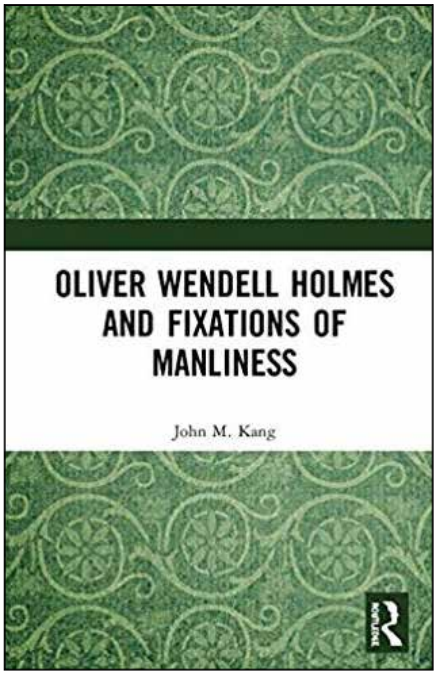


Oliver Wendell Holmes and Fixations of Manliness

By John M. Kang

Routledge, New York, NY, 2018. 159 pages, $140.

Reviewed by Henry Cohen

Why did Oliver Wendell Holmes Jr. enlist in the Union Army to fight in the Civil War? In 1926 and 1928, when he was in his 80s, Holmes wrote in two personal letters that, as a young man, he was an abolitionist, though he doesn't say that that was why he enlisted. In *Oliver Wendell Holmes and Fixations of Manliness*, John M. Kang is skeptical that opposition to slavery was Holmes' motivation for enlisting, because, "In both [letters] Holmes was trying to remember what he was thinking *sixty* years ago." Actually, Holmes enlisted at the outbreak of the war in 1861, which was 65 and 67 years before he wrote the letters, respectively. Nevertheless, I highly doubt that he'd misremember being an abolitionist or even that he had to "try" to remember. I clearly remember, without trying, my opposition to the Vietnam war when I was in college 50 years ago.

Kang, however, offers other, more cogent, reasons for his skepticism that Holmes enlisted because he was an abolitionist. One is that the two letters were to Harold Laski (a socialist) and Arthur Garfield Hays (co-founder of the American Civil Liberties Union), so Holmes might have exaggerated his opposition to slavery to impress these young admirers. After all, Kang writes, "there is scarcely any reference to racial justice in his wartime letters to his family."

Kang argues that, in fact, Holmes enlisted to prove his manliness. Holmes exalted manliness throughout his life; one might even say, to echo the title of the book under review, that he was fixated on the subject. At Harvard College, Holmes published an essay, "Plato," that praised Plato and Socrates as "manly and heroic" because each had "only himself to rely on, and no accepted faith that killed a doubt it did not answer." Many decades later, Holmes' dissenting opinions in the free speech cases of *Abrams v. United States* (1919) and *Gitlow v. New York* (1925) were, according to Kang, "animated" by his conception of manliness. Even his decision in *Buck v. Bell* (1927), upholding forced sterilization, reflected his fixation.

As a young man, Holmes was strongly influenced by Ralph Waldo Emerson, a family friend, who, in "Self-Reliance," wrote that "whoso would be a man must be a nonconformist." To Emerson, manliness consisted of two traits: autonomy (being your own man) and courage. Kang conjectures that Holmes enlisted "to become a genuine Emersonian man who would fight against the conformist impulses that had insisted on the validity of institutional slavery." May we infer that Holmes would have fought for slavery if doing so had been nonconformist? In his 1884 Memorial Day speech, Holmes said that Confederate soldiers "held just as sacred convictions that were the opposite of ours, and we respected them as every man with a heart must respect those who give all for their belief." If that were so, then I, for one, would have no heart.

On Memorial Day in 1895, when Holmes was 54 and a judge on the Supreme Judicial Court of Massachusetts, he gave a speech titled "The Soldier's Faith." Paraphrasing a line from the speech, Kang writes that Holmes complains about "animal rights activists, socialists," and others who condemn suffering instead of being manly. I knew that Holmes could not have spoken of animal rights activists, because that would be an anachronism. So I checked the speech: Holmes had spoken of "societies for the prevention of cruelty to animals." But that's an aside. A more significant line from "The Soldier's Faith" is that Holmes could not doubt "that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands."

Holmes, of course, uses "adorable" to mean worthy of adoration, and not, as it is currently used, to mean "cute" or "charming." That word aside, Kang takes Holmes' statement not to be jingoistic, as some have charged, but to advocate the soldier's faith in *himself*. Holmes believed, according to Kang, that, in the end, the soldier could "rely only on his own manliness." But, if manliness, as Emerson believed, consisted of autonomy and courage, then to blindly throw one's life away seems to me to be turning over one's autonomy to the state. It is also doing so without regard to the cause at hand. It apparently no longer mattered to Holmes (to the extent that it ever did) whether one fought to end slavery or to preserve it. Furthermore, Holmes speaks of a soldier's blindly throwing his life away, but neither he nor Kang mentions the other side of the coin: blindly taking others' lives. I find Holmes' statement repulsive.

