Nomocracy in Politics

L i b e r t y , P r u d e n c e , I m p

Nomocracy and Oliver Wendell Holmes, Jr.

By Allen Mendenhall, September 30, 2013

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Introduction

Saying anything celebratory or positive about Oliver Wendell Holmes, Jr. will invariably provoke the ire of commentators on both the left and the right. Few jurists are as controversial or confusing. This essay avoids passing judgment on him or his jurisprudence and does not praise or condemn his judicial opinions and dissents; instead, it makes the case that Holmes's jurisprudence reflects nomocracy as described in the "Editorial Statement" of this magazine. For one who endorses nomocracy or nomocratic constitutionalism, this proposition might seem welcome or unwelcome, depending on what one has read or heard about Holmes. Most educated people interested in the law carry with them a bundle of presuppositions about Holmes that are difficult to see beyond and overcome. Nevertheless, there are appropriate reasons why figures as wide-ranging as Robert H. Bork,[1] William H. Rehnquist,[2] Thomas Sowell,[3] and J. Harvie Wilkinson, III[4] have praised Holmes, whose jurisprudence has been compared to the philosophy of Michael Oakeshott.[5]

At the outset, I encourage readers to undertake a sort of Cartesian thought experiment: suspend your judgment and cast doubt on what you know (or think you know) about Holmes; then weigh the evidence, which I will supply, in the light most favorable to him and draw what reasonable inferences are necessary to determine whether he was a nomocratic or teleocratic thinker. If you determine, after viewing the facts, that the evidence does not support the contention that Holmes's thought was nomocratic, then you are invited—indeed urged—to respond to this piece.

Although I submit that Holmes is nomocratic, I am mindful of Justice Felix Frankfurter's admonition that "[o]nly the shallow would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification."[6] A definition is therefore in order. By "nomocratic" and "nomocracy," I mean the opposite of "teleocratic" and "telocracy." Forrest McDonald explains the difference in this way:

> *[The idea behind nomocratic constitutionalism] is that the Constitution was designed to bring government under the rule of law, as opposed to achieving any specific purpose. . . .[T]he Constitution is primarily a structural and procedural document, specifying who is to exercise what powers and how. It is a body of law, designed to govern, not the people, but government itself; and it is written in language intelligible to all, that all might know whether it is being obeyed. The alternative, teleocratic view, is one that has come into fashion the last few decades and has all but destroyed the original Constitution. This is the notion that the design of the Constitution was to achieve a certain kind of society, one based upon abstract principles of natural rights or justice or equality or democracy or all of the above. It holds that the specific provisions of the document are of secondary importance or none at all; what counts are the "principles" it supposedly embodies, usually principles based upon the Declaration of Independence or Lincoln's Gettysburg Address, neither of which has any standing in the law.[7]*

Marshall L. DeRosa, working out of McDonald's paradigm, offers additional clarification regarding the difference between nomocratic and teleocratic constitutional schemes:

> *If the Constitution is essentially nomocratic, then the federal courts would be restricted to the enforcement of constitutionally established procedures through which participants in the political process compete against one another in the attempt to have their respective interest prevail in the public policy-making process, whether those interests are economic, social, cultural, religious, regional, and/or political. Judicial review would be invoked when the procedures are allegedly breached, with the courts being responsible for upholding the constitutional integrity of the political process. Under this model political questions are nonjusticiable. This does not mean that the Constitution fails to place limits on nomocratic procedures for making public policy. It certainly does (see Art. I, sections nine and ten and the Bill of Rights), but these limits were nomocratically produced through the drafting and ratifying of constitutional provisions. . . .Nevertheless, if the U.S. Constitution is construed to be a teleocratic a priori embodiment of truth, justice, and righteousness, with U.S. Supreme Court justices serving as its privileged interpreters, then popular control over important areas of public policy becomes precarious and subject to the domination of exclusive interests—usually ideological in nature—which at any particular period of constitutional development may exercise control over the policy-making process through the institutional Supreme Court.[8]*

Holmes favored a nomocratic approach to judging that is in keeping with these descriptions. His preference for nomocracy is evident in (1) his judicial restraint in the form of deference to legislatures; (2) his admiration for the common law system in which rules evolve slowly and incrementally while always retaining and reflecting the wisdom and values of our predecessors; and (3) his skepticism about natural law and natural rights that, as concepts, are vague and appropriable enough to justify vastly different and even radical approaches to judging. Let's consider each position *seriatim*.

