

JUSTICE HOLMES AND CONSERVATISM

ALLEN MENDENHALL*

David E. Bernstein's recent book, *Rehabilitating Lochner*,¹ is a careful work of historical revisionism that ought to both please and motivate libertarian and conservative jurists. From its cover, however, one might think that Justice Oliver Wendell Holmes Jr. has nothing constructive or commendable to offer libertarians and conservatives.

The cartoonish image is of a boxing ring in which Justice Peckham and Justice Holmes both appear white-haired and eminently mustachioed. They have apparently been fighting, and the former stands over the latter with his right fist raised in what could be either triumph or anticipation. The judges are wearing their robes and boxing gloves, and Holmes, looking worried and slightly pathetic, crouches on the ground as though about to crawl away. His eyes stare pleadingly at someone or something; they seem to be asking an out-of-frame referee to call the fight.

Although it is good advertisement, this caricature sets up a misleading binary opposition. It suggests that Peckham, who authored the majority opinion in *Lochner v. New York*,² an opinion generally understood as libertarian and protective of the freedom of contract,³ supports individual rights whereas Holmes, the dissenter, supports government power over business.⁴ Such

* Allen Mendenhall (M.A., J.D., LL.M.) is a staff attorney for Chief Justice Roy S. Moore of the Supreme Court of Alabama and a doctoral candidate in English at Auburn University. Visit his website at AllenMendenhall.com. The views expressed herein do not reflect those of his employer.

1. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

2. 198 U.S. 45 (1905).

3. See Robert M. Anderson, *The Judiciary's Inability to Strike Down Healthcare Service Certificate of Need Laws Through Economic Substantive Due Process*, 2 CHARLESTON L. REV. 703, 709–10 (2008).

4. See *id.* In *Lochner*, the Court held that a section of the New York labor law prohibiting bakery employees from working more than sixty hours per week violated an individual's freedom of contract. *Lochner*, 198 U.S. 45. The majority reasoned that while a state does have an interest in protecting the health of its citizens, it can only limit the freedom to contract if the statute has a direct relation to and substantial effect on employee health. *Id.* at 64.

was not the case.

Holmes is enigmatic. He was no conservative, but he was no progressive, either. Misconstruing and mislabeling Holmes only leads to the confusion and discrediting of certain views that conservatives and libertarians alike seriously ought to consider. One must not mistakenly assume that because *Lochner*-era Fourteenth Amendment due process jurisprudence favored business interests,⁵ Holmes stood against business interests when he rejected New York's Fourteenth Amendment due process defense. (I have avoided the anachronistic term "substantive due process," which gained currency decades after *Lochner*.)⁶

Holmes rejected a methodology, notwithstanding the end result. He resisted sprawling interpretations of words and principles—even if his hermeneutics brought about consequences he did not like—and he was open about his willingness to decide cases against his own interests.⁷ As he wrote to his cousin John T. Morse, "It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits."⁸

What Holmes disliked about the Fourteenth Amendment was neither the Amendment itself nor due process, but the liberal reading and interpretation of due process that infringed upon the power and province of the several states. Holmes put it this way in his dissent in *Baldwin v. Missouri*:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower

5. See Anderson, *supra* note 3 ("During the *Lochner* era, the Supreme Court recognized economic liberties as protected by the Fourteenth Amendment's Due Process Clause.").

6. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999).

7. Letter from Oliver Wendell Holmes Jr. to John T. Morse (Nov. 28, 1926), quoted in LOUIS MENAND, THE METAPHYSICAL CLUB 67 (2001).

8. *Id.*

reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words "due process of law[,"] if taken in their literal meaning[,] have no application to this case; and while it is too late t[o] deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.⁹

It has become commonplace to refer to Holmes as a progressive,¹⁰ but Louis Menand points out that "[t]here have been hundreds of efforts since Holmes published *The Common Law* . . . to sew a political label on him. Commentators have tried to prove that he was a progressive, a liberal, a civil libertarian, a democrat, an aristocrat, a reactionary, a Social Darwinist, and a fascist."¹¹ Menand adds that

Holmes has been called a formalist, a positivist, a utilitarian, a realist, a historicist, and a pragmatist (not to mention a nihilist). Commentators who cleave to one of these terms usually find themselves spending a good deal of time explaining why commentators who favor one of the other terms cannot possibly be right.¹²

Menand scoffs at these careless exercises in labeling, which merely assume that "[Holmes] was interested in the political consequences of his ideas."¹³ Menand asserts, correctly, that "one thing that can be said with certainty about Holmes as a judge is