Yet, after the Civil War, Holmes came to believe, according to Kang, that disagreements are better handled through civilized methods than through war, and that Holmes condemned war. Can this view be reconciled with "The Soldier's Faith"? Kang thinks so, writing, "War was vital for Holmes as a chance for the soldier to claim his honor as a man, not as a chance to fulfill the ends of political ideology…. The intensity and sacrifice the men brought to bear was admirable; the war itself was not."

Now we come to *Abrams* and *Gitlow*. In *Abrams*, decided in 1919, the Supreme Court, without mentioning the First Amendment, upheld convictions for distributing

anti-war leaflets during World War I. Earlier that year in a postal office, the police discovered 16 packages containing homemade bombs addressed to public officials, including Holmes. Kang believes that fear on the part of the justices underlaid the decision. Holmes, however, shrugged off the personal threat against him ("I haven't thought much about it") and thought that the other justices (except Louis Brandeis, who joined the dissent) should have been more courageous in their response to "a silly leaflet by an unknown man." Kang writes, "Abrams was not to be feared, but to be ridiculed, Holmes suggested." The justices were not being manly enough to tolerate opinions that, though "we loathe and believe to be fraught with death," do not "imminently threaten immediate interference with the lawful and pressing purposes of the law."

In his dissent in *Abrams*, Holmes wrote "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." This assertion, I believe, is not necessarily true, and that a better reason to protect freedom of speech is to respect individual autonomy. But Kang places Holmes' comment in a new light. Holmes believed, writes Kang, "that truth could not be objectively assessed." This view is supported by Holmes' statement in a letter to Laski that "when I say a thing is true I only mean that I can't help believing it—but I have no grounds for assuming that my can't helps are cosmic can't helps and some reasons for thinking otherwise." Holmes believed that the best test of truth is the marketplace, but the "truth" that the marketplace yields is not truth in an objective sense, because such truth does not exist. If truth doesn't exist, then one opinion is as good as another, and we ought to tolerate them all.

Gitlow, as Kang tells it, was the same as *Abrams* in relevant respects. The Supreme Court, again over the objections of only Holmes and Brandeis, affirmed a conviction for distributing an anti-government pamphlet. Again, Holmes minimized the threat, finding "no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views." The majority opinion said that Gitlow's "manifesto was more than a theory, that it was an incitement." But, Holmes replied, "[e]very idea is an incitement." Every idea "offers itself for belief and if believed it is acted on unless some other belief outweighs it.… If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." "[I]f my fellow citizens want to go to Hell," Holmes wrote elsewhere, "I will help them. It's my job." Kang sees Holmes as making citizens "struggle to defend their democracy; he was testing their manliness." Perhaps. But Holmes may have simply taken a liberal view of the First Amendment. To be fair, these alternatives are not mutually exclusive, and Kang states that his "thesis is meant to supplement, not supplant, those that have come before."

In *Buck v. Bell* (1927), his most notorious case, Holmes wrote the majority opinion upholding the forced sterilization of an allegedly, but not actually, feebleminded woman, concluding "Three generations of imbeciles are enough." In the opinion, Holmes wrote:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices.

To Holmes, the "best citizens," of course, were soldiers, who sacrifice their lives for others, whereas "imbeciles" were parasites who sap the strength of the state. Soldiers made manly sacrifices for us; mentally defective people could surely be expected to make a lesser sacrifice "in order to prevent our being swamped with incompetence."

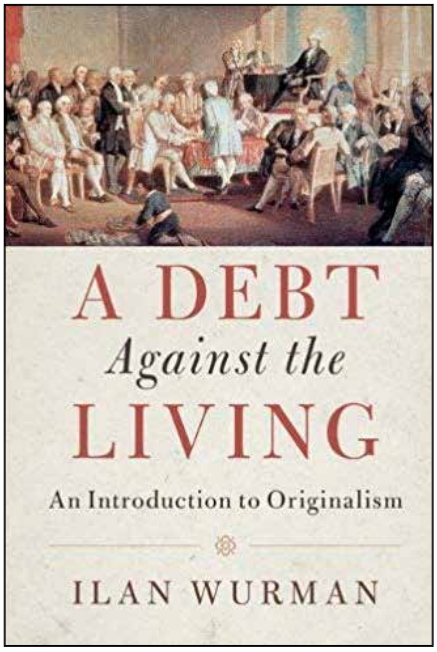
I have two non-substantive criticisms of the book. One is that Kang repeatedly repeats himself. On page 6, in consecutive paragraphs, he quotes Holmes as saying that his father's "sardonic criticisms" of him "made it difficult for [him] to be conceited." On page 8, Kang writes that Holmes' father was "a reported 5 feet 3 inches," and on page 10 writes that he was "slightly more than five feet." (Holmes, incidentally, was 6 feet, 3 inches tall.) After a few pages of discussing Holmes' experience at Harvard College, Kang writes that he entered as a freshman, which we would have assumed, because Kang has mentioned no previous college. Then, two pages later, Kang again states that he entered as a freshman. I will spare you numerous other repetitions.