I. Judicial restraint in the form of deference to legislatures

When, in 2009, President Obama was tasked with nominating a successor to Justice David H. Souter on the United States Supreme Court, the focus was upon Obama's expressed criterion for excellence: "empathy." What it meant to be an empathetic justice and how an empathetic justice was supposed to rule were never made clear. During this time, Sowell penned an op-ed that presented empathy as

antithetical to the law and referred to Holmes as a "*great Supreme Court justice*" *who would not have been* "*appointed under Pres. Barack Obama's criterion of* 'empathy' *for certain groups*." Sowell explained that Holmes "had empathy for some and antipathy for others, but his votes on the Supreme Court often went against those for whom he had empathy and in favor of those for whom he had antipathy." He then recalled Holmes's own words: "I loathed most of the things in favor of which I decided." Sowell might have added Holmes's remark to his cousin, John T. Morse, that "[i]t 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."[9]

What makes a judge rule against his beliefs? The answer is the preempting belief that his other beliefs are irrelevant to the job at hand. 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."[10] This remark anticipates Chief Justice John Roberts's umpire analogy, made famous during his confirmation hearings.

Holmes's judicial restraint meant deference to state legislatures. "I think the proper course," he said, "is to recognize 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."[11] The judge or justice should respect the will of the people, as expressed through legislation enacted by elected representatives, so long as that legislation is within the fixed parameters of the United States Constitution and the state constitution. No matter how bad or offensive the legislation appears to be, the judge is not to disturb it absent obvious constitutional authority to do so. "[I]f my fellow citizens want to go to Hell," Holmes said, "I will let them. It's my job."[12] On this theory, Holmes wrote in favor of an Alabama law disqualifying blacks from voting[13] and an Iowa prohibition against the teaching of foreign languages.[14] Justice Frankfurter most likely had cases like these in mind when he said that Holmes "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."[15] In the 1990s, Thomas Grey echoed Frankfurter, remarking that Holmes "believed that his public duty was to subordinate his own views to the dominant opinion of the community, that of his masters, the people. He did not respect the substance of those views, but he respected their source."[16]

In Holmes's opinions and dissents, there are two glaring exceptions to this default position that a state law must be upheld so long as it is constitutional; these are in the areas of free speech and *habeas corpus*. So much has been made of the former that there is now an entire book on the subject: *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America (2013)* by Thomas Healy. This book shows that Holmes was inclined to defer to state legislatures but eventually flip-flopped to support more vigorous protections of free speech. As for *habeas corpus*, his opinion in *Moore v. Dempsey*[17] and his dissent in *Frank v. Mangum*[18] reveal an unwillingness to go along with state law.

Holmes's deference to state legislatures led him to despise the Fourteenth Amendment, or at least its increasingly robust application against the states. His dissent in *Baldwin v. Missouri* lambasted such an application:

> *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 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.[19]*

Elsewhere, he was even more pointed in his reproach of the Fourteenth Amendment: "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 several states."[20] He added that he would uphold state laws even if they "may seem futile or even noxious to me and to those whose judgment I most respect."[21]

In his most famous dissent in *Lochner v. N.Y.*,[22] Holmes stood against the judicial activism of the majority and dissented in colorful language. Appealed from the Court of Appeals of New York, which ruled that a bakery owner had violated a New York labor statute restricting the working hours of bakers, *Lochner* held that the right to contract was protected from state government interference under the Fourteenth Amendment. The Supreme Court thereby ensured that the Fourteenth Amendment, which had been ratified to protect the rights of freed slaves, applied against the states even in cases having nothing to do with freed slaves. Bork would later describe this decision as a "judicial usurpation of power."[23] Justice Antonin Scalia also has employed the word "usurpation" to describe expansive interpretations of the Fourteenth Amendment at the expense of state and local autonomy.[24] Bork and Scalia appear to agree with Holmes.

Although Holmes adored titans of industry and praised business interests in his private correspondence, he dissented against his own personal preferences in *Lochner* and reasoned that the New York statute was not unconstitutional. He claimed that the majority opinion was "decided upon an economic theory which a large part of the country does not entertain,"[25] even if Holmes himself, for aught that appears, entertained this very theory. Rather than imposing a set of beliefs on the citizens, the United States Constitution, he said, was "made for people of fundamentally differing views."[26] Accordingly, the Supreme Court ought not to read into the Constitution restrictions on state sovereignty that are not there.

