

## BRANDEIS'S FACTS

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In the first part of the nineteenth century every proof to be worthy of attention had to conform to the Newtonian standard. There had to be two primary forces whose effects were first worked out, and then a lot of disturbing causes were considered afterwards. At present the popular notions of proof have swung to the opposite pole. Great masses of concrete facts must be collected beneath which the theories of the collector are submerged. Facts are now supreme because biology has become the model science, and students are forced to work and reason according to its methods. Yet the real opinions of men have not been altered. If the mass of obtruding facts be pushed aside, it will be found that the skeleton of men's thought—their real opinions and creeds—has undergone but little modification, and such changes as have taken place are due to the dominance of new types of men . . . .

Simon Patten (1899)<sup>1</sup>

For reformist lawyers, Louis Brandeis remains the consummate professional—a unique blend of the almost incompatible qualities that we most admire: prodigiously industrious but “a free man”; fabulously learned about business as well as law; a righteous preacher with an engineer's grasp of minutia; fiercely hostile to the trusts, yet always constructive; a man who recast themes from classical liberalism—individual responsibility, the sense of craftsmanship, village democracy—into a vision of industrial America that even now seems both daring and conservative. He has acquired some of the patina of an ancient statesman, yet

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1. S. PATTEN, *THE DEVELOPMENT OF ENGLISH THOUGHT 370-71* (1899). I have come closer to traditional law review footnoting practices than to those of a journal of opinion. Even so, an occasional reader may want more documentation. Unfootnoted material was generally derived from the following sources. For general history: J. GILBERT, *DESIGNING THE INDUSTRIAL STATE: THE INTELLECTUAL PURSUIT OF COLLECTIVISM IN AMERICA, 1880-1940* (1972); R. HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); I. UNGER & D. UNGER, *THE VULNERABLE YEARS: THE UNITED STATES, 1896-1917* (1978). For labor history: J. COMMONS, *HISTORY OF LABOR IN THE UNITED STATES* (1935), especially the third volume. Concerning working women: J. BAER, *THE CHAINS OF PROTECTION* (1978) (the most detailed criticism of the *Muller* brief); A. KESSLER-HARRIS, *OUT TO WORK* (1982); L. TENTLER, *WAGE EARNING WOMEN* (1979). On evolving attitudes toward women, I also gained insight from B. EHRENREICH & D. ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* (1978) and R. ROSENBERG, *BEYOND SEPARATE SPHERES* (1982).

many of his problems—from privacy to freedom of speech to unemployment—are our problems, and many of his answers still inspire. He was a founding father of the twentieth-century Constitution.

The original founders have long since been rescued from naive patriots. Most discussions of Brandeis, on the other hand, are almost wholly adulatory. Our critical faculties have been dulled by admiration, and perhaps also by the complexity of many of his campaigns—railroad mergers, insurance reforms, and rate proceedings.

Brandeis's famous Supreme Court briefs are one of his more accessible legacies—a good place to begin reexamining his work. In *Muller v. Oregon*,<sup>2</sup> he successfully defended a statute restricting the hours of labor for women. As every student of constitutional history learns, this is the brief in which Brandeis, after a few pages of legal analysis, presented an enormous array of factual material, drawn from studies of industrial conditions. He filed several similar briefs, not only in the United States Supreme Court, but also in several state courts where a maximum hour or minimum wage statute was assailed as violative of constitutional rights. Pauline Goldmark and other assistants did most of the research for the briefs; and in the minimum wage cases Felix Frankfurter replaced Brandeis as advocate before the Supreme Court. So when we speak of “the Brandeis briefs” we are describing a collective effort of which he was the leader.

Although *Muller* was not the first case in which economic and social facts were presented to the Court,<sup>3</sup> it was the most impressive and celebrated instance of the technique. Subsequent commentators have adopted a familiar litany of praise. The briefs were “the spirit of modern science” in “a terrific array of evidence,”<sup>4</sup> which was “overwhelmingly persuasive on economic, sociological, and medical data,”<sup>5</sup> a “milestone” in the effort to “shift the emphasis of law from individual rights to social realities, a movement that advocated adaptation of the law to changing social needs.”<sup>6</sup> In *Muller*, “the facts of modern industry which provoke regulatory legislation were, for the first time, adequately mar-

2. 208 U.S. 412 (1908).

3. In *Lochner v. New York*, the company's brief contained an appendix attacking the health rationale of maximum hours for bakers.

4. Poole, *Brandeis*, foreword to L. BRANDEIS, *BUSINESS—A PROFESSION* xxxiii (1914).

5. Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1913-1933*, 78 MICH. L. REV. 1252, 1271 (1980).