In addition, the book's copyediting is not up to snuff. Kang writes that *Gitlow* (1925) was decided four years after *Abrams* (1919), and two pages later states correctly that it was decided six years later. *Abrams* was also not decided about 150 years after 1790. In chapter 3, Kang writes, "As an undergraduate, [Holmes] did, it is true, condemn slavery, as the last chapter showed." Chapter 2 has not a word about slavery; nor does chapter 1. The closest we come in the text preceding chapter 3 is a comment in the preface that I quoted in the second paragraph of this review.

Finally, Kang writes, "Holmes again found himself opposing the Court's majority, this time for upholding the legality of the Sherman Anti-Trust Act, the first federal law to outlaw business monopolies. What made Holmes's support for the act ironic was that [in a letter] he had ridiculed it as 'foolish.'" Obviously, something is wrong here, but Kang does not identify the case he is referring to, so we cannot tell what he meant to write. We can say, however, that for a judge to uphold a statute that he finds foolish is not ironic, as Kang claims. It is, as Holmes noted, a judge's job.

Holmes' belief, expressed in "The Soldier's Faith," "that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands," has long seemed to me a blight on Holmes' career. Yet it could not have come out of the blue. Kang places it in the context of Holmes' lifelong fixation on manliness, and makes a valuable contribution by showing the role that this fixation may have played in his judicial opinions—both in his great free speech dissents and in his odious opinion in *Buck v. Bell*. *Oliver Wendell Holmes and Fixations of Manliness* is a rare book in showing us a person who has been much written about in a new light. ⊙

Henry Cohen was a legislative attorney with the Congressional Research Service, Library of Congress from 1975 to 2010, and was the book review editor of The Federal Lawyer *from 1989 to 2017.*



A Debt Against the Living: An Introduction to Originalism

By Ilan Wurman

Cambridge University Press, New York, NY, 2017.
158 pages, $15.75 (paperback), $46.56 (hardcover).

Reviewed by Diego M. Pestana

In *A Debt Against the Living: An Introduction to Originalism*, author Ilan Wurman aims to introduce originalism to lawyers and non-lawyers. The book's title derives from correspondence between Thomas Jefferson and James Madison. Around the time of this country's founding, Jefferson wrote a letter to Madison in which Jefferson said the earth belonged to the living, each generation is independent from the previous generation, and the living should not be bound by the "dead hand of the past." Opponents of originalism use these excerpts to support their claim that the Constitution is a living document and the living should not be bound by the Founding Fathers' intent when they created the Constitution. In response, Wurman refers to Madison's lesser known reply to Jefferson in which Madison claimed each generation is dependent on previous generations and that "improvements made by the dead form a debt against the living, who take the benefit of them." In this assertion by Madison, Wurman sees support for the idea that each generation owes some form of obedience to previous generations, especially with respect to the form of government the Founding Fathers intended to create through the Constitution. It is by these early seeds of originalism, Wurman begins exploring the judicial philosophy.

Wurman begins by discussing the origins of originalism. Although Wurman discusses statements by former Attorney General Edwin Meese and Judge Robert Bork, in which both men criticized what they viewed as a growing trend of Supreme Court justices implementing what each believed to be sound public policy, Wurman argues originalism is an obvious or intuitive constitutional theory. According to Wurman, until the 20th century, most lawyers and judges interpreted the Constitution by looking at the Founders' intentions and the legal and linguistic conventions that existed when the Founders enacted the Constitution. It was not until the 20th century, when law professors, under the theory of legal realism, began teaching the principle that judges make law rather than interpret it. Wurman then discusses what he calls "The Progressive Counterattack," in which opponents of originalism, including Justice William Brennan, criticized the idea of determining the original intention of the Founding Fathers. The strength of these criticisms led originalists to adopt a new theory of originalism: original public understanding. Original public understanding submits that constitutional provisions are interpreted through the perspective of the individuals who ratified the Constitution, and what those individuals would have understood the provisions to mean. This requires looking at the text and the context in which the provisions were written. Before addressing the different originalist theories spawned by the idea of an original public understanding, Wurman discusses constitutional legitimacy.