9. 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

10. See Eric R. Claeys, *Takings, Regulations and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1619 (2003) ("Mahon was ironic because the Court's opinion was written not by any of the conservatives on the bench, but by progressive icon Justice Holmes, famous for dissenting in *Lochner v. New York*."); Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 736 (1999) (reviewing DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997)) ("Only after World War I did most Progressives, such as Holmes and Brandeis, suddenly discover the value of free speech."); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395 (2003) ("For Holmes and the Progressives and [the] legal realists who followed in his footsteps, the essence of property was exclusion"); Robert H. Whorf, *Civil Rights: Looking Back—Looking Forward*, 4 BARRY L. REV. i, i (2003) ("During this period, even the Court's early Twentieth Century legendary progressive, Oliver Wendell Holmes, 'in a cynical and disingenuous opinion . . . insisted that federal courts could do nothing about racial disenfranchisement.'").

11. LOUIS MENAND, *AMERICAN STUDIES* 33 (2002).

12. *Id.* at 35.

13. *Id.* at 33.

that he almost never cared, in the cases he decided, about outcomes [H]e was utterly, sometimes fantastically, indifferent to the real-world effects of his decisions.”¹⁴ In other words, Holmes did not reach his decisions because they would produce results he approved of; he reached them because he thought they were conclusions he had to reach in light of the facts, circumstances, and rules.

Holmes was not necessarily hostile to the workaday effects generated by the freedom of contract principles espoused by the majority in *Lochner*,¹⁵ instead, he was hostile to the federal-judicial regulation of citizens based upon the vagaries of an ideal like “liberty,” a word so vacuous that it could be appropriated, as it is today, by disparate ideological camps supporting vastly different political agendas.¹⁶

The pragmatist in Holmes disliked making decisions that were not rooted in lived experience or based upon observable, concrete phenomena relating to commonplace interactions among regular people.¹⁷ Holmes also disliked any tendency to marry morality and law, since law, for him, was nothing more than “the prophecies of what the courts will do in fact.”¹⁸ Holmes considered a judge’s positions to be subject to the restrictions of the Constitution, which he believed only on rare occasions permitted federal judges and Supreme Court Justices to overturn the legislative acts of state governments.¹⁹

Holmes was not an opponent of big business or industry.²⁰ He claimed that “the man of the future is the man of statistics and the master of economics,”²¹ and he adored titans of industry and once remarked that “if they could make a case for putting

14. *Id.*

15. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating that it is not his “duty” to give his opinion on the matter).

16. *Id.* at 76 (“[L]iberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ”).

17. See OLIVER W. HOLMES, THE COMMON LAW 1 (1881) (“The life of law has not been logic: it has been experience The law embodies the story of a nation’s development through many centuries.”).

18. Justice Oliver W. Holmes, The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 460–61 (1897).

19. *Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

20. Letter from Oliver Wendell Holmes Jr. to Lewis Einstein (Oct. 28, 1912), in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 141 (Richard A. Posner ed., 1992).

21. Holmes, *supra* note 18, at 469.

Rockefeller in prison I should do my part; but if they left it to me I should put up a bronze statue of him.”²²

Menand points out that Holmes’s “personal sympathies were entirely with the capitalists” and that Holmes “thought that socialism was a silly doctrine.”²³ Richard Posner submits that Holmes had “made laissez-faire his economic philosophy” years before *Lochner* and that Holmes “doubtless thought the statute invalidated in *Lochner* [was] nonsense.”²⁴

Posner doubts “whether the Fourteenth Amendment was intended to authorize the kind of freewheeling federal judicial intervention in the public policy of the states that *Lochner* has come to symbolize,”²⁵ and libertarians and conservatives who lately have decided to deride Holmes’s position in *Lochner* would do well to remember that what Holmes feared was the tendency of federal judges to invalidate state laws with theories not explicit in the Constitution.²⁶

None other than Robert Bork has sided with Holmes and referred to *Lochner* as an example of “judicial usurpation of power.”²⁷ Justice Scalia, who with Justice Thomas rejects the substantive due process theories emanating from *Lochner*, has used the same word—“usurpation”—while discussing liberal readings of the Fourteenth Amendment.²⁸

If Holmes was an unashamed capitalist, he also did not think that unelected, immensely powerful federal judges should bring about a flourishing of capitalism from their comfortable government perches.²⁹ Posner goes so far as to say this about Holmes:

Holmes’s reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—what should have been but was not apparent from his judicial opinions and his occasional pieces—

22. Holmes, *supra* note 20.

23. MENAND, *supra* note 7, at 65.

24. RICHARD A. POSNER, LAW AND LITERATURE 344 (3rd ed. 2009).

25. *Id.* at 347.

26. Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 433–34 (1927) (Holmes, J., dissenting).

27. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990).

28. McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring); City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

29. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905).

that, so far as his personal views were concerned, he was liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance and were doomed to fail Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding.³⁰

This passage is all the more remarkable in light of Holmes's claim in *Lochner* that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statistics."³¹ What Holmes meant, as he makes clear elsewhere in the dissent, is that the Constitution must apply to all citizens despite their differing views.³² Holmes felt that his job did not entail spreading his beliefs about economics; those beliefs were irrelevant to judging.³³

Holmes has been called "as profound, as civilized, and as articulate a conservative as the United States has produced."³⁴ Max Lerner marks Holmes as "an aristocratic conservative who did not care much either for business values or for the talk of reformers and the millennial dreams of the humanitarians."³⁵ Nevertheless, many progressive jurists—Roscoe Pound, Benjamin Cardozo, Jerome Frank, and Learned Hand among them—idolized Holmes.³⁶ How can this be explained?

All labels for Holmes miss the mark. Holmes defies categorization, which is a lazy way of affixing a name to something in order to avoid considering the complexity and nuances, and even contradictions, inherent in that something.

30. Richard A. Posner, *Introduction* to OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., at xv (Richard A. Posner ed., 1992).

31. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

32. *Id.* at 75–76 (stating that the Constitution "is made for people of fundamentally differing views . . .").

33. *Id.* at 75.

34. Irving Bernstein, *The Conservative Mr. Justice Holmes*, 23 NEW ENG. Q. 435, 435 (1950).

35. Max Lerner, *Introduction* to OLIVER WENDELL HOLMES, JR., THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS, at xxviii (Max Lerner ed., 2nd ed. 2010).

36. See Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 685, 687 (2012) (citing examples of Pound, Hand, and Cardozo praising Holmes); Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119, 119 (1999) (quoting Frank's praise of Holmes).

"Only the shallow," said Justice Felix Frankfurter, "would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification."³⁷

Holmes's position regarding the Fourteenth Amendment was put best in his dissent in *Truax v. Corrigan*: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the se[veral] states . . ."³⁸ Holmes was careful to qualify that he would maintain this position on the Fourteenth Amendment "even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."³⁹

Holmes was not a relativist; he simply thought that his position on the Supreme Court did not give him license to prescribe moral beliefs for the rest of the country.⁴⁰ He reasoned that a judge should not impose his personal ideology onto a populace; he did so in part because his experience as a soldier in the Civil War led him to disdain avoidable conflicts between different cultures trying to impose their norms on each other and intensely disliked those who claimed to know what was true or right with absolute certainty.⁴¹ His devotion to judicial restraint and his fear of judicial tyranny were such that he once wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."⁴²

Holmes tended to give state law the benefit of the doubt when the Constitution was not clear on an issue. In *Giles v. Harris*, he refused to grant relief from an Alabama law that disqualified many blacks from voting.⁴³ In *Bartels v. Iowa*, he dissented from the majority by reasoning that Iowa's ban on foreign language education in school was constitutional.⁴⁴ His dissent in *Tyson &*

37. Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 698 (1916).

38. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

39. *Id.*

40. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

41. MENAND, *supra* note 7, 61–62; see also Thomas R. Healy, *Holmes and the Battle of Ball's Bluff: Touched with Fire*, OR. ST. B. BULL., Aug./Sept. 2009, at 40, 42 (discussing Holmes's involvement in the Battle of Ball's Bluff during the Civil War).

42. Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, at 249 (Mark De Wolfe Howe ed., 1953).

43. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

44. *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

Brother v. Banton asserts that

a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.⁴⁵

A common mistake is to take Holmes's deference to the mores and traditions of states and localities as evidence of his shared belief in those mores and traditions. Holmes did not have to agree with the opinions of states and localities to say that federal judges and Supreme Court Justices should not inject their own worldview into the life of a community with an opposing one. As Frankfurter said of Holmes, "He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom."⁴⁶

These stances do not make Holmes a constitutional conservative; they make him a pragmatist in the judicial sense. Holmes's position on judging is analogous to William James's suggestion that a person is entitled to believe what he wants so long as the practice of his religious belief is verifiable in experience and does not infringe upon the opportunity of others to exercise their own legitimate religious practices.⁴⁷ James expounded the idea of a "pluralistic world," which he envisioned to be, in his words, "more like a federal republic than like an empire or a kingdom."⁴⁸ Holmes likewise contemplated the notion of a federal republic in his opinions and dissents.⁴⁹

Holmes's deference to state legislatures may have had

45. *Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

46. Frankfurter, *supra* note 37, at 686.

47. See WILLIAM JAMES, *The Varieties of Religious Experience*, in WILLIAM JAMES: WRITINGS 1902–1910 436–38, 459–60 (Bruce Kuklick ed., 1987) (arguing that it is not regrettable that there are many different religious sects and creeds and that others should be tolerant of these differences).

