the role of the Supreme Court in our country's history. I think there may be a place in a law school curriculum for such a course which tries to cover the border land between history and law.

Since I became an Associate Justice in January, 1972, I have employed three law clerks for each annual term of our Court. As may be imagined, they were all young men and women who had done very well in law school. However, it never ceases to amaze me how some of these "brightest and best" have a woefully inadequate background in American history and virtually no comprehension of the geography of the United States.

I know that Pepperdine's Associate Dean, James McGoldrick, was surprised when I asked if I might have in the classroom a large pull-down map of the United States, but he graciously obliged my idiosyncratic wish. I found the map useful in pointing out to the students important geographical factors which played a role in the history of the Supreme Court as well as of the United States. No one can possi-

* Chief Justice William H. Rehnquist has completed a book wherein he discusses his views on the development of constitutional law. W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987).

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bly understand the trials and tribulations imposed by the circuit-riding duties on the Justices in the first half of the nineteenth century without having seen traced on a map the route by which Justice Peter V. Daniel, who lived in Richmond, Virginia, had to follow in order to hold court in Little Rock, Arkansas.¹ No one can fully understand the importance of cases such as *Gibbons v. Ogden*² and the *Genesee Chief v. Fitzhugh*³ without knowing when the steamboat was invented and the enormous change it made in the transportation of goods in this country in the period before the Civil War. No one can really understand the significance of cases such as *Munn v. Illinois*⁴ and *Wabash, St. Louis & Pacific Railroad Company v. Illinois*⁵ without knowing just how, when, and where the coming of the railroad wrought its dramatic transformation of our society and our economy in the latter part of the nineteenth century. Indeed, a glance through the index of the United States Reports, or through the pages of any state reporter system, is enough to indicate that the railroads were not only a vital engine in the development of commerce, but that they were a catalyst for many of the legal doctrines which now occupy a prominent place in our jurisprudence.

Case books and courses on constitutional law must necessarily cover a tremendous amount of material in a short span of time. One almost inevitably gets the impression from such books and courses that the Supreme Court of the United States is more or less a con-

1. Justice Daniel served on the Court between 1841-1860.

2. 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court examined the scope of federal and state power under the commerce clause. In a narrow opinion written by Justice Marshall, the Court laid the foundation for later justices to uphold a federal power to deal with national economic and social problems. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6 (1978).

3. 53 U.S. (12 How.) 443 (1852). In rejecting the common law rule that navigable waters were those in which tides "ebbed and flowed," the Court held that admiralty jurisdiction extended to the Great Lakes. The Court premised its opinion on the fact that the Great Lakes were public navigable waters on which foreign and domestic trade took place.

4. 94 U.S. 113 (1877). In *Munn*, the Court upheld an Illinois regulation of grain elevator charges but issued a strong warning: issues which the public has no legitimate interest in must be decided by the courts. In addition, the Court cautioned that the fourteenth amendment prohibits the states from any actions which constitute a violation of common law principles. *Id.* at 134.

5. 118 U.S. 557 (1886). In *Wabash*, the Court utilized the analysis set forth in *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851) to strike down an Illinois statute which attempted to regulate intrastate railway rates. The Court in *Cooley* stated that "States are free to regulate those aspects of interstate and foreign commerce so *local* in character as to demand diverse treatment, while Congress alone can regulate those aspects of interstate and foreign commerce so *national* in character that a single, uniform rule is necessary." L. TRIBE, *supra* note 2, at 324. Although the *Wabash* Court concluded that a state could not prohibit railroad rate discriminations even with respect to a portion of an interstate journey which occurred within the state, the opinion did not preclude a state from regulating other aspects of transportation relating to local incidents of interstate movement of goods and persons which affected health and safety.

stant: a sort of Delphic oracle located not in Greece, but in Washington, D.C., which in a very impersonal way answers questions asked of it by litigants. Upon reflection we know this is not the case, but we don't really know what *is* the case.

