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**Dedicatory Address:
Act Well Your Part: Therein All
Honor Lies***

WILLIAM H. REHNQUIST**

It is a great privilege to have been called upon to participate in the dedication of this magnificent new facility for legal education. I am sure that the reason for calling on me was not my credentials as a legal educator, since I have none. While it has been suggested that the Supreme Court of the United States does "teach," by example, through its decisions, I do not believe that teaching is or should be the role of judges and courts. Teaching is an activity of voluntary participation on the part of teacher and student, at least after the school-leaving age established by the state. Whether it be an undergraduate college or a professional graduate school such as the Pepperdine Law School, participation by the students is voluntary. No one has to go to college or remain in college if he chooses to withdraw; no one has to go to law school. On the other hand, parties to lawsuits, including those which reach the Supreme Court of the United States, are often not in court by voluntary act. They are bound to obey the decisions of those courts or risk contempt of court. Obedience to these deci-

* This address was delivered by Justice Rehnquist at the dedication of the Odell S. McConnell Law Center at the Pepperdine University School of Law on November 17, 1979.

** Associate Justice of the United States Supreme Court.

sions can involve submission to orders for sale of property under execution, and on occasion, imprisonment. Perhaps for this very reason judges are not given any roving mandate, akin to the freedom of legal scholars, to fashion the law as they see fit or would like to have it; they decide cases based upon laws enacted by elected representatives of the people or upon constitutional provisions ratified by the people or their representatives. Thus, to my mind, the Supreme Court does not "teach" in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.

But in a larger sense, even though I am not a teacher of law, I am a member of the legal profession. I would like to suggest to you today that the legal profession might fairly be characterized as a three-legged stool: the lawyers who practice law, the judges who preside over courts and decide cases, and the teachers of law who make up the faculties of law schools. This triangular relationship was embodied in the old saw current in my law school days that "the 'A' students make the teachers, the 'B' students make the judges, and the 'C' students make the money." A friend of mine in law school, who was on the verge of flunking out, coined a corollary to this maxim which said that the "D" students flunked out of law school, went into business, and hired the lawyers who made the money. There is probably a lot of truth in both the original proposition and its corollary.

Thus, I think it is fitting for any member of the profession to voice his views on some branch of it in which he has not directly participated. Teachers of law can and do criticize courts; courts can and do criticize lawyers; and lawyers can and do criticize courts and law schools. And to my mind this is an entirely healthy situation, since we are, as I have previously suggested, all members of a common profession.

I am reminded of a former member of the Judiciary Committee of the House of Representatives, now a federal judge, who told me that more than one of his constituents, when they came to see him in Washington, would ask him, "Didn't you used to be a lawyer?" Since he was a member of the bar of his home state and practiced law before coming to Congress, he would reply to them, "I used to be a lawyer and I like to think I still am one."

The legal profession has had some hard going during the past decade, and I would think that most of you are sufficiently familiar with the main outlines of the criticisms and difficulties—charg-

ing exorbitant fees, lawyer participation in Watergate, endless delays in court proceedings, and the like. I will not burden you with any broad gauge analysis that I might have of either the cause or cure of these heavy seas through which the profession is passing. I feel quite sure that my comments regarding this problem would do little to regain for the profession that measure of public respect which it once had.

I would rather focus on a much narrower subject which I think deserves attention from all branches of the profession and which I think looms on the horizon as another possible cause for the dissatisfaction with lawyers of all kinds. I would like to focus on the relationship between the courts and legal academia. Since I am a member of the federal judiciary, I will use that judicial system as my model when I speak about courts. Since this building, in which we all take pride in dedicating, will house not only faculty offices, but classrooms, law review offices, and the like, I will include in the term "legal academia" not merely those who are denominated professors of law, but also all those who contribute to the law reviews, which almost invariably include students. I ask you to join me in the inquiry as to what role the law schools—legal academia, as I have previously referred to them—may best play in our democratic society as critics of the decisions made by courts. To assure you that there will be no "O. Henry" ending to my speech, I will tell you, in summary form, what my opinion is on this question, and then try to support it with a more detailed analysis.

The Supreme Court of the United States, and indeed all federal courts and many state courts, have been given the power to declare laws enacted by the representatives of the people unconstitutional, a power called "judicial review." Given the increasingly broad sweep of judicial decisions in this area, touching more and more the rights and liabilities of individuals and institutions, the courts are bound to be criticized for the decisions which they reach. No one doubts the right of anyone to freely express criticism of decisions of any court, including the Supreme Court of the United States. But the more difficult question is to what extent should the Supreme Court and other courts be responsive to that criticism. I urge upon you the view that since the Supreme Court is itself a thoroughly undemocratic institution, it cannot respond to criticism or popular dissatisfaction with its judgments and still carry out its mandate under the Constitution. The Con-

stitution has placed the judiciary in a position similar to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home court crowd wants him to call it.

