

CONSTITUTIONAL OPINIONS

# THE JUSTICE DEFIES EASY CARICATURE

## BY ALLEN MENDENHALL

The justice defies easy caricature.

By [Allen Mendenhall](#) – 1.8.15

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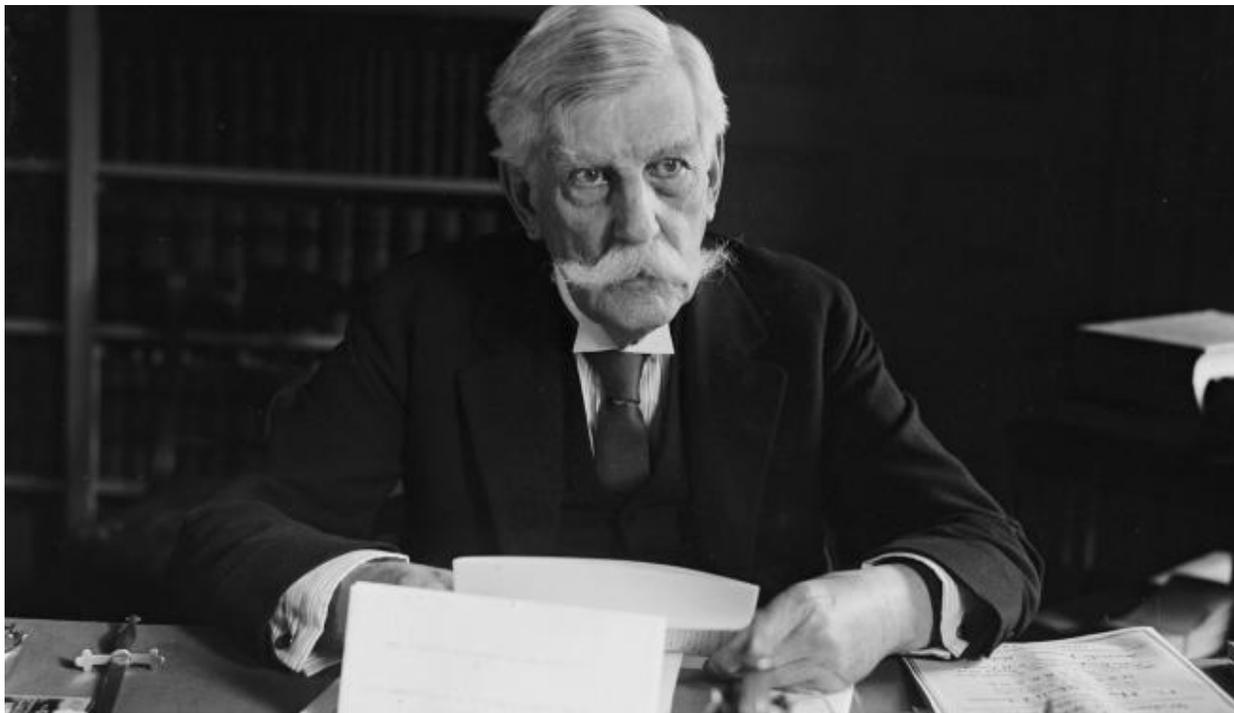
### Sympathy for Oliver Wendell Holmes

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## **Overruled: The Long War for Control of the U.S. Supreme Court**

**By Damon Root**

**(Palgrave Macmillan, 288 pages, \$28)**

The sounds coming from the echo chamber suggest that Damon Root's new book *Overruled: The Long War for Control of the U.S. Supreme Court* has been an unchecked success. On the book's cover Randy Barnett declares it

a riveting account of the raging debate over the future of our Constitution between those who contend that judges must 'defer' to

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legislatures and those who view the judiciary as an equal branch of government whose mandate is to secure the rights and liberties of the people by holding government to its just powers.

Writing for the Volokh Conspiracy blog at the *Washington Post*, Ilya Somin praises the book as the “most thorough account of the libertarian-conservative debate over judicial review so far.”