Much more could be said about Holmes's deference to state law. Those interested in a full treatment of Holmes's judicial restraint should consult Francis R. Kellogg's *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (Cambridge University Press, 2007). Law reviews on this topic are too numerous to list, but if I had to recommend one, it would be David Luban's "The Metaphysics of Judicial Restraint" in volume 44 of the *Duke Law Journal* (1994).

II. Admiration for the common law system in which rules evolve slowly and incrementally while always retaining and reflecting the wisdom and moral values of our predecessors

While serving as Chief Justice on the Massachusetts Supreme Judicial Court, Holmes penned the following about the common law practice of *stare decisis*:

> *We may agree that. . .it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. . . [,] [b]ut the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past.[27]*

This was, in effect, his thesis for *The Common Law*, published nearly twenty years earlier. It is a theme that recurred throughout his many opinions, dissents, and law review articles. Contrary to conservative criticism, Holmes was not anxious to dispense with rules and principles that had enjoyed a long career in the Anglo-American tradition. He did "not expect or think it desirable that the judges should undertake to renovate the law. That is not their province."[28] What was expected, desirable, and within the judges' province was following precedent, i.e., following established traditions and norms embodied in accumulated case decisions. Here is his explanation for why he himself followed precedent:

> *[P]recisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especially code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our important duty is to see that the judicial duel shall be fought out in the accustomed way.*[29]

The common law practice of adhering to residual precedents revealed, to him, that society is better off when trusting tested and tried principles than when making up untested and untried principles. Experimentation, when the people deem it necessary, must take place in the halls of legislatures where it is less likely to be radical because of the difficulty of achieving consensus among the people and their representatives (as against the relative ease of securing concurrences among a small group of likeminded judges or justices). Legislators may be voted out of office if their experiments fail, whereas federal judges, and many state court judges, enjoy life tenure. Because experimentation originates in the legislature and because the courts are merely responsive to legislation, "in substance the growth of the law is legislative."[30]

Philosophy without history is dangerous. Because the common law is old (just how old is disputed), a judge must have an understanding of history in order to adopt a cautious jurisprudence. On this point, rather than summarizing Holmes, I defer to his own words, which appear in an 1880 review of a contacts casebook by Christopher Columbus Langdell, then dean of Harvard Law School:

> *No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.*[31]

Similar words appear in the opening lines to *The Common Law*:

> *The object of this book is to present a general view of the Common Law. To accomplish this task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.*[32]

These lengthy passages are summed up by one line in *New York Trust Co. v. Eisner*: "A page of history is worth a volume of logic."[33] It would only belabor the point to comb through Holmes's writings for other, similar sentiments. His particular vision of the common law demands more attention than this short piece can give. These few quotations, however, provide glimpses into his complex jurisprudence that prizes history, incrementalism, gradualism, meliorism, and restraint—all elements of nomocratic constitutionalism. His occasional comments about how law adapts over time and in response to changing social settings is a reflection of his immersion in British common law theory that had little bearing on American public law or constitutional jurisprudence. (In this article, Bruce Frohnen touches on the difference between the old British common law system and our more recent constitutional system.) Holmes's view of the common law was not new: it was, if anything, anachronistic in an increasingly nationalized public law system that was governed by a federal constitution and regulated by federal judges. For guidance and methodology, Holmes looked back to when courts were divided into smaller jurisdictions with more limited scope over subject matter, when

lawsuits were fewer, when courts at law and equity were separate, when statutory or codified law was more restricted in range and application, when bureaucratic agencies were not as numerous or large, and when judges themselves were more educated in legal custom and doctrine.

III. Skepticism about natural law and natural rights that, as concepts, are vague and appropriable enough to justify vastly different and even radical approaches to judging

What did Holmes have against "the jurist's search for criteria of universal validity which he collects under the head of natural law"?[34] Having fought in the War Between the States and been wounded during three battles in that conflict, having transitioned from a young transcendentalist before the war into a disenchanted realist who fraternized with Southern sympathizers during and after the war, Holmes viewed natural law theories as merely philosophical cover for purely ideological programs. He had seen what happened when two great powers, the Union and the Confederacy, were convinced of the absolute rightness of their position and were willing to fight and die for their beliefs. He, therefore, thought that doubt and humility were necessary to temper flaming passions and to preserve civilization itself. "Certitude is not the test of certainty," he said, because "[w]e have been cock-sure of many things that were not so."[35] President Ronald Reagan would later parrot that line but substitute "liberals" for the pronoun "we." The point, anyhow, is that, in Holmes's opinion, too many natural law thinkers mistook their personal prejudices (which grow out of community influence) for holy decrees. If one is deluded into believing he is carrying out the will of God when he is not, his convictions quickly lead to tyranny and oppression.