6. A. GAL, *BRANDEIS OF BOSTON* vii (1980).

shaded before the Court." "If the court, aided by the bar, has access to the facts and heeds them, the Constitution, as he had shown, is flexible enough to respond to the demands of modern society." Brandeis himself "never flinches from stubborn reality. Facts, not catchwords, are his sovereigns."<sup>7</sup> "Here," says another historian, "was Brandeis the educator in action, instructing bench and bar in what the law should be and, more important, why it should be that way."<sup>8</sup> He "patiently began to educate the Court to an understanding of conditions in a modern industrial society."<sup>9</sup> In the same vein, we are assured that "[n]o intelligent group of men could shut out from their minds the telling force of . . . [the brief's] presentation of facts."<sup>10</sup> At the oral argument in *Muller*, "[i]n the silence of this solemn chamber the dry bones of legalism rattled; a dead hand tried to shut the court against the living world. Brandeis swept aside these archaisms and produced a picture of the hazards of modern industrialism," persuading the Court to take "judicial cognizance of the facts of life."<sup>11</sup>

Historians usually do not pause to ask some obvious questions. How could Brandeis have been so eloquent, so "overwhelmingly persuasive" about "the facts of modern industry," as to gain the assent of every justice on the decidedly conservative Court that upheld Oregon's maximum hours law? Granting the great power of his advocacy, what elements of the social and legal milieu made such a triumph possible? Our images are of sweatshops and robber barons. Was it that simple?

Beyond that, how do Brandeis's arguments for maximum hour and minimum wage laws look today? Are they still persuasive? Some feminist authors have suggested that the early hour and wage laws, applicable only to women, were invidious paternalism. What kinds of evidence have they offered?

## I

Brandeis's briefs have become the apotheosis of objective social science, assembled by a legal-intellectual elite, in the service of social amelioration. In all these respects, the briefs were char-

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7. Frankfurter, *Mr. Justice Brandeis and the Constitution*, in MR. JUSTICE BRANDEIS 47, 52-53, 117 (F. Frankfurter ed. 1932).

8. M. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 53 (1981).

9. J. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 121-22 (1951).

10. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 754-55 (1922).

11. A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 137 (1936).

acteristic expressions of the progressive mentality. Like the other progressives, Louis Brandeis reached maturity during the nineteenth century, when science became preeminent. The spectacular successes of scientists were the envy of their peers in other fields, who began to imitate their vocabulary and to try to imitate their methods.<sup>12</sup> In philosophy, Comte, Pareto, and Mosca insisted on the virtues of the scientific method. St. Simon and Marx advocated "science" as well as socialism. From roughly 1880 until 1920, the cult of science reached its apogee. Science was synonymous with expertise and reform. Progressives advocated scientific child raising, scientific housekeeping, scientific public administration, scientific medicine, scientific charity, and scientific law.

Brandeis was an avid reader of books about "scientific management." In the late nineteenth century American managerial techniques were not very systematic. Accounting, for example, was still relatively primitive. As late as 1880 there were no American books on management. In the twenty years from 1881 to 1900, there were 27, and then came the blizzard: 240 appeared between 1900 and 1910. One enthusiast proclaimed that with better management "wages would be higher, hours shorter, employment more secure, justice and contentment dominant."

Realism, profound and shallow, was in the air. Holmes, Pound, and John Chipman Gray stressed that judges create law in accordance with their prejudices about public policy; the corollary was that ignorant prejudice makes bad law. Judicial activism, Professor Frankfurter was later to write, thwarts experimentation, "preventing an increase of social knowledge by the only scientific method available, the test of trial and error."<sup>13</sup>

These jurisprudential arguments echoed the pragmatic philosophy of thinkers like Peirce, James, and Dewey, who taught that a proposition's truth is to be tested by experience, not by deductive logic. As in science, truth is what works. And as in science, one never stops experimenting and verifying.

The progressive years were also a period of realistic novels, art, and journalism. Men like William Dean Howells, Norris, and later Dreiser, portrayed the squalor of cities and of business. A realistic school of painters, led by former newspaper illustrators with a sharp eye for city scenes, came to prominence during the same period. In journalism, the "muckrakers" were engaged in a similar enterprise. According to Hofstadter, "the Progressive mind was characteristically a journalistic mind"; he adds that "its

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12. See generally F. HAYEK, *THE COUNTER-REVOLUTION OF SCIENCE* 13 (1952).

13. Frankfurter, *supra* note 7, at 74.

characteristic contribution was that of the socially responsible reporter-reformer," with his "fact-finding zeal." "What they all had in common—the realistic novelists, the muckrakers, and the more critical social scientists of the period—was a passion for getting the 'inside story.'" Books, novels, and the daily papers all contained exposés, but periodical magazines eventually became the favored medium. The trend began toward the end of the nineteenth century, as newspapers told newcomers the secrets of the city. Beginning with *McClure's* January 1903 issue, an outpouring of exposure journalism made muckrakers like Steffens and Tarbell famous. Mr. Dooley complained that when he picked his "fav-rite magazine off th' flure," he found that "iverythin has gon wrong," and "th' wurruld" was "litttle betther thin a convict's camp."