Wurman asserts that before figuring out which originalism theory works best, originalists must decide whether the Constitution as originally understood is a legitimate document. Wurman then discusses three schools of thought regarding constitutional legitimacy. Libertarian originalists, including Professor Richard Epstein, argue the Constitution must protect natural rights to be legitimate. Progressive originalists, like Professor Jack Balkin, submit that an original understanding of the Constitution results in a "living constitution"—that is, the Founders intentionally left standards in the Constitution to be decided by future generations. For progressive originalists, it is the consent given by the living generation, who interpret the Constitution according to modern standards, that gives the Constitution legitimacy. The third school of thought regarding constitutional legitimacy is popular sovereignty. Proponents of popular sovereignty, like professor Keith Whittington, argue that because "We the People" enacted the Constitution and we continue to consent to be governed by it today, the Constitution remains legitimate until there is another constitutional convention or it is amended. After addressing arguments between these three theories of originalism, and discussing the Founding Fathers' thoughts on constitutional legitimacy, Wurman analyzes the different theories of interpretation which originalists espouse.

Wurman specifically addresses three theories of originalist interpretation. The theory of "presumption of constitutionality" submits legislatures should be free to legislate according to the will of the people, who elected them, unless the Constitution prohibits specific legislation. Wurman claims an early proponent of this theory was Justice Louis Brandeis. The theory of "presumption of liberty" posits that the Constitution requires judges to assume people are free from government regulation, and it is incumbent on the government to prove a law or act is necessary to achieving legitimate ends. Wurman also discusses the originalist theory which uses "original interpretive conventions." Under this theory, there are no presumptions. Instead, the many interpretive conventions used when the Founders enacted the Constitution, like rules of grammar and syntax, allow judges to answer constitutional questions without resorting to presumptions or constructions. After discussing these theories of originalist interpretation, Wurman proceeds to address the most common criticisms against originalism.

The first criticism of originalism Wurman exposes is the claim that originalism is impractical because it requires lawyers to act as historians. Wurman provides a counterargument that lawyers can analyze history just as well as historians. For Wurman, it is no argument to claim history is too controversial for lawyers to analyze objectively. Wurman also submits that many legal questions require historical analysis. And if history can only provide objective truth relative to a historical time and place, Wurman claims originalism would be valid because it is concerned only with objective historical knowledge of the Founding Period.

Therefore, Wurman concludes that the argument that lawyers cannot perform the work of historians is unconvincing.

Wurman next addresses the claim that originalism must fail as a theory because it cannot justify the Supreme Court's ruling in *Brown v. Board of Education*, that "separate but equal" public schools are unconstitutional. Wurman first discusses an originalist approach that looks at historical evidence supporting the idea that the framers of the Fourteenth Amendment thought it would apply to school desegregation. Wurman next addresses the originalist approach which claims the Equal Protection Clause of the Fourteenth Amendment enacted an innovative principle, the application of which changes over time. In the context of *Brown v. Board of Education*, Wurman refers to Judge Robert Bork's argument that although the framers may have believed separate could be equal when they enacted the Fourteenth Amendment, sociology proved that perspective to be untrue and therefore, the Fourteenth Amendment's application changed based on those learned facts. Wurman also discusses professor Christopher Green's similar theory that even if the framers of the Fourteenth Amendment believed segregation was compatible with the amendment, we are not bound by their factual errors and those errors cannot be evidence of what the words in the Fourteenth Amendment mean. Wurman believes a combination of these originalist theories proves originalism justifies *Brown v. Board of Education*.

In the last chapter, Wurman discusses many non-originalist theories and argues they are unsatisfactory. Wurman first addresses the idea of a common law constitution—that is, the Constitution evolves through judicial decisions similar to common law. For Wurman, proponents of this view, like professor David Strauss, fail to articulate why judges should make policy choices concerning the Constitution, instead of leaving those decisions to elected representatives. Wurman then addresses two theories that assert the notion that progressive, moral readings of the Constitution have improved democracy, and that the Constitution should be interpreted to provide a better process for democratic decision-making. Wurman argues the problem with a moral reading of the Constitution is that it is unclear which moral reading to adopt. Further, the problem with a process reading of the Constitution is that it prioritizes process-oriented purposes over substantive rights. Lastly, Wurman compares textualism, which focuses solely on the text, with originalism, which looks at the text, historical practices, intent of the authors, and linguistic conventions. Ultimately, Wurman finds none of these non-originalist theories superior to originalism.

A Debt Against the Living achieves what Wurman set out to do: introduce the reader to originalism. Although the book has 133 pages of substance, the sophisticated material may require a few readings to grasp the complex ideas. However, the reader will be grateful for its analysis, after spending time with *A Debt Against the Living*. Whether the reader is inclined to agree with originalism or not, Wurman's book helps promote a healthy exchange of ideas among lawyers and non-lawyers. ☉

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