"The prophecies of what the courts will do in fact, and nothing more pretentious," Holmes remarked, "are what I mean by law."[36] Put another way, the laws of nature or of nature's God, to employ Jefferson's phrase, might be one thing, and the laws of man another thing; if the two conflict, and if society does not recognize the conflict, then society will go on applying the laws of man. Both the laws of God and the laws of man are "laws" according to the nomenclature, but one is "true law" and the other not. Nevertheless, they are both "law" insofar as they constitute rules that people follow, and they will be applied as such in whatever society adheres to them. The question is not necessarily which constitutes law and which doesn't, but which law is better. Holmes believed it was up to the people to decide which is better, that is to say, which ought to obtain in society. If the criterion of the people was a perception of divine or natural law, so be it. Perhaps the people would misinterpret scriptural or preordained mandates; perhaps not. Either way, it was important that judges were not making the decision.

No matter what we think the absolute truth may be—and we are entitled to think what we wish about absolute truth—we nevertheless "leave to the unknown the final valuation of that which in any event has value to us."[37] Holmes never said that there was no God who designed the universe and demanded our obedience to a prescribed set of rules. What he said was that judges should not presume to be gods or even agents for God with unmediated access to His complete plan for the universe: "If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance."[38] Accordingly, we and our judges should not attempt to make a false idol or heaven-on-earth out of our legal system, for the "common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."[39]

We have seen in the thought of the West Coast Straussians and the neoconservatives (see here and here) a presumed universality in legal norms and conventions. We have also seen much resistance to such alleged universality, both here and abroad, most notably in the protests and demonstrations against American military intervention in foreign affairs during the last twelve years. Viewing Holmes's comments on natural law, in light of these recent champions of that jurisprudence, helps us to put his frustration into a contemporary context. "The jurists who believe in natural law," he says, "seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[40] One does not need to be as skeptical as he to recognize the importance of modesty and restraint in intellectual matters up for debate, especially within the framework of laws that coerce and control people. It is worth remembering that the binding opinions of a judge, however distinguished and applauded they may be during his lifetime, are but "the ultimates of a little creature on this little earth [and probably not] the last word of the unimaginable whole."[41]

Holmes's view leaves room for natural law, but he never explains how. Bork, however, supplies the explanation. He argues that "a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones. Any time he does so, he violates the limits of his own authority and, for that reason, also violates the rights of the legislature and the people. When a judge is given a set of constitutional provisions, then, as to anything not covered by those provisions, he is, quite properly, powerless. In the absence of law, a judge is a functionary without a function."[42] For a natural rights theorist or a proponent of natural law, this statement is absurd on its face: there can never be an absence of law. But for a nomocratic constitutionalist, theological and philosophical inquiries about divine law and natural order are not within the prescribed authority of the judge. He may philosophize on his own time but may not bind the people based on philosophical convictions that find no articulation or representation in established, functioning rules.

Citizens may want their judges to believe in divine law and natural order; yet they might, at the same time, fear the consequences of allowing judges to coerce society into adhering to possibly wrong interpretations about philosophical abstractions. In a nomocratic paradigm, then, natural law and positive law are not mutually exclusive; they interact. The judge, however, does not dictate his personal beliefs about natural law; instead, he follows those beliefs about natural law that are memorialized in positive rules representing the consensus of the citizens. The distinction between primary and secondary rules drawn by H. L. A. Hart is relevant on this score. It is one thing to say that murder is morally bad and should be punished, as natural or divine law so decrees, and quite another to say whether hearsay should be admitted during the prosecution of an alleged murderer, or whether a man committed "'murder'" when he became intoxicated and accidentally struck a young girl with an automobile while she was playing in the street. These examples suggest that positive law in the form of procedural and substantive rules is necessary to carry out divine or natural law. It also shows that what appears to be obvious natural law does not easily obtain in practice because actual events are more complex and unforeseeable than plain generalizations.