Of all the flourishing techniques of realism, photography was the most amazing. What fascinated observers was the camera's ability to record reality objectively. "So faithful was the camera that people often commented that the photographic image recorded the original with an exactness 'equal to nature itself.'" It was, said the elder Holmes, "the mirror with a memory."<sup>14</sup> Reformers soon realized that the mirror could persuade. In 1877, John Thompson and Adolph Smith published *Street Life in London*, a book about the slums. They decided to include photographs because, as they explained, "[t]he unquestionable accuracy of this testimony will enable us to present true types of the London poor and shield us from accusations of either underrating or exaggerating individual peculiarities of appearance."<sup>15</sup> In America, Jacob Riis decided that photographs should accompany his study of New York's Lower East Side, *How the Other Half Lives*. His pictures of immigrants in their squalid, crowded tenements were meant to shock the middle class.

## II

In 1822 the journeymen millwrights and machinists of Philadelphia "met at a tavern, and passed resolutions that ten hours of labor were enough for one day . . ."<sup>16</sup> At first, agitation for shorter hours did not distinguish between men and women. It was justified as a way of sharing the available jobs, and as enabling workers to become educated citizens in their spare time. By 1890,

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14. J. DAVIDSON & M. LYTLE, *AFTER THE FACT: THE ART OF HISTORICAL DETECTION* 208 (1982).

15. *Id.*

16. 5 J. MCMASTER, *HISTORY OF THE PEOPLE OF THE UNITED STATES* 84 (1914).

the goal was by way of being achieved. Despite the paucity of meaningful government regulations, most employees of manufacturing, construction, mining, and mercantile concerns worked ten hours per day and 58-60 hours per week, with overtime during busy seasons. There were, however, some conspicuous exceptions, including cotton manufacturers, sawmills, iron and steel plants, and bakeries, which still worked most of their employees 11 to 13 hours daily and in some cases seven days a week.<sup>17</sup> In addition, all industries had wide variations in hours from city to city and state to state, especially ones like bakeries that catered to local markets.<sup>18</sup> Hours tended to be longer in rural states, in the South, where labor was more plentiful (as on the Atlantic seaboard), where unionism was weak (as in bakeries and textile mills) and where the labor force included many blacks or immigrants.<sup>19</sup> In some areas, progress seems to have been due to labor's strong bargaining position, as in sparsely-settled Pacific states like Oregon, where hours were relatively short even prior to the *Muller* law.<sup>20</sup> Sometimes improved business methods led to shorter days, without labor agitation and even occasionally in the face of resistance by workers who feared that a shorter day would mean a smaller paycheck.<sup>21</sup>

Most of the early hours laws applied only to women and children; with several narrow exceptions, the hours of labor of adult men were unregulated until the New Deal.<sup>22</sup> By 1908, there were some twenty maximum hours laws for women.<sup>23</sup> Typically, they established a limit of ten hours daily (and 58 or 60 a week) for female employees of "manufacturing or mechanical" establishments.<sup>24</sup> (Several of the laws were obviously weak, applying only if the employer "compelled" the woman to exceed the maximum, but nevertheless this was an impressive start.) In the nine years after *Muller*, from 1909-1917, such laws proliferated. They generally became broader in scope, with eight- or nine-hour days more

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17. J. COMMONS, 3 HISTORY OF LABOR IN THE UNITED STATES 99 (1935).

18. *Id.* at 103.

19. *Id.* at 104.

20. *Id.*

21. *Id.* at 99-100.

22. *Id.* at 540-45. In the twenties, Oregon was the only state with a general limitation on the hours of men's work. I. BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933 at 225 (paper ed. 1960).

23. See Brief for Defendant in Error at 1-8, In the Supreme Court of the United States, October Term, 1907, No. 107, Curt Muller, Plaintiff in Error v. State of Oregon, in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 63, 66-73 (P. Kurland & G. Casper eds. 1975) [hereinafter cited as *Muller* Brief for Defendant].

24. *Id.*

common, and fewer loopholes.<sup>25</sup>

To understand the special protection afforded to women, some history is useful. American women began to work outside the home in significant and increasing numbers after 1875. As the economy became more sophisticated, cities became communication and service centers—insurance, banking, advertising, accounting, publishing, education, government, fashion, and entertainment expanded. The increasing mechanization and rationalization of industry created many light, unskilled jobs: assembling, packing, sorting, sewing, operating light machinery, store clerking, and so on. In these jobs, brawn was less important than punctuality, conscientiousness, accuracy, and literacy.

Women were wanted, but they were in no position to demand high wages or ideal working conditions. Tied to a male breadwinner, most of them lacked mobility. Usually, they were young (often just teenagers), single, living at home with their parents, contributing a small fraction of the family's income but not responsible for supporting anyone, unassertive, planning to work only for six or eight years until marriage, and (since they turned over their paychecks to their mothers anyway) inclined to select jobs by social criteria—places where they had friends, or at least near home and where the employees were of compatible ethnic origins, and where the supervisor was pleasant, not necessarily where wages were highest. Unskilled, easily replaceable, and with no long-term interest in the job, they were hard to organize, even aside from sex discrimination by some unions, which also existed. Frequently, the number of applicants vastly exceeded the number of women's jobs available, so that as one employer put it, "we really only like to employ people who live at home, that is of the younger people, and I do not think they are at all dependent upon the salary they make."

