Articles

REVENGE OF THE TRIPLE NEGATIVE: A NOTE ON THE BRANDEIS BRIEF IN *MULLER v. OREGON*

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The legal brief filed by Louis D. Brandeis and Josephine Goldmark in the case of *Muller v. Oregon*[1]—the original "Brandeis brief"—remains a landmark in American constitutional lawyering. Of course, the brief, like the U.S. Supreme Court's own opinion in *Muller*, has not worn well with everyone. The *Muller* case was once regarded in conventional legal and constitutional histories as a ray of progressive light amidst the darkness of such decisions as *Lochner*[2] and *Adkins*,[3] and a testament to Brandeis's brilliant legal strategy; today legal scholars (particularly feminists and libertarians) are as likely to stress the paternalism (or "maternalism"), indeed the unvarnished sexism, of Justice Brewer's language concerning woman's distinctive role of discharging the "burdens of motherhood,"[4] so as to promote "the future well-being of the race,"[5] in his opinion upholding Oregon's maximum-hours law for laundresses.[6] And the lengthy

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1. 208 U.S. 412 (1908) (upholding Oregon law limiting hours of work of women working in laundries to ten hours per day).

2. Lochner v. New York, 198 U.S. 45 (1905) (declaring unconstitutional New York's law limiting the hours of work for bakery employees to sixty per week). Of course, a generation of "Lochner revisionism" has rendered the traditional account of so-called "laissez-faire constitutionalism" largely obsolete.

3. Adkins v. Children's Hospital, 261 U.S. 525 (1923) (declaring unconstitutional Congressional statute providing for establishment of minimum wage for women and children in the District of Columbia).

4. *Muller*, 208 U.S. at 421.

5. *Id.* at 422.

6. *See, e.g.*, JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL

presentation of statistical studies, public health reports, and other "social facts" in the Brandeis and Goldmark brief,[7] while perhaps a bit more nuanced than Brewer's blunt opinion, largely prefigured Brewer's conclusions.[8] Moreover, the brief is now regarded by many scholars as relying on a highly selective presentation of "scientific" studies that by modern standards seem biased and amateurish.[9] Nevertheless, I suspect that, as a landmark in constitutional-political advocacy, the brief retains much of its luster, or at least importance, for historians and legal scholars. Certainly the "Brandeis brief" has been, in many major cases, an important weapon in the arsenal of appellate litigators, and its immediate impact on the movement for protective labor legislation was considerable.

RESPONSE TO WOMEN'S LABOR LEGISLATION 55–67 (1978); Nancy S. Erickson, Muller v. Oregon *Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228 (1989); David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1967–70 (2003) (reviewing JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS (2001)). One fascinating index to the declining fortunes of the *Muller* decision is that in 1991, while striking down Johnson Controls' fetal protection policy as a violation of Title VII, the Supreme Court made a disparaging reference to *Muller* and the sexist presumptions underlying the decision. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) ("Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities.") (citing *Muller*, 208 U.S. at 412). *See also* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986), *cited in Johnson Controls*, 499 U.S. at 187. Another feature of recent feminist consideration of *Muller* and the Brandeis brief has been increased recognition of the important role played by Josephine Goldmark, Brandeis's sister-in-law (and, to a lesser extent, Florence Kelley), in compiling the brief, particularly in tracking down the numerous studies on which the brief relies. *See* NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 29 (1996); NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN, *supra*, at 82; OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 at 175 (1993).

7. The text of the brief can be found at *The Brandeis Brief*, http://library.louisville.edu/law/brandeis/muller.html (last visited Mar. 28, 2006), and at *Women in Industry*, http://ocp.hul.harvard.edu/ww/organizations-ncl.php (last visited Mar. 28, 2006). *See also* LOUIS D. BRANDEIS & JOSEPHINE GOLDMARK, WOMEN IN INDUSTRY 113 (Arno Press 1969) (1908); 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63–178 (Philip B. Kurland & Gerhard Casper eds., 1975). Each of these versions are photostat copies of the original brief. The brief is also generously excerpted in WOLOCH, *supra* note 6, at 109–33, although its final paragraph is not included in that excerpt.

8. For an early example of criticism of the gender stereotypes invoked by the *Muller* brief, see KATE MILLETT, SEXUAL POLITICS 88 & n.38 (1970).

9. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 & n.63 (1993) (arguing that the Muller brief would be regarded today as "junk social science"). Rustad and Koenig, whose real quarry is elsewhere, hasten to add that Brandeis's brief should nevertheless be praised for breaking the formalist mold in constitutional argument. *See also* FISS, *supra* note 6, at 179 (calling the brief a "hodgepodge" of studies).

Let's turn for a moment to the brief itself. I ask the reader to examine Brandeis's concluding paragraph:

> CONCLUSION
>
> We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.
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> See *Holden v. Hardy*, 169 U.S. 366, 395, 397.
>
> LOUIS D. BRANDEIS,
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> Counsel for State of Oregon.

Unless I miss my guess, you probably have found it necessary to read this passage a second or perhaps even a third time.