Bork explains the interrelation of positive law and divine or natural law by divorcing the office of the judge from the role of the citizen:

> *One need not be skeptical about the existence of moral truths and natural rights to think that appeals, by judges, to natural rights, appeals beyond the text of the Constitution, are a pretext for evading the discipline of the Constitution. . . .*
>
> *The formulation and expression of moral truths as positive law is, in our system of government, a system based on consent, a task confided to the people and their elected representatives. The judge, when he judges, must be, it is his sworn duty to be, a legal positivist. When he acts as a citizen, he, like all other citizens, must not be a legal positivist, but must seek moral truth. Otherwise, there is no way for anybody to say what the law should be, what should be enacted and what repealed.[43]*

A judge acting in isolation is prone to error and overconfidence due to the inherent limitations and fallibility of man. No matter how learned or righteous or pious the judge may be, the risk of a mistake or oversight is too great for his moral opinion—his alone—to control the everyday operations of the people subject to his jurisdiction. One may wonder whether Justice Kagan or Justice Sotomayor or Justice Ginsburg ought to dictate what moral rules obtain in our society, or whether a constitution should restrain them from imposing their moral views on communities having different moral views. Consider these questions in the context of more profound thinkers: If Augustine and Aquinas and Luther and Calvin and Jonathan Edwards and John Henry Newman and so on could not achieve consensus on matters of theology that bear upon the law, then who are our judges, untrained in matters of theology or philosophy, to pronounce which laws are "natural" or "divine" and therefore universally binding? The issue is not whether the laws of society should comport with the laws of God—any seriously religious thinker must believe they should—but what those laws are and how they should be brought about as positive law. One individual cannot be trusted to know what God ordains as law, so natural law must be brought about by a consensus of the people acting through elected representatives—and must be articulated as positive law. A society that is virtuous will enact positive laws consistent with scriptural, divine, or natural mandates; a society that is not virtuous, will not. Holmes may not have expressed his jurisprudence in these words, but they are implied in what he did

express. For more on what he did express, I recommend his essays "Ideals and Doubts" and "The Path of the Law."

Conclusion

Holmes once said that a "word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and time in which it is used."[44] This is neither a call for liberal hermeneutics nor an excuse for broad applications of the law; rather, it is a modest acknowledgment that language is contextual: what words mean depends on the speaker's or writer's intention and on the hearer's or reader's anticipated understanding. Only when the speaker's or writer's intention corresponds with the hearer's or reader's understanding is meaning possible. Therefore, Holmes's remark would suggest that judges ought meticulously to consider all diction and syntax for their precise meaning.

Holmes did just that. It has been said that he "was exacting in construing a statute" and that "once a statute was clearly constitutional and it became a matter of construing it, Holmes put on his most scrupulous spectacles."[45] In the context of the Fourteenth Amendment, and in particular due process, he protested that courts could distort the word "liberty" to mean or justify whatever they wanted. "[L]iberty," he said, "is perverted when it is held to prevent the natural outcome of a dominant opinion."[46] In *U.S. v. Johnson*,[47] he painstakingly analyzed the meaning of "misbranding" pursuant to § 8 of the Food and Drugs Act of 1906. In *Boston Sand & Gravel Co. v. U.S.*,[48] he considered a special act brought by the corporate owner of a steam lighter that had collided with a government destroyer and determined that the act did not permit the collection of interest as damages.

Holmes's own words deserve such high levels of scrutiny. Those of us who embrace nomocratic jurisprudence do not have to like Holmes to admit that he was nomocratic. For my own part, I wince at his callousness in *Buck v. Bell* and despise his comment that "[t]axes are what we pay for civilized society."[49] Many of his other views I find deplorable and indefensible. That makes me all the more grateful that his jurisprudence did not seek to impose those views on me and my society, and intrigued that he made it his business to ensure that judges were not treated as Platonic guardians. Had future Supreme Court justices followed in his footsteps, holdings such as the one in *Roe v. Wade* might not have been possible. He was selfish, vain, and obnoxious, but an impartial jurist. There's much to be said for that.

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[1] See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990) 6, 45–48, and 248.

[2] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review*, Vol. 54 (1976) 704–05.

[3] Thomas Sowell, *A Conflict of Visions* (New York: William Morrow, 1987) 38, 51–52, 55, 116, 162–63, 168, 175–77, 179, 181, 186–87, 201–02, 258 n. 55.