At best, Americans of both sexes were ambivalent about women working outside the home. If they lived alone, they were said to be "adrift." Even the typical case of a young girl or woman living with her parents invited criticism. Despite segregation of jobs, some men were afraid of competition from cheap female labor. Women who worked when they "didn't need to" were most often criticized—not only by men, and not only as competitors of men. They were blamed for depressing other women's wages. Too, many middle-class women reformers worried that married wage-earning women would neglect their families, while single ones would acquire habits of profanity and immodest dress and

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25. J. COMMONS, *supra* note 17, at 474.

perhaps even fall into sin. A spate of investigations assessed these dangers. According to an 1888 survey of wage-earning women in large cities, "the moral tendencies of the Philadelphia working women are of a distinctly high order." In Richmond, on the other hand, "in the tobacco factories where the races are mixed, immorality is much more noticeable than elsewhere." While in Indianapolis "the moral tone of the work rooms was respectable," in Cincinnati it was "low." In Cleveland "working girls are less worldly and extravagant than in larger cities, less dependent on excitement, less alert and knowing, and consequently seem slow and dull in comparison; but the slowness is respectable and the dullness good." Generalizing, the Bureau of Labor Statistics concluded that "wherever the sexes work indiscriminately together, great laxity obtains."<sup>26</sup>

One solution to the problem of single women was to find husbands for them. Virginia Penny, author of the cyclopedia of women's work, proposed to punish bachelors with a special tax, whose proceeds apparently were to go to unmarried women. Even without Ms. Penny's encouragement, men sometimes decided that marriage was the best solution. The Birmingham *Labor Advocate*, whose editor believed women belonged at home, reported in 1901 that workers in one Chicago factory "successfully adopted a new method of preventing women from working in the shop. They marry the women." This, announced the editor, "is the first feasible solution that has ever been offered for one of the great problems of the day."

Wage work, declared Flore MacDonald Thompson, subjects a woman "to a false system of education which mentally and morally unfits her for economic office in the family." This sort of psychological speculation was supplemented by a mass of scientific and pseudoscientific information about the physiological consequences of work, sometimes for both sexes, sometimes with particular reference to women. Experts said that alcoholism, fatigue, uterine disorders, insanity, and menstrual dysfunction could be traced to overwork, routinized work, and body positions imposed by some work situations.

Victorian America was not even sure that women could safely endure the strains of a university education. No less a figure than Dr. Edward Clarke, a Harvard overseer and former medical school professor, warned in 1872 that college would destroy women's health and reproductive ability.<sup>27</sup> Clarke's apprehen-

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26. A. KESSLER-HARRIS, *supra* note 1, at 101.

27. R. ROSENBERG, *supra* note 1, at xv.



sions were grounded in the Spencerian notion that the human body is a closed energy system in which any undue demand put on one part of the system inevitably depletes some other part. On this basis, Clarke argued that the mental strain of college would adversely affect the development of a young woman's reproductive organs. "Why," asked another physician in 1883, "should we spoil a good mother by making an ordinary grammarian?" To avert such disasters, Vassar forbade physical exercise by students during the first two days of their menstrual periods and tried to regulate every student's study habits, so that "the end of no day shall find her overtaxed, even if that day has borne the added periodic burden."

Even critics of these views shared some of the same underlying apprehensions. This was nicely illustrated by a report of the Association of College Alumnae, an organization devoted to encouraging women to attend college, whose leaders were generally inclined to offer cultural explanations of women's behavior patterns. Seeking a statistical refutation of the idea that college is dangerous to women, the ACA distributed a questionnaire to 1,290 graduates. Since most of the respondents reported some physiological disorder, the results were not altogether encouraging. John Dewey, a proponent of higher education for women, was dismayed to learn that only 63 percent had borne any children. Twelve percent of these children had died, and 25 percent of these deaths were associated with childbirth. Mistakenly assuming that the ACA rates were higher than for women at large, Dewey declared that "these figures . . . speak for themselves."

The authors of the ACA report seem to have accepted the idea that, once a woman impairs her health, her children will inherit the defect. They attributed the most common health problem cited by their respondents ("constitutional weakness") to the uneducated "older New England dames," who had had "very limited knowledge of the many laws of sanitary science" and had passed poor physiques down to their descendants.