I think most lawyers would agree that this was not the ideal way of concluding one of the most important briefs ever to be filed in the U.S. Supreme Court. It's a pretty long sentence, and residing within it is a formidable triple negative. It evokes the question H.L. Mencken asked after reciting a passage from Warren G. Harding's inaugural address: "What on earth does it *mean*?"[10] It is hard to believe that a reputable law firm today would allow such a brief in a major U.S. Supreme Court case to leave the office for the printer without first ensuring that that final paragraph had been subdued and domesticated. It is true that Brandeis's innovative strategy in his *Muller* brief was to subordinate the legal argument to exposition of the "social facts"; but that strategy had not previously been thought to entail making the legal argument's ultimate conclusion unintelligible. (Of course, some literary critics might find this a rather clever way of making the larger proto-Realist point, performa-

10. H.L. Mencken, *Gamalielese*, *in* THE IMPOSSIBLE H.L. MENCKEN: A SELECTION OF HIS BEST NEWSPAPER STORIES 410 (Marion Elizabeth Rodgers ed., 1991) (emphasis added). The particular phrase in Harding's speech to which Mencken was referring was "[t]he expressed conscience of progress."

tively rather than propositionally, that the internal coherence of legal doctrine is largely a mirage. But it goes without saying that the austere Brandeis lacked both the playfulness and the "law-skepticism" to have entertained such a notion, much less incorporate it in a Supreme Court brief.)

You've probably noticed already that the real allure of Brandeis's concluding paragraph is not its overall impenetrability but the fact that, when all the dust has settled, it ends up arguing something like the opposite of what the brief's 100 pages of often laborious social science were supposed to be building to. Granted, it's not *literally* the opposite; Brandeis, very much to his credit, does not in this passage actually invite the Court to strike down Oregon's law. However, according to its syntax, the passage does attribute to the State of Oregon, Brandeis's (presumably surprised and unamused) client, the view that regulation of laundresses' working hours was *un*necessary, and argues strenuously (if somewhat chaotically) that such a view was reasonable. The contention that Oregon might reasonably (and thus constitutionally) refrain from regulating those hours would have provoked little disagreement from the Court, but it does sit uneasily with the remainder of the brief.[11]

It may be frivolous even to speculate as to whether this eleventh-hour subversion of the logic of Brandeis's entire argument should be attributed to anything other than simple error, produced perhaps by the shortness of time or too many late nights at the office. But this won't take long. Thus, for example, Brandeis does seem to have taken a sardonic view of the fact that so much effort was required to convince the Court of the constitutionality of the Oregon statute—in private he remarked that the brief should have been entitled "What Any Fool Knows"[12]—but it seems unlikely that that sense of irritation would have led him to conclude his brief on a strange and sour note of sarcasm: "It's entirely reasonable for Oregon to believe that no legal regulation of the hours of laundresses is necessary. Yeah, right. [Rolling of eyes.]"

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11. The thrust of Brandeis's legal argument was, of course, quite clear from its statement in the brief's opening pages. See pp. 9–10 of the brief, available in any of the sources for the brief identified *supra* note 7 ("[T]here is reasonable ground for holding that to permit women in Oregon to work in a 'mechanical establishment, or factory, or laundry' more than ten hours in one day is dangerous to the public health, safety, morals, or welfare")—still not ideal as a statement of the legal proposition, perhaps, but enough to get the message across.

12. DEAN ACHESON, MORNING AND NOON 53 (1965).

Alternatively, did Brandeis think that by means of his last sentence, he might send a subliminally soothing message to those members of the Court who had little patience with protective labor regulation, thus putting them in a better mood about reaching the result Brandeis desired? Or was he throwing sand in their eyes, sowing just enough confusion to lead them, in desperation, to decide in his client's favor? Doubtful.

Perhaps the brief's conclusion was a gesture in the direction of Holmes, who after all had famously written that the life of the law has not been logic. Unfortunately for this interpretation, Holmes had not concluded his aphorism by saying, "Rather, the life of the law has been the introduction by lawyers of incoherence into the structure of their arguments."

Finally, did Brandeis himself harbor a subconscious ambivalence about the position he was arguing, leading him to subvert its thrust in his very last sentence? As satisfying as this supposition might be to psycho-historians, there is nothing in the record to validate it, and much to refute it. Theorists of deconstruction have often spoken of the self-subverting qualities of language, but usually they are referring to the properties of indeterminacy immanent in language itself, and not the phenomenon of an author suddenly and unaccountably saying the opposite of what he has been saying.

No, that last paragraph was just a mistake, as a cigar is often just a cigar. At all events, the mistake seems to have had no effect on anyone, either the Justices themselves or the generations of scholars who have written about *Muller* and the Brandeis brief (none of whom seems previously to have noted, or at least called attention to, the error).[13] The overall thrust of Brandeis's argument was known to all, and most readers of the brief, then and now, have undoubtedly passed quickly over its final paragraph, transiently flustered by its density but with no real need to parse it for greater understanding. Brandeis's oral argument before the Court would in any case have swept away any ambiguities created by his brief.

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13. After a literature review that was something more than cursory and something less than exhaustive, I have found no previous reference to the error in the brief's final paragraph. At least three studies have quoted that paragraph without noting the error. WOLOCH, *supra* note 6, at 31 (noting the triple negative but not mentioning its logical error); LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES 165 (1983) (quoting the paragraph without comment); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 115 (1984).

Still, legal historians and law teachers may now have added reason to attend to the brief in their work. Teachers of appellate advocacy can point to it not only as a landmark in the use of sociological data in appellate briefs, but also as an object lesson in how *not* to conclude a brief and in the vital importance of careful proofreading; nothing engages and consoles law students more than a demonstration that even celebrated lawyers are capable of silly and avoidable mistakes. At the same time, historians and students of Brandeis now have further reason (albeit a minor one) to complicate their accounts of the brief in *Muller* and to show that Isaiah, too, was quite capable of nodding (perhaps literally, in the early morning hours before the brief was due). And the fact that most people seem to have read the last paragraph as being consistent with the rest of the brief—obviously we cannot know this for everyone who has ever read it—confirms the views of many cognitive psychologists as to the way in which we read and comprehend. Or that lots of people are doing lots of skimming.

Further commentary on this episode would be gratuitous. But one might hazard a final observation: It cannot be said that Brandeis had no reasonable basis for not concluding his brief the way he did.