48. WILLIAM JAMES, *A Pluralistic Universe*, in WILLIAM JAMES: WRITINGS 1902–1910, *supra* note 47, at 625, 776.

49. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, 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.").

something to do with the majoritarianism of John Dewey as some critics have alleged,⁵⁰ or, as I prefer to think, it may have had to do with his hesitance to encroach upon the sovereignty of localities. Either way, Holmes resisted the temptation to command faraway people on the grounds of supposed rights and liberties about which there was much disagreement.⁵¹

In light of Holmes's opinion in *Buck v. Bell*,⁵² which upheld Virginia's eugenics statute,⁵³ libertarians and conservatives have associated Holmes with eugenics and eugenics with progressivism; however, a belief in the biological inferiority of certain groups and the concomitant call for human sterilization were not exclusive to progressives.⁵⁴ Nor were they conservative.⁵⁵ Although controversial from the beginning, ideas supporting eugenics were simply what many in that era, be they progressive or conservative, supposed to be scientifically correct and politically prudent.⁵⁶

The eugenics movement was progressive in the broadest sense of the word in suggesting a utopian genetic vision toward which humans ought to advance, but that is the very sense of the word that is difficult to apply to Holmes. Holmes was no doubt insensitive (to put it mildly) when he declared that "[t]hree generations of imbeciles are enough,"⁵⁷ yet his opinion is tough to reconcile with the ideas of eugenicists like Charles Davenport.⁵⁸

50. See Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1468 (1994); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 184 n.67 (1982).

51. See, e.g., Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

52. 274 U.S. 200 (1927).

53. *Id.* at 208.

54. See Robert E. Mensel, *The Antiprogressive Origins and Uses of the Right to Privacy in the Federal Courts 1860–1937*, 3 FED. CTS. L. REV. 109, 117–18 (2009) (stating that the many reforms of the time were diverse and were not wedded to a particular party or ideology).

55. *See id.*

56. *See id.*

57. *Buck*, 274 U.S. at 207 (reasoning that the interest of the state in a "pure" gene pool outweighed the individual interest in bodily integrity).

58. See, e.g., CHARLES BENEDICT DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* 255–59 (1911) (proposing ways to eliminate undesirable traits in people, including sterilization and segregating the feeble-minded from everyone else unless it can be shown that the feeble-minded are in their condition because of their environment rather than their heritable genes); *id.* at 260 (suggesting that controlled mating can enhance the species); *id.* at 266 (proposing that criminals be restricted in their right to mate); *id.* at 267 (proposing that just as the state has the ability to take life, it also has the right to sterilize or segregate certain people from marriage); *id.* at 268–269 (proposing that the state use the census to collect data about heritable traits so that families can advise their

Holmes's dissent in *Lochner* owes to the influences of C.S. Pierce, William James, and Chauncey Wright and has as its aim an opposition to federal intrusion upon state law as well as a protest against abstractions such as "rights" or "freedoms" and other appropriable signifiers.⁵⁹ It wasn't that rights or freedoms did not exist (Holmes discussed rights at length in *The Common Law*⁶⁰); it was that unelected judges should not be in the business of defining them for everybody else.

Holmes explained that a judge's "first business is to see that the game is played according to the rules whether [he] like[s] them or not."⁶¹ A judge does not or should not attempt to legislate or mobilize political action based on what he thinks is right; he must decide particular cases based on what the rule is because rules evolve out of the natural and gradual unfolding of the common law or else are voted upon by the people through their representatives. Holmes most likely agreed with the principle of freedom of contract that the *Lochner* majority delivered, but he was not about to dictate his belief to a state or local government, especially on such a liberal reading of the Constitution.⁶²

Conservatives and libertarians ought to avoid the knee-jerk demonization of Holmes. Rather than trying to state what Holmes stood for, Holmes's critics ought to acknowledge that his thought reflects a multiplicity of influences, any one of which might have prevailed in one writing or another. There is much in Holmes that will excite and inform conservatives and libertarians, if only they would take the time to read him closely and to put his ideas into the appropriate context. To pass judgment on a man and his ideas without being familiar with them is precisely the type of thing Holmes cautioned against and labored to avoid. From that effort, at least, we can glean his conservatism.

children about how to marry).

59. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

60. OLIVER W. HOLMES, THE COMMON LAW *passim* (1881).

61. Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915).

62. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).