However large a component of our lives amateur and professional sports have become, they are still, after all, a form of participatory or spectator recreation in which we may voluntarily participate or not, as we wish. But the power vested in the Supreme Court is one which has a profound effect on how the nation shall be governed. Consider the extraordinary difficulty of amending the Constitution to change the result of a constitutional decision handed down by the Supreme Court. Is such an institution, composed of nine appointed Justices, simply to roam unchecked in deciding what the Constitution means? The Justices are vested with authority of more significant and lasting importance, in many cases, than that of Congress, the President, and the governors and legislatures of the states. There will undoubtedly be criticism from all quarters of any institution which has an effect of this magnitude on American life. Almost a century ago—when the Supreme Court had far less influence on American life—one of its members, Justice Brewer, made the oft quoted comment:

It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its Justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time has passed in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all.

But this is the answer only to the easy part of the problem. In any self-governing society, particularly one where freedom of expression is constitutionally protected, anyone is entitled to criticize in the most outspoken manner the actions of any part of the government of that society. Those among us, whether it be the members of the profession, the press, or the public, who would dismiss such criticism with the offhand remark that “the Court has spoken—let us have no more discussion of the matter” must be wholly unfamiliar with the Court’s nearly two centuries of decisions, which demonstrate beyond doubt that its members are indeed mortal and fallible.

The difficult part of the problem is not whether there should be criticism of the Court: no sensible person would argue with Justice Brewer’s affirmative answer that there should be. The difficult part is to what extent the Court should heed this criticism in

deciding future cases. And here there is a genuine paradox, for the Supreme Court and the federal courts were not intended by the framers of the Constitution to be responsive to popular opinion. There was to be some indirect popular input: the Justices were to be appointed by a President who was elected by the people of the nation and were to be confirmed by the Senate which represented the people of the states. Of course, the very fact that we have amendments grouped under the heading of the Bill of Rights demonstrates in the most forceful manner that the individual citizen was to have certain rights guaranteed which could not be denied him by the government, no matter how democratic the representation of that government might be. Although the Bill of Rights is positive proof that the Court has a role to play in the adjudication of these rights, the notion that nine individual Justices composing the Supreme Court of the United States have the final say as to more and more of the governmental action that may or may not be taken in a nation comprising more than two hundred million people and more than three million square miles is bound to trouble any thoughtful student of government.

It is here that I think the law schools can play an important role as critics of the court, a role virtually unique to what I have described as "legal academia." The opinions of judges of courts other than the Supreme Court of the United States are always subject to review by that court of last resort and so there is at least that check upon them. In the words of Justice Stone, in his dissent in the case of *United States v. Butler*,¹ referring to the power of judicial review, "the only check upon our own exercise of power is our own sense of self-restraint." Lawyers who argue cases before the Court have an obvious interest in the outcome of those cases, and can scarcely qualify as disinterested critics although they may know a good deal about the law implicated in their case. And very few practicing attorneys not directly involved as advocates in a case have the time or interest to evaluate even the more important of the Court's opinions with care, knowledge, and objectivity. Theoretically, only the legal academic community is disinterested, in any material sense, in the outcome of a particular case, and exists, at least in part, for the purpose of devoting the necessary time and thought to an evaluation of the performance of the Supreme Court. If its criticisms are made with

1. 297 U.S. 1, 79 (1935) (Stone, J., dissenting).

caution, scholarship, and objectivity, they may be of great assistance to the Court, and may quite properly be taken into account by the Court in deciding later cases. But if criticism from legal academia is substantially founded on the critic's personal philosophy of government rather than the common legal training to which we have all been subjected, the attention that it may justly command from the Court will be quite different. At least the nine Justices of the Supreme Court have been appointed by the President and confirmed by the Senate, whereas law school faculties and students have received no official imprimatur whatever. This is undoubtedly one of the blessings of academic freedom, but a member of the legal academic community who sets out to tear apart one of our decisions (which in many cases is not difficult to do) should base his criticism on logical analysis and scholarship if it is to be any more helpful to the Court than a letter to the editor of some widely circulated newspaper. In other words, with due regard to the nature of judicial review, academics can perform not only an invaluable service to the judiciary and to society at large, but also enjoy for themselves a maximum level of efficacy. But if objectivity is absent in academic criticism, its effect will and should be sharply diminished.

