

Economics of the Federal Court System

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

Damon Root's 2014 book, *Overruled: The Long War for Control of the U.S. Supreme Court*, begins with the story of Supreme Court Justice Stephen Field

On the Supreme Court, he became the driving force behind a legal theory that would come to be known as "liberty of contract." Rooted in the free labor philosophy and self-ownership principles of the antislavery movement, liberty of contract held that the Fourteenth Amendment's guarantee that no person be deprived of life, liberty, or property without due process of law served to protect every individual's "right to pursue a lawful and necessary calling" against arbitrary and unnecessary government interference." (p. 7)

For students researching the various debates for federal court system reforms, there will be many questions over whether the federal court system should pass judgement on federal regulations according the Fourteenth Amendment "liberty of contract" provisions, or whether the federal courts should continue to defer to the Legislative and Executive Branches in their own long march to regulate voluntary economic exchange.

The author writes:

Revived over the past four decades by a growing camp of libertarians and free-market conservatives, the aggressive legal approach once associated with Justice Field and his successors has come roaring back to life in the early twenty-first century. Its modern followers have no patience with judicial restraint and little use for majority rule. They want the courts to police the other branches of government striking down any state or federal law that infringes on the broad constitutional vision of personal and economic freedom, an approach that has been dubbed "principled judicial activism." (p. 7)

On the *Washington Post's* Volokh Conspiracy, Ilya Somin reviews *Overruled*, and writes:

*Root effectively traces libertarian-conservative disagreements over judicial review to their origins in the late nineteenth and early twentieth centuries, when Progressives attacked nineteenth century natural rights-based jurisprudence for what they regarded as unjustified judicial activism in protecting both economic liberties and noneconomic ones. As he notes, many early Progressives opposed not only the Court's enforcement of economic freedoms in cases like *Lochner v. New York*, but also judicial efforts to protect free speech and enforce other noneconomic freedoms. For example, leading Progressive Justice Louis Brandeis praised the Court's notorious decision to uphold mandatory sterilization of the mentally ill in *Buck v. Bell* as an example of cases where judges should give state governments free reign to "meet...modern conditions by regulations" (though he gradually came to support judicial protection of some other civil liberties).*

Beginning in the 1920s and 1930s, political liberals gradually shifted towards supporting strong judicial intervention to protect noneconomic rights, even as they repudiated similar protection for economic freedoms and property rights. But, ironically, the original Progressive defense of judicial nonintervention was taken up by post-New Deal conservatives, including such notable legal theorists as Judge Robert H. Bork.

Michael Greve reviews *Overruled* in the *Wall Street Journal* (Nov. 17, 2014), writing:

We have had wars over the direction of the Supreme Court—President Roosevelt's 1937 court-packing plan or, more recently, the brutal fights over the judicial nominations of Robert Bork and Clarence Thomas. These partisan confrontations, however, are not what Damon Root has in mind in "Overruled: The Long War for Control of the U.S. Supreme Court." His "war" pits libertarians against conservatives. Libertarians, he says, want judicial "action" and "engagement." Conservatives want "restraint."

A senior editor at Reason magazine, Mr. Root is with the libertarians. Still, he is admirably respectful of the "restraint" tradition. He traces it to Oliver Wendell Holmes, through Louis Brandeis and Felix Frankfurter, and eventually to Robert Bork—all of whom, in different ways, argued for letting democratic majorities govern without undue judicial obstruction. Mr. Root shows how the liberal "restraint" commitment,

originally calculated to create broad space for New Deal programs, migrated to conservatives in the 1960s, when Robert Bork joined the Yale Law School faculty and met Alexander Bickel, a brilliant Frankfurter disciple who famously urged the federal judiciary to exercise its "passive virtues" in deference to democratic demands.

I look forward to talking with NCFCA debate students and coaches about Justice Field and the case for "judicial engagement" and "principled judicial activism." The Supreme Court's relatively conservative judges have been reluctant to overrule legislation in part because not enough of the public understand or appreciate the history, judicial principles, or economic arguments for economic freedom.

Overruling federal regulation would, economists argue, protect the very people that progressives argue need protection. Without seeing the actual effects of federal regulations on the lives of the poor, many Americans believe regulations raising minimum wages or creating national health insurance actually help people rather than make so many lives more complicated and costly.

There is a legal case for Justice Field's Constitutional protection of the liberty of contract and "free labor," and also an empirical case that the tens of thousands of regulations that pour out of the federal and state capitals each year, trying to protect people from economic transactions (ride-sharing services like Uber and Lyft, for example), serve more to protect special interest (such as established and protected taxi and limo services).

Posted by Gregory Rehmke at 6:57 AM