[4] "Showcase Panel IV: An Examination of Substantive Due Process and Judicial Activism." A debate between J. Harvie Wilkinson, III; Steven G. Calabresi; Mark Tushnet; William H. "Chip" Mellor; Walter E. Dellinger, III; and Nelson R. Lund and moderated by Edith H. Jones. The Federalist Society 2012 National Lawyers Convention. *Texas Review of Law & Politics*, Vol. 17, No. 2 (2013) 323. Calabresi refers to Holmes as "Judge Wilkinson's hero." Ibid., 326.

[5] See Sheldon M. Novick, "Introduction," *The Collected Works of Justice Holmes: Complete Public Writings and Selected Opinions of Oliver Wendell Holmes* (Sheldon M. Novick, ed., 1995) 115–17, 121, and 134 nn. 178–90.

[6] Felix Frankfurter, "The Constitutional Opinions of Justice Holmes," *Harvard Law Review*, Vol. 29 (1916) 698.

[7] Forrest McDonald, "Forward," in M. E. Bradford, *Original Intentions on the Making of the United States Constitution* (Athens: The University of Georgia Press, 1993) 16.

[8] Marshall L. DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control* (New Brunswick, New Jersey, and London: Transaction Publishers, 1996) 151–52.

[9] Letter from Oliver Wendell Holmes, Jr. to John T. Morse (Nov. 28, 1926), quoted in Louis Menand's *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001) 67.

[10] Oliver Wendell Holmes, Jr., "Ideals and Doubts," *Illinois Law Review*, Vol. 10 (1915) 3.

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

[12] Letter from Oliver Wendell Holmes, Jr. to Harold Laski (March 4, 1920), in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1925,* Vol. 1 (Mark DeWolfe Howe, editor, 1953) 249.

[13] *Giles v. Harris*, 189 U.S. 475, 488 (1903).

[14] *Bartels v. Iowa*, 262 U.S. 404, 412 (1921) (Holmes, J., dissenting).

[15] Frankfurter, supra note 6, 686.

[16] Thomas Grey, "Holmes's Language of Judging—Some Philistine Remarks." *St. John's Law Review*, Vol. 70, No. 5 (1996) 7.

[17] 261 U.S. 86 (1923). This case arose out of a race riot. Holmes authored the majority opinion, which held that federal courts may review *habeas corpus* petitions raising discrimination claims in state courts.

[18] 237 U.S. 309, 345–50 (1915). Holmes dissented on the grounds that federal courts may review state court rulings as to due process violations.

[19] 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

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

[21] Ibid.

[22] 198 U.S. 45 (1901).

[23] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, supra note 1, 44.

[24] *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).

[25] *Lochner*, 75.

[26] Ibid.

[27] *Stack v. New York R.R. Co.*, 58 N.E. 686, 687 (Mass. 1900).

[28] Oliver Wendell Holmes, Jr., *The Collected Legal Papers* (Mineola, New York: Dover Publications, 2007) 239.

[29] Ibid.

[30] Oliver Wendell Holmes, Jr. *The Common Law* (Boston: Little, Brown & Co., 1881) 35.

[31] Oliver Wendell Holmes, Jr. "Book Notices." *American Law Review*. Vol. 14 (1880) 234.

[32] Holmes, *The Common Law*, supra note 30, 1–2.

[33] 256 U.S. 345, 349 (1921).

[34] Oliver Wendell Holmes, Jr. "Natural Law." *Harvard Law Review*, Vol. 32 (1918–19) at 40.

[35] Ibid.

[36] "The Path of the Law," Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in *Harvard Law Review*, Vol. 10 (1897) 460–61.

[37] Holmes, "The Natural Law," *Harvard Law Review*, Vol. 32 (1918–19) 43.

[38] Ibid., 44.

[39] *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[40] Holmes, "The Natural Law," supra note 37, 41.

[41] Ibid., 43.

[42] Robert H. Bork, *A Time to Speak: Selected Writings and Arguments* (Wilmington, Delaware: ISI Books, 2008) 272.

[43] Ibid., 311.

[44] *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

[45] Max Lerner, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (New Brunswick, New Jersey: Transaction Publishers, 1989) 222.

[46] *Lochner v. N.Y.*, 198 U.S. 45, 75 (1903) (Holmes, J., dissenting).

[47] *U.S. v. Johnson*, 221 U.S. 488 (1911).

[48] 278 U.S. 41 (1928).

[49] *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

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