Class played a role in attitudes toward women. In the late nineteenth century, middle- and upper-class women were supposed to be delicate. Many of them slipped into invalidism, with symptoms including headaches, muscular aches, depression, indigestion and assorted disorders. As some feminists noticed, poor women did not suffer from this strange syndrome. Still, it would be a mistake to dismiss all the fears about women's health as imaginary. In *The Youngest Science* Lewis Thomas tells us how seldom his father, practicing medicine early in this century, was able to cure his patient's ailments. At that time, the mortality rate for

female wage-earners was more than double that of other women. Azel Ames reckoned that in Massachusetts alone 72,727 female workers had died young.<sup>28</sup> Lacking adequate contraception, women had more children in those days, and the risks of childbirth were much greater. Young women were particularly vulnerable to tuberculosis, and in general working-class women endured more sickness, exhaustion, and injury than they do today. As it usually does, prejudice seems to have exaggerated real problems rather than inventing wholly fanciful ones.

Among the women of the progressive era, we can discern various conceptions of woman's nature and sphere. One group held what we would call "feminist" opinions. They believed that the genetic differences between the sexes had been vastly exaggerated, to the detriment of women, who should be treated essentially as men's equals, in the factories as well as the universities. The National Woman's Party represented such women, lobbying successfully for suffrage (as the Congressional Union) and later unsuccessfully for an Equal Rights Amendment.<sup>29</sup> The NWP, though not hostile to labor legislation as such, denounced bills that gave special protection to women.<sup>30</sup>

A different approach was taken by the National Consumer's League, in which equally vigorous, independent, and well-educated women worked for social reforms including protective labor legislation. Josephine Shaw Lowell, Frances Perkins (Secretary of Labor under FDR), and Josephine Goldmark were three prominent members. Many of the supporters of these laws were also suffragists. Brandeis and others wanted similar regulations for men, and were using the idea of protecting women partly as an entering wedge.<sup>31</sup> Nevertheless, they were prepared to accept laws that treated women as more vulnerable than men. Led by Florence Kelley, the league joined forces with labor unions, and with men like Brandeis and Frankfurter, to form a potent political and legal alliance for women's hour and wage legislation. They opposed the Equal Rights Amendment, fearing that it would jeopardize their social legislation.<sup>32</sup> This approach, though unpopular today, may have been closer to the opinions of most working-class women than the purist feminism of the NWP. However this may

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28. A. KESSLER-HARRIS, *supra* note 1, at 106.

29. P. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT* 139 (1980).

30. S. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT* 144 (1981).

31. Brandeis, before being nominated to the Supreme Court, agreed to represent Oregon in the *Bunting* case, in which regulation of men's hours was upheld. Most likely, the great majority of members of the league believed in hours laws for both sexes, but also that they were especially needed for women.

32. S. BECKER, *supra* note 30, at 131.

be, it is understandable that for many years the hours laws generally applied only to women.

What were the constitutional prospects of such legislation? The key Supreme Court precedents were *Holden v. Hardy*,<sup>33</sup> decided in 1898, and the subsequent *Lochner* decision. Both cases involved maximum hour laws, applicable to all employees in occupations where long hours were said to be dangerous. In *Holden* the Court sustained a Utah statute limiting the working day of men in mines and smelters to eight hours. The opinion, while granting that "in ordinary employments" long hours may not injure health, stressed that a miner "is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gasses, generated by the process of refining or smelting."<sup>34</sup> Nowadays few would feel the need for further justifications. But the *Holden* court saw fit to address the issue of paternalism. Why shouldn't each miner be free to decide for himself whether the health risk is too great? The Court's answer was that "the proprietors of these establishments and their operatives do not stand upon an equality," and "their interests are, to a certain extent, conflicting." Despite the parties' nominal freedom of contract, in reality "the proprietors lay down the rules and the laborers are practically constrained to obey them." This being so, the miners cannot reasonably be expected to avert danger by pursuing their own self-interest. Even if they had freely chosen long hours, the government would be entitled to intervene, because "the state still retains an interest in his welfare, however reckless he may be."<sup>35</sup>

Having upheld an eight-hour day for miners, the Court proceeded in *Lochner v. New York*<sup>36</sup> to strike down a ten-hour day for bakers. The decisions are difficult to reconcile, because in *Lochner*, as in *Holden*, there was at least a plausible claim that long hours in the particular business endangered the workers' health. But in *Lochner* the Court seems to have regarded this health evidence as a makeweight rationale. The real legislative motive, hints the majority opinion, was impermissible paternalism, not for the accepted police power purpose of protecting the health of employees, but rather as a mere "labor law" designed to substitute the legislature's notion of a proper working day for the parties' private bargains. Such paternalism could be justified only

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33. 169 U.S. 366 (1898).

34. *Id.* at 396.

35. *Id.* at 397.