The Supreme Court is of course an institution referred to in Article III of the Constitution⁶ as a repository of the judicial power of the United States, and established as a going concern by the First Congress in 1789. Over the course of the nearly 200 years of its existence, it has had 103 members. Their terms of service have varied from thirty-six years, put in by Justice William O. Douglas, to the single year which James F. Byrnes spent on the Court. It has been peopled by some remarkably strong and able Justices, as well as by a very few who would have to be classified as nonentities. However, I do not think that constitutional law can be fully understood without some notion of the role played by some of the more important members of the Court.

John Marshall, of course, left an indelible impression on the Court and on the office of Chief Justice during his thirty-four years of service in that office. His successor, Roger B. Taney, has suffered more than he should have from his seriously mistaken opinion in the Dred Scott case; on the other side of the ledger from this self-inflicted wound, are twenty-eight years of capable and devoted service. During the period from 1801 to 1864, a period during which there were fifteen Presidents of the United States, there were only two Chief Justices: Marshall and Taney.

After the Civil War, the Chief Justices were less eminent and less able, and Associate Justices played a more prominent part in deciding the direction which the Court would take. Samuel Freeman Miller brought to that office a sturdy common sense and an ability to write which made him a force to be reckoned with in the Court's post-Civil War era. Stephen J. Field,⁷ who served during roughly the same time as Miller, was nothing if not doctrinaire, but the strength of his

6. U.S. CONST. art. III, § 1, "The judicial power of the United States shall be vested in one supreme court . . ." *Id.*

7. Associate Justice Stephen Johnson Field was nominated by President Abraham Lincoln and unanimously confirmed to the United States Supreme Court on March 10, 1863, and served until 1897. 4 THE NEW ENCYCLOPAEDIA BRITANNICA 125 (15th ed. 1977). Justice Field was a prominent member of the Court and his dissenting opinion in the Slaughter-House cases would eventually move the majority of the Court to adopt his interpretation of the fourteenth amendment. *Id.* See also the Slaughter-House cases, 83 U.S. (16 Wall.) 36 (1873). For more about Justice S. Field, see C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAWS (1975).

convictions and his ability to support them in written opinions made his contribution to the Court a lasting one.

As the century turned, President Theodore Roosevelt appointed Oliver Wendell Holmes, Jr., to the Court, and Holmes served with a graceful distinction unmatched by any predecessor or successor. He is better known for his epigrammatic dissents than for his Court opinions, but his prose will live wherever the English language is honored. In the next decade, President Woodrow Wilson appointed Louis D. Brandeis to the Court, and though he was quite different in temperament and philosophic outlook from Holmes, his name was linked with that of Holmes in many famous dissents. Both thought that the Court majority of this time placed too many constitutional impediments in the way of governmental regulation of business and too few constitutional protections around freedom of expression.

In 1930, Charles Evans Hughes was appointed Chief Justice of the Supreme Court, and he presided over it masterfully for eleven years. More important than any single decision or series of decisions that he authored was his masterminding of the behind-the-scenes strategy to defeat President Franklin Roosevelt's Court-packing plan. I concluded the course with the Court's 1952 decision in the *Steel-Seizure Case*,⁸ because I wanted to avoid as much as possible getting into the still-current doctrinal disputes of the second half of the twentieth century, and the Justices who have been roughly my contemporaries on the Court.

It has been rightly said that an institution is often the lengthened shadow of an individual. No such claim may be made in the case of the Supreme Court, which has existed for 200 years and has had more than one hundred members. However, I firmly believe that the institution and its decisions cannot be fully understood without some knowledge of those Justices who have made major contributions to its work—knowledge of who they were, how they came to the Court, and what they did after they arrived. If I have been able to impart a little bit of that feeling to the students at Pepperdine, I feel that the course was a success.

8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President lacked authority to order the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies during a nation-wide strike, to prevent a weakness in national defense during the United States' involvement in Korea.).