In the *Wall Street Journal* Michael Greve critiques the obvious weaknesses in Root’s narrative — its oversimplification — with which, Greve says, “legal historians may quarrel.” But Greve accepts Root’s negative portrayal of Justices Oliver Wendell Holmes, Jr., Louis Brandeis, and Felix Frankfurter, notable expositors of the doctrine of judicial restraint. The trio, Greve claims, “had not the foggiest notion of the Constitution,” which they “loathed... as inimical to their vision of government by experts.”

Here’s a contrary opinion from a libertarian student of the law: Root’s book suffers from caricature. His approach pits essentialized binaries (what he calls “two competing visions”) against one another in a fight for the good that one binary allegedly represents. History is rich and complex and not simply or without consequence pressed into two-sided struggles. Root would have benefited from a more concerted effort to understand the range of perspectives and heuristics embraced by jurists across a spectrum of backgrounds and beliefs.

Root purports to tell a story “which stretches from the Civil War

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period to the present,” but the key players are just three people: Holmes, Robert Bork, and Justice Stephen Field. The first two represent the doctrine of judicial restraint that might send “the whole country straight to the devil”; the third man represents an “aggressive legal approach” that Root attributes to libertarianism. Root seeks to show how conservatives over the course of the twentieth century adopted a jurisprudence of restraint that was once the darling of progressives. The subtext is twofold: that today’s conservatives need to be told their legal theory derives from the left, and that current libertarian jurists are part of a more dependable school of thought.

The problem is that the divide between libertarians and conservatives is not so clear in the legal context. In fact, many of both adhere to the basic tenets of originalism and textualism, although within those operative paradigms they may disagree. It’s also difficult to discern whether a judge is conservative or libertarian, since his job is to analyze constitutional provisions and statutes and prior decisions to determine what the law is, not what he wants it to be. A judge may be forced to rule against his political interests if the statutory authority is both unambiguous and constitutional; in such moments the judge has no power to overturn the will of the voters as manifest in legislation or to alter the Constitution.

The most devastating  
shortcoming of  
*Overruled* is its tendency  
to reduce complicated



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cases and figures to artless political categories. Root's Holmes is a fictional type, a stock character, not the actual jurist of history. Look no further than Thomas Sowell for a libertarian — or someone often categorized as a libertarian — who champions Holmes's jurisprudence rather than considering him an enemy. The real Holmes had much in common with F.A. Hayek, as Richard Posner has revealed in law review articles and in his book *Law, Pragmatism, and Democracy*.

Before Hayek, Holmes formulated his own version of “the knowledge problem,” maintaining that no one judge or group of judges should presume to understand the facts on the ground well enough to direct the goings on in local communities with disparate values and conflicting objectives. We learn the diverse preferences of citizens through the feedback mechanisms of the market and should not have them prescribed for us through the commands of judges and justices. That's why Holmes deferred to state legislatures to, in his words, “prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states.”

Root advocates an inversion of Holmes's jurisprudence, for

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something loosely akin to rule by Platonic Guardians: put wise activist philosophers on the bench, he seems to say, and they can waive their magic wands to perform libertarian miracles. With such power and leeway, couldn't they also do the opposite? Couldn't they impose on us a scheme of "rights" — to subsistence or a basic income — that's antithetical to the free market? Scholars on the left such as Erwin Chemerinsky, Charles Black, Peter Edelman, and Frank Michelman champion the same expansive approach that Root celebrates. Their goal, however, is to empower the judiciary to impose a statist agenda by regulating business and eradicating economic liberties.

If Root's claim is true that libertarian jurists are "the sworn enemies" of Holmes, then why has Posner — who's no dummy — declared Holmes to be "liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer"? Posner goes further, suggesting that Holmes "made laissez-faire his economic philosophy."

Holmes was influenced by Spencer and versed in Mill. It isn't accurate to assert, as Root does:

Spencer was regarded as the late nineteenth century's leading proponent of full-throated laissez-faire. That's why Holmes cast him as a villain in his *Lochner* dissent.