36. 198 U.S. 45 (1905).

by showing that bakers were less capable than other workers of protecting themselves through negotiation:

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.<sup>37</sup>

If *Holden* had given some reformers false hopes, later dashed by *Lochner*, a careful reading of *Lochner* offered grounds for hoping that the reformers would win in *Muller*. Consider the strategies open to counsel for Muller, in urging that the ten-hour day was unconstitutional. One option was to disparage Brandeis's "evidence." Although successful in *Lochner*, this response was more problematic in *Muller*, partly because Josephine Goldmark had assembled an enormous amount of material, partly because the great bulk of the literature favored such laws, but most of all because the proposition that women (like miners) need special protection must have seemed self-evidently valid. To refute Brandeis's facts would have been a great challenge; to refute the ethos that made the facts intuitively persuasive would have been impossible.

A more promising approach would have been to wave the flag of property rights, relying on some of the choicest language in *Lochner*, and suggesting that regulation of women's hours was a devious tactic designed to establish a precedent for regulating men's hours. This type of argument could be wholly persuasive only if the Court found it difficult to distinguish women from other workers. Of the four state courts of last resort that had considered the question, three had upheld women's maximum hours legislation.<sup>38</sup> In *Holden*, the Supreme Court had cited these decisions as an accepted form of paternalism, analogous to protecting miners.<sup>39</sup> To be sure, critics of *Lochner* might contend that that decision was inconsistent with *Holden*; but there was no reason to suppose that the Court's conservatives agreed. Indeed, if the usual criticism of *Lochner*—that the Court was covertly "legislating"—is true, then *Holden* can readily be distinguished, simply on the "legislative" ground that everyone knows that mining is dangerous, and that miners cannot really negotiate individually with their bosses. If that sort of stereotyping was the unarticulated dis-

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37. *Id.* at 57.

38. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876); *Wenham v. State*, 65 Neb. 394, 91 N.W. 421 (1902); *State v. Buchanan*, 29 Wash. 602, 70 P. 52 (1902). A contrary result was reached in *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

39. 169 U.S. at 395.

inction between *Lochner* and *Holden*, it augured well for Brandeis's chances in *Muller*.

### III

Confronted by a difficult tactical problem, Muller's lawyers gambled on a theory whose time had not yet come. Though also suggesting other lines of analysis, their brief argued vigorously that women are entitled to equal treatment—as a matter of principle.

The employees of adult age, whether men or women, in the same service, are alike entitled to equal protection and freedom of contract. It is difficult to imagine any employment that may be dangerous to women employees that would not be equally dangerous to men. The health of men is no less entitled to protection than that of women. For reasons of chivalry, we may regret that all women may not be sheltered in happy homes, free from the exacting demands upon them in pursuit of a living, but their right to pursue any honorable vocation, any business not forbidden as immoral, or contrary to public policy, is just as sacred and just as inviolate as the same right enjoyed by men. In many vocations women far excel, in proficiency, ability and efficiency, the most proficient men. Some callings are peculiarly adapted to the temperament, training and skill of women. What would be thought of a law which attempted to forbid women working as nurses, beyond ten hours of any day in the hospitals of the country, or in the homes of the people, and at the same time imposed no restrictions upon the hours of service of men employed in the same service? Why limit the hours of service of women employees in the great mercantile establishments of the country, and assume that this may be done, to protect the public health, or that of the employee, when a like statute would be held beyond the police powers of the state if made applicable to men, standing behind the same counter, or keeping books at the same desk?<sup>40</sup>

With a little editing, this passage would sound good today. But to some of those who read it in 1908 it must have been hypocritical twaddle.

Brandeis's brief began with a short statement of legal principles, amounting to the proposition that the law is to be upheld unless the complainant establishes that it lacks any reasonable police power rationale. The next section summarized American and foreign hours legislation. Then, in the heart of the brief, he presented his evidence, an assortment of excerpts from the plethora of books, reports, and testimony about hours of labor and women at work. Much of this material was valid, if at all, irrespective of the workers' gender. But the main purport of the evidence was—and given *Lochner* had to be—that women need

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40. Brief for Plaintiff in Error at 24. In the Supreme Court of the United States, October Term, No. 107, *Curt Muller, Plaintiff in Error v. State of Oregon*, in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 3, 27 (P. Kurland & G. Casper eds. 1975).

shorter hours than men. On this decisive point, Brandeis summarized his evidence:

Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury.<sup>41</sup>

One of women's weaknesses is, of course, menstruation. As one expert explained,

It has been estimated that out of every one hundred days women are in a semi-pathological state of health for from fourteen to sixteen days. The natural congestion of the pelvic organs during menstruation is augmented and favored by work on sewing-machines and other industrial occupations necessitating the constant use of the lower part of the body. Work during these periods tends to induce chronic congestion of the uterus and appendages, and dysmenorrhoea and flexion of the uterus are well known afflictions of working girls.<sup>42</sup>

Women, said Brandeis's experts, are less capable of standing for long hours:

