George Heitczman sporting what is, in life, a colorful vest.

THE BRANDEIS BRIEF, REVISITED

To the *Bag*:

David Bernstein's essay on the Brandeis brief (Autumn 2011) does not describe "winner's history;" (page 15); Brandeis' concerns with Supreme Court treatment of constitutional cases involving state governments remain largely unaddressed today.

Moreover, it is simply not true that "*Lochner* was an anomaly, not the leading edge of a Supreme Court war on progressive legislation."(page 11). One alleged "standard myth" (page 9) should not be succeeded by another. Post-*Lochner* decisions included *Adair v. United States*[1] and *Coppage v. Kansas*[2] invalidating federal and state laws bar-

[1] 208 U.S.161 (1908).

[2] 236 U.S.1 (1915). The overruling of this decision was a necessary predicate to the

ring employers from requiring that workers not join unions, *Adkins v. Children's Hospital*[3] and *Morehead v. Tipaldo*[4] invalidating federal and state minimum wage laws for women, *Adams v. Tanner*,[5] invalidating a statute limiting employment agency fees, and other cases felling like duck-pins various state price regulations and licensing laws.

Bernstein's derision of Brandeis' "hodgepodge" of reports should not obscure the central point of the much-maligned 'realists' and 'progressives': in a democracy, the law should be empirical, not a deduction from vague and constitutionally undefined notions of 'natural right' or 'class legislation.' That was the opening salvo of Holmes' book on the *Common Law*: "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 . . . have had a good deal more to do than the syllogism in determining the rules by which men shall be governed."[6] This view derived, as Edmund Wilson[7] and Louis Menand[8] have shown in their essays on Holmes, not on a worship of force but on an abhorrence of it, founded on experience.

Economic doctrines over time have displayed a certain mutability. So have views as to appropriate sex roles. "The judicial economics that Robert Bork treats with such scorn is, after all, the blue-ribbon opinion in economics of a generation back."[9] The Freudian

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decision upholding state right-to-work laws: "Just as . . . the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union members." *Lincoln Federal v. Northwestern*, 335 U.S.525 (1949) (Black, J.).

[3] 261 U.S.525 (1923).

[4] 298 U.S.587 (1936).

[5] 244 U.S.590 (1917).

[6] O. Holmes, The Common Law (Boston: Little Brown, 1881), 1.

[7] E. Wilson, Patriotic Gore: Studies in the Literature of the American Civil War (New York: Norton, 1994), ch. XVI.

[8] L. Menand, The Metaphysical Club: A Story of Ideas in America (New York: Farrar Straus, 2002), ch. I.

[9] D. Dewey, The Antitrust Experiment in America (New York: Columbia U., 1990), 51. *See also* F. Rowe, *The Decline of Antitrust and the Delusion of Models: The*

thirties, in which gender was everything, have given way to the era celebrated by Bernstein in which we are assured that gender is totally unimportant

The Brandeis brief as a corrective of judicial naivete is a messy device, but one that has not outlived its usefulness. It was employed by the present writer in an amicus brief on behalf of state governments cited in both the majority and dissenting opinions in *San Antonio v. Rodriguez*.[10] The administrative law scholar Kenneth Culp Davis noted the limitations of the adversary process in constitutional cases: "Penalizing a litigant for a failure of his counsel may be appropriate on a narrow question of private law, but it is inappropriate for overriding law enacted by state legislatures."[11] The abortion and contraception cases were decided on inadequate records; the same is true of the *Lawrence* 'gay rights' case; the California Attorney General[12] and U.S. Solicitor General have labored assiduously to insure that equally inadequate records will underpin the 'marriage' cases currently en route to the Supreme Court.

"Of course," Professor Davis noted, "the Supreme Court should not replace its accustomed procedure with notice and comment procedure." He noted that it has on occasion appointed special masters to supplement inadequate records[13] and allowed responses by motions for rehearing to judicially noticed facts.[14] But the true remedy is, as Davis said, judicial restraint and respect for the rights of non-parties. That lesson of the Brandeis brief has not been invalidated, nor has it been adequately heeded.

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Faustian Pact of Law and Economics, 72 Geo. L. Rev. 1511, 1558, 1570 (1989).

[10] 411 U.S. 1, 56 n.111, 85 n.42 (1973).

[11] 1 K. Davis, Administrative Law Treatise (San Diego: K.C. Davis Pub. Co., 1978 ed.), 421-22; 4 Id. X.

[12] *Compare* Comment, *An Attorney General's Standing before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. Chi. L. Rev. 624 (1959).

[13] *Borden's Farm Products v. Baldwin*, 293 U.S.194, 210-13 (1934) (Hughes, C.J.).

[14] *Ohio Bell Tel. Co. v. Public Service Commission*, 301 U.S. 292, 301-06 (1937) (Cardozo, J.).