For starters, Holmes did not cast Spencer as a villain; he simply



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stated that Spencer’s views on economics were irrelevant to the Fourteenth Amendment, which secured federal citizenship for former slaves and prohibited the states from abridging the privileges or immunities of that citizenship. In reality, Holmes’s assessments of Spencer were mixed, and the justice’s letters are sprinkled with references to him. He cited Spencer while developing a theory of torts. He read Spencer’s autobiography. He criticized Spencer less for his philosophy than for his style and idealism, saying, for instance, “He is dull. He writes an ugly uncharming style, his ideals are those of a lower middle class British Philistine.”

Louis Menand has written that Holmes’s “personal sympathies were entirely with the capitalists.” That seems right: he once jested that “if they could make a case for putting Rockefeller in prison I should do my part; but if they left it to me I should put up a bronze statue of him.” Nevertheless, Holmes was no libertarian. What libertarian would proclaim, “Taxes are what we pay for civilized society”? Just because he wasn’t a libertarian, however, doesn’t mean he offered no good insights.

Holmes read Adam Smith shortly before writing his dissent in *Abrams v. U.S.*, in which he trumpeted that “the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” This dissent has been dubbed “libertarian” by so many commentators that listing them all would take up the space of this entire review. Surprisingly, Root mentions Holmes’s affirmation of the conviction of Eugene Debs under the

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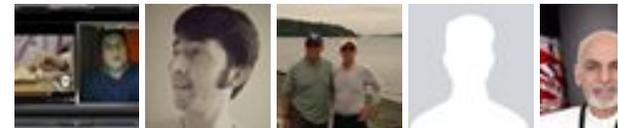
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Espionage Act of 1917 but fails to address this more famous dissent, which doesn't square with Debs's case.

It's possible to attack Holmes shrewdly, without raw polemics that skip over inconvenient facts. David Bernstein's *Rehabilitating Lochner* does that, condemning the ideas and not the man who held them. Only the cartoonish cover of Bernstein's book, which depicts Holmes being punched out by Justice Wheeler Peckham in a boxing ring, is unfair to Holmes.

Whether Bork can be easily lumped together with Holmes is another matter. Bork called Holmes's dissent in *Lochner* "flawed," even though he agreed with most of it. He decried Holmes's marketplace metaphor in *Abrams* as "foolish and dangerous."

Root's book may appeal to already-within-the-pale libertarian readers but won't interest many beyond that audience. That's probably a good thing. The truth is that judicial restraint and judicial activism are not palpably partisan creeds that can be readily summarized or easily illustrated. Labeling them "conservative" or "libertarian" is not conclusive as to their substance. Judges with wildly divergent worldviews have pushed the limits of their authority to reach their desired result in certain cases.

In the book's opening pages, Root asserts that Elena Kagan, who claimed in her confirmation hearings that the political branch, not the judiciary, was the proper mechanism for dispensing with bad laws, "had placed herself squarely within a long and venerable legal

tradition that seeks to give the government wide control over regulatory affairs while simultaneously preventing most interference from the courts.” This is missing the point. The courts, which Root wishes to vest with wider control over regulatory affairs, are not necessarily an outside check on our problematically powerful government; they are *part* of our problematically powerful government.

The federal judiciary is an arm of the state, plain and simple, peopled by *unelected* judges and justices who *aren't* accountable to the people. It's thus strange to see Root cast the judiciary as the people's branch. If a member of Congress isn't representing the people's interest, the people can, excuse me, throw the rat out. Federal judges, on the other hand, must be impeached.

Root's recommendation for a more robust judiciary makes sense only if most judges are libertarians. Most aren't. Therein lies the case for judicial restraint. 

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#### ABOUT THE AUTHOR

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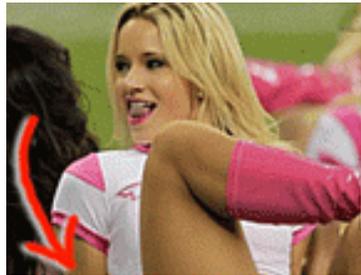
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"It is better for all the world, if instead of waiting to execute degenerat  
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- Oliver Wendell Holmes

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