Woman is badly constructed for the purpose of standing eight or ten hours upon her feet. I do not intend to bring into evidence the peculiar position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column. The knee joint of woman is a sexual characteristic. Viewed in front and extended, the joint in but a slight degree interrupts the gradual taper of the thigh into the leg. Viewed in a semi-flexed position, the joint forms a smooth ovate spheroid. The reason of this lies in the smallness of the patella in front, and the narrowness of the articular surfaces of the tibia and femur, and which in man form the lateral prominences, and thus is much more perfect as a sustaining column than that of a woman. The muscles which keep the body fixed upon the thigh in the erect position labor under the disadvantage of shortness of purchase, owing to the short distance, compared to that of man, between the crest of the ilium and the great trochanter of the femur, thus giving to man a much larger purchase in the leverage existing between the trunk and the extremities. Comparatively the foot is less able to sustain weight than that of man, owing to its shortness and the more delicate formation of the tarsus and metatarsus.<sup>43</sup>

Concerning the same problem, Brandeis also offered the views of an English authority, testifying before a select committee of the House of Commons:

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41. *Muller* Brief for Defendant, *supra* note 23, at 18.

42. *Id.* at 23 (quoting G. Price, M.D., *Hygiene of Occupation* in 6 REFERENCE HANDBOOK OF THE MEDICAL SCIENCES 321).

43. *Id.* at 19 (quoting REPORT OF THE MAINE BUREAU OF INDUSTRIAL AND LABOR STATISTICS 142 (1888)).

And would not standing so long very much affect women, if they were married, afterwards?

It is not good for women to stand . . . at all really.

If it is not good for them to stand at all, still less will it be good for them to stand thirteen hours a day?

I think it is shocking.<sup>44</sup>

Brandeis included evidence that shorter hours are good for the children as well as the mother. "The inspector for Erfurt reports that when a working girl marries, unless she is very strong she gradually fails in health and is frequently unfit for giving birth to healthy children or to nurse those who are born."<sup>45</sup> Excessively long hours, said an English doctor, have "a very grave effect upon the generative organs of women, entailing a great deal of suffering and also injuring a very large body of them permanently, setting up inflammation in the pelvis in connection with those organs."<sup>46</sup> Other experts reported that overwork sometimes makes women sterile, increases infant mortality during childbirth, and leads to neglect of those children who are born alive:

As things now stand, a mother leaves her infant (say of two months old) at 6:00 a.m., often asleep in bed, at 8 she nurses it, then until 12:30 the child is bottle fed, or stuffed with indigestible food. On her return at noon, overheated and exhausted, her milk is unfit for the child's nourishment, and this state of things is again repeated until 6 p.m.; the consequence is, that child suffers from spasmodic diarrhoea, often complicated with convulsions and ending in death.<sup>47</sup>

If the child survives infancy, can his overworked mother provide a suitable home environment? The care and protection of children was a primary Victorian value. Some authorities offered utilitarian justifications for this concern:

The family furnishes the really fundamental education of the growing generation—the education of character; and the family life thus really determines the quality of the rising generation as efficient or non-efficient wealth producers. If a reduction in the hours of labor does promote the growth of a purer and better family life, it will unquestionably result in the production of greater material wealth on the part of the generation trained under its influence; nothing else in fact will so effectively diminish the vast number of criminals, paupers, and idlers, who, in the present generation, consume the people's substance. When one or both parents are away from home for twelve or thirteen hours (the necessary period for those who work ten hours) a day, the children receive comparatively little

44. *Id.* at 30 (quoting BRITISH HOUSE OF COMMONS, REPORT OF SELECT COMMITTEE ON SHOPS EARLY CLOSING BILL 5379-87 (1895)).

45. *Id.* at 33 (quoting *The Working Hours of Female Factory Hands* from the REPORTS OF FACTORY INSPECTORS 111 (collated in the Imperial Home Office, Berlin) (1905)).

46. *Id.* at 36 (quoting BRITISH HOUSE OF COMMONS, REPORT OF SELECT COMMITTEE ON SHOPS EARLY CLOSING BILL 219 (1895)).

47. *Id.* at 38 (quoting REPORT OF THE BRITISH CHIEF INSPECTOR OF FACTORIES AND WORKSHOPS (1873)).

attention.<sup>48</sup>

It was not just that neglect of maternal duties will produce a generation of “criminals, paupers and idlers.” In addition, a kind of racial degeneracy will set in: “It is well known that like begets like, and if the parents are feeble in constitution, the children must also inevitably be feeble. Hence, among that class of people, you find many puny, sickly, partly developed children; every generation growing more and more so.”<sup>49</sup>

Having adduced evidence that long hours imperil the health and safety of women and their offspring, Brandeis proceeded to consider morality, another traditional rationale of police-power regulation. First, there was alcohol. By the progressive era, the Women’s Christian Temperance Union, allied with the predominantly male Anti-Saloon League, was in full battle cry, partly because alcoholism was a genuine problem and partly because some old-stock Protestants neither understood nor cared that the saloon was the poor man’s club. Actually, per capita consumption of alcohol was much higher in 1830, before temperance crusaders and taxation reduced it sharply, than it was in 1908.<sup>50</sup> Nevertheless, Brandeis himself considered drink (along with unemployment and low wages) one of the major causes of the misery of workers.<sup>51</sup> Drinking to excess, claimed the brief, became more common when women worked long hours.