If the law were something of an exact science, the question of the attention which the courts should pay to criticism of their decisions by legal academia would be less troubling; but all of us who have been through law school, and many who have never taken any legal education at all, know that the law is not a science, to say nothing of an exact science. The result of a basically undemocratic institution such as the Supreme Court responding to highly subjective and result-oriented criticism by legal academia, a branch of the profession which is even further from any responsibility to a public constituency than the Supreme Court, could well have some of the earmarks of elitism about it. Or, if you like, it could be said to resemble a rather cozy arrangement by which one group, lawyers, have a say out of all proportion to their numbers, and perhaps out of all proportion to their capacity and ability, as to how the country will be governed.

If what I have just said is true of fellow members of the legal profession, it must be at least as true of the general public, including editorial writers and television newscasters. We, as Americans, have every right to express our opinions as to the soundness or unsoundness of the decision of the Supreme Court or any other court in a particular case. But to the extent that the criticism is what I would call "result-oriented"—that is, obviously determined by the fact that the critic is unhappy with the rule which the Court has laid down, it will offer little help to the court

subjected to the criticism in making future decisions unless it is backed with some sort of sound reasoning. Here I take the liberty of quoting from another part of Justice Brewer's address back in the 1890's which is not as well known as the part I have quoted earlier:

I remember seeing in an eastern paper immediately after the decision in the well-known income tax case a most extravagant eulogy upon the Supreme Court as a great defender of the rights of the few states against the many and of the accumulation of property against unconstitutional assaults. And when thereafter by that court the Act of Congress denouncing all contracts, combinations and conspiracies and restraint of trade was held applicable to a combination between railroads to prevent competition in rates, that same paper contained an article expressing the most extraordinary surprise that men supposed to be of ordinary intelligence could be guilty of such a stupid blunder.²

Compare, if you will, the justification for the doctrine of judicial review advanced by Chief Justice John Marshall in the case of *Marbury v. Madison*³ with the familiar language indirectly but sharply criticizing the Supreme Court found in Abraham Lincoln's first inaugural address.

Marshall's justification for judicial review was not elitist or authoritarian in any sense of the word. Borrowing heavily from Alexander Hamilton's Federalist Paper No. 78, he stated in the *Marbury* opinion that the ultimate source of authority for any government is the people. *Marbury* was decided in 1803, only sixteen years after the framers of the Constitution had drafted the Constitution during the summer of 1787 in Philadelphia, and only fourteen years after the United States of America came into existence. Marshall reasoned that since the people of each state, either through state legislatures, conventions, or some other sort of constituent assembly, had ratified the Constitution, and because Article IV of the Constitution provided that the Constitution shall be the "supreme law of the land," any Act of Congress or other governmental body which conflicted with it could not be enforced by the courts consistently with the Constitution. Since the courts were sworn to uphold the Constitution, and the Constitution by its own terms was said to take precedence over any law contrary to it, when the courts faced a conflict they had no choice but to declare the law unconstitutional and void.

Yet Lincoln, in his first inaugural address, delivered in 1861, said:

2. 15 NAT'L CORP. REP. 849 (1898).

3. 5 U.S. (1 Cranch) 137 (1803).

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

If Marshall's opinion in *Marbury* makes sense, as it does to me, what has happened in the intervening 170-odd years that would give rise to such a statement as that made by Lincoln in 1861, and countless other similar statements by responsible and knowledgeable people since that time in the same vein? The answer is that a number of things have happened.

First, Marshall was writing in the days when the general view of the legal profession and of the courts was that there was a body of law somewhere up in the sky that one could divine and apply to particular cases if only he had been properly trained. Legal treatises such as those of Coke and Blackstone long predate the United States Constitution and Marshall's opinion in *Marbury v. Madison*. These treatises primarily expounded court decisions, which simply by virtue of the fact that they *were* court decisions made them "the law." Most of the early cases decided by the Supreme Court of the United States, until well into the nineteenth century, involved application of this common law to particular cases that came before the Court on appeal from the lower courts. It was only natural that there should be interaction between scholars who collected cases from various courts and the Supreme Court of the United States, which was frequently called upon to apply the body of law which resulted from those various decisions.

But as the social unrest following the close of the Civil War coincided with an era of rapid industrial growth in this nation, people who were benefited less than others, or who were actually harmed by the changing economic and social structure sought relief from their state legislatures and from Congress. The body of statutory law—that is, laws enacted by legislatures as opposed to case law made by court decisions—greatly increased. Frequently, the very purpose of new statutes was to change in some respect the existing body of case law. It became less important for a judge to have mastered common law case precedents, and more important for him to be able to interpret a statute passed by a state legislature or by Congress.

Accompanying this change in governmental dynamics was what is loosely referred to as "legal realists" school of jurisprudence (also occasionally referred to as the "burnt toast school of jurisprudence"). These scholars began to poke holes in the notion that there was an amorphous body of law somewhere up there in

the sky that could simply be found and applied to the facts of a particular case if only the judge in question had been sufficiently trained in the law and was sufficiently skilled in its application. This school of legal thought pointed out that judges frequently made their decisions, when not bound by statute or constitutional principle, simply on the basis of how they thought society ought to be run. They pointed out that frequently it was the philosophical outlook of the particular judge in question, or indeed the condition of his digestion on the day he decided the case, that may have determined its outcome; hence, the aphorism "burnt toast school of jurisprudence." What the judge had for breakfast may have had a greater influence on how he decided the case than what he knew about the law.

Immediately after the Civil War came three amendments to the Constitution known as the Civil War Amendments—the thirteenth, forbidding slavery, the fifteenth, forbidding the denial of the right to vote on the basis of race or color, and the fourteenth.

The fourteenth amendment cannot be so easily summarized. It has undoubtedly been the amendment which has been responsible for more constitutional decisions than all the other amendments put together. It was not aimed at evils or practices as readily definable as the thirteenth or fifteenth amendments. It prohibits a state from depriving any person of "life, liberty or property without due process of law;" it prohibits a state from denying to any person "the equal protection of the laws." Taking only these two phrases from the amendment, one can understand why a distinguished Justice of the Supreme Court of the United States referred to its "vague and ambiguous mandate."⁴

I am certainly not up to the task of telling you what those who drafted and ratified the fourteenth amendment meant by these phrases, or of telling you what the current state of the constitutional decisional law is in the countless areas in which they have been applied. I think it can be fairly said that they gave the federal courts a great deal more "running room," to put it in football parlance, than they had had before the amendments were ratified and adopted.

The result of all of these developments was the beginning of a process in the latter part of the nineteenth century which was to

4. R.H. JACKSON, *The Supreme Court as a Political Institution*, in SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 68 (1955).

mushroom in the twentieth century, whereby the Supreme Court of the United States, and other federal and state courts, have played a larger and larger role in the lives of individual citizens and in making decisions of national importance. The beginning of the change is nowhere better illustrated than by comparing the careers of Justice Horace Gray, who served for twenty years on the Supreme Court of the United States, but whose name is scarcely recognized by anyone but students of the Supreme Court, and his successor on the Court, Oliver Wendell Holmes, Jr., whose name is one of the best known not only in the field of law but among all people familiar with American political history. Horace Gray was one of the great legal scholars of the common law era of the Supreme Court of the United States. Both he and Holmes, before their appointments to the Supreme Court of the United States, had served on the Supreme Judicial Court of Massachusetts. Gray had a mastery of the common law precedents and state court decisions which was virtually unmatched by other members of the Supreme Court during his tenure, and yet one racks his brain to think of a single memorable decision which Justice Gray authored for that Court.

Holmes, too, had good claim to being a legal scholar. Before serving on the Supreme Judicial Court of Massachusetts, he had taught at Harvard Law School and written a widely acclaimed treatise entitled "The Common Law." Perhaps benefited by the fact that his service in the Supreme Court of the United States was in the twentieth century, rather than the nineteenth century, he had a breadth of vision that went far beyond the ability to recite judicial precedents. He also recognized much of the truth in what the legal realists were saying, and that such truth was particularly applicable when a judge was construing the general language of a constitutional provision.

As an example, let me cite a paragraph from his famous dissenting opinion in the case of *Lochner v. New York*,⁵ decided by the Supreme Court of the United States in the first decade of this century. The majority of the Court decided that a New York law, which prohibited an employer from allowing bakery workers to work more than ten hours per day, deprived the bakery employer of liberty without due process of law, and, therefore, violated the fourteenth amendment. Justice Holmes dissented from this decision, stating:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and famil-

5. 198 U.S. 45, 75-76 (1904) (Holmes, J., dissenting).

lar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Obviously, the language of Justice Holmes' dissent cannot be taken out of the context in which it is found. It is quite conceivable that a Constitution might be intended to embody a particular economic theory, and say so in no uncertain terms. In such a case, it would be the Court's duty to enforce those terms just as any other terms embodied in the Constitution. Holmes' real complaint is that the majority opinion in *Lochner* was using the "vague and ambiguous mandate" of the fourteenth amendment to give vent to its own ideas on the proper approach to economic and social legislation. If one were to catalog all of the state laws and state actions which have been declared unconstitutional under the fourteenth amendment between the time of *Lochner* in 1905 and the present day, the catalog would be a weighty document indeed. All the decisions in that catalog would have been made by federal judges who, once appointed, had no responsibility to any constituency whatsoever, and who, for all practical purposes, had life tenure.

At first blush, such a situation seems indeed a paradox in a democratic society which prides itself on self-government. And this I take to be the sense of Lincoln's remarks in his first inaugural address previously quoted. Yet Marshall's opinion in *Marbury* demonstrates, at least to my satisfaction, that judicial review by appointive federal judges who are not all responsible to public opinion is *not* a paradox in the abstract sense. The people ratify a Constitution setting up a structure of government, empowering each of the three branches to perform various functions, and guaranteeing individual rights against infringement by governmental action. The courts are merely carrying out the will of the people when they declare unconstitutional an Act of Congress or a law passed by a state legislature which violates that Constitution.

Alas, if only it were as simple as that. Because of the "vague and ambiguous mandate" of provisions such as the fourteenth amendment, we have vested in a Supreme Court of the United States the final decision as to how that "vague and ambiguous mandate" shall be interpreted. Given the developments which have intervened since Marshall's opinion in *Marbury v. Madison*, there remains scarcely any claim under the fourteenth amendment that can now be dismissed as totally frivolous, whereas a

claim under the general body of common law might have been dismissed as totally frivolous in the days when Horace Gray represented the pinnacle of scholarship on the Supreme Court of the United States.

Considering the difficulty of amending the Constitution—two-thirds of each House of Congress must propound the Amendment, and three-fourths of the states ratify—we are thus brought to the question which is actually an English translation of the Latin phrase *Quis custodiet custodiet*—who shall regulate the regulators? To allow either the executive or the legislative branches of the federal government to overrule a judicial decision by a simple legislative act or executive decree would be totally alien to the idea of an independent judiciary. Yet an independent judiciary, which has been given such latitude as the loose language of the fourteenth amendment allows, runs the risk that its highest court—the Supreme Court of the United States—may turn into nine platonic guardians, as Learned Hand put it, each of them totally independent of public opinion or the will of the people, more often than not violently disagreeing with one another as to what the right answer to the question posed by a case should be. Any court which has the power possessed by the Supreme Court of the United States, and any judicial system which has the power possessed by the federal court system, is bound to draw criticism from all quarters.

Herein, alas, lies the rub. Although courts are bound to get criticism, the more difficult question is what consideration should the Court afford the criticism. Epithetical criticism—whether it be of “forced busing” or “handcuffing the police” on the one hand, to “cutting back on individual rights” or “curtailing the freedom of expression” on the other, can scarcely commend itself unless supported by careful analysis. And here, it seems to me, is the place where legal academia can exercise an important role. A genuinely detached body of scholars and students, observing the performance of the courts, can bring to bear on the decisions of those courts the same legal discipline which is supposed to have been the basis for those decisions. I suppose that scholars and students are no less subject than judges to the temptation to read their own views into the “vague and ambiguous mandate” of the fourteenth amendment and other similarly broad constitutional provisions. Academic freedom obviously contemplates that every legal scholar shall be free to pursue his own version of legal truth. But the question remains as to how responsive courts ought to be to various views of legal truth taken by various members of the legal academic community. I submit that the responsiveness of the courts should be determined by the character of the criti-

cism; analytical and objective criticism is the cornerstone of our profession and may claim a legitimate role in the judicial process. But legal academia, cannot any more than the judiciary, properly impose its own moral visions of the future, or its subjective views of how ambiguous phrases in the Constitution should be interpreted, on an unwilling populace of some 230 million. That is the role reserved to the people, through their elected representatives.

It is difficult to concentrate on academic or legal matters when surrounded by the spectacular scenery of the Malibu cliffs and the Pacific Ocean as is the Odell McConnell Law Center which we take pride in dedicating today. But presumably those who study law here are willing to risk that hazard. The hazard to which they and all students of the law should not succumb, I earnestly suggest, is the belief that being admitted to law school and obtaining good grades in legal courses qualifies them to assume a special role in authoritatively deciding large policy questions of national government, rather than merely qualifying them to judge the analytical soundness of judicial opinions. Perhaps I may conclude by reverting to the similar admonition of Alexander Pope in his "Essay on Man": lawyers, like other mortals, should heed his counsel:

Honor and shame from no condition rise;
Act well your part, therein all the honor lies.