I have noticed that the hard, slavish overwork is driving those girls into the saloons, after they leave the mills evenings . . . good, respectable girls, but they come out so tired and so thirsty and so exhausted . . . from working along steadily from hour to hour and breathing the noxious effluvia from the grease and other ingredients used in the [cotton] mill.

Wherever you go . . . near the abodes of people who are overworked, you will always find the sign of the rumshop.

Drinking is most prevalent among working people where the hours of labor are long.<sup>52</sup>

Brandeis cited evidence for the proposition that hot work in laundries leads to overindulgence in beer.<sup>53</sup> “When the working day is so long that no time whatever is left for a minimum of

48. *Id.* at 48 (quoting REPORT OF THE NEW YORK BUREAU OF LABOR STATISTICS 69 (1900)).

49. *Id.* at 51 (quoting REPORT OF THE MASSACHUSETTS BUREAU OF LABOR STATISTICS 504 (1871)).

50. W. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION 10 (1979).

51. A. LIEF, *supra* note 11, at 428. So did George Washington. W. RORABAUGH, *supra* note 50, at 6.

52. *Muller* Brief for Defendant, *supra* note 23, at 45 (quoting U.S. SENATE COMMITTEE. I RELATIONS BETWEEN LABOR AND CAPITAL 647 (1883)).

53. *Id.* at 46 (quoting T. OLIVER, M.D., DANGEROUS TRADES 672 (1902)).



leisure or home-life," he emphasized, "relief from the strain of work" is sought in alcohol "and other excesses."<sup>54</sup> The argument, in short, was that with more spare time there will be less sex and carousing.

Unanimously, the court voted to sustain Oregon's law. The opinion was written by Justice Brewer. He and Justice Peckham had been the dissenters in *Holden* but were nonetheless prepared to uphold hours laws for women. Rejecting Muller's theory of equality, Justice Brewer invoked the reality that woman "still looks to her brother and depends upon him." This is because of the "inherent difference between the two sexes," and "the different functions in life which they perform." They "differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence."<sup>55</sup>

#### IV

Perhaps, in some rosewood-panelled celestial office, Muller's attorneys have been informed that they will be permitted to relitigate *Muller v. Oregon*. If so, they must be chuckling as they assemble a thousand-page Brandeis brief, replete with testimony to the plasticity of gender roles, celebrations of the musculature and stamina of well-conditioned women, and grave experts' warnings about the horrendous consequences of sexual stereotyping.

Brandeis, after initial doubts, came to favor women's suffrage,<sup>56</sup> and there is no reason to treat him as an enemy of equal rights. Nor does it follow, from the ease with which one might ridicule some of Brandeis's evidence today, that the statute, the brief, or the decision was wrong in its time. Preferential protection of women workers might be bad policy in 1984, but was it bad policy in 1908? Fewer women were offended then than would be offended now by a comparable law. Brandeis and his allies were trying to establish industrial ground rules that feminists today take for granted. The situation of a woman lawyer or professor in 1984 is conducive to a different point of view, surely, than that of a laundress in 1908. In Brandeis's time, it was sensible for progressives to treat the stereotyping implicit in these laws as, at

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54. *Id.* at 44.

55. 208 U.S. at 422-23.

56. A. LIEF, *supra* note 11, at 183, 256.

worst, a fault to be weighed in the balance against the tangible benefits to overworked women. If those benefits were as great as the reformers supposed, the speculative consequences of reinforcing cultural assumptions that would have been prevalent in any event may have been a small price to pay.

But when this is said the question remains—how great were the benefits of the hours laws? In 1928, the Women's Bureau of the Department of Labor produced a report on *The Effect of Labor Legislation on the Employment Opportunities for Women*.<sup>57</sup> By and large their figures indicated that women indeed worked fewer hours in states that had hours laws than in those that did not. They also studied establishments in five industries with high percentages of women employees, covering nine states. The purpose of this investigation was to learn what reductions in hours had been made in recent years and their causes and consequences. The authors concluded that, while there were often other reasons, in most cases the cause of a reduction in hours was a reduction in the legal maximum. Searching for bad results—such as employer preference for men, who were not subject to the hours law—the bureau's analysts found virtually no dismissals of women on this ground and no decrease in their opportunities for employment.<sup>58</sup>

Other studies have been less favorable. Reasoning from what she admitted was insufficient evidence, Elizabeth Baker concluded in 1925 that in industries (like those later studied by the Women's Bureau) where women were more numerous than men, hours legislation probably helped both sexes, because companies generally shut down at the close of the women's working day rather than trying to find male replacements. But in occupations where men predominated, Baker felt that women were restricted rather than protected by the laws.<sup>59</sup> Although the number of "protected" women might exceed the number "restricted," Baker saw that the latter group was disproportionately significant. The women who were being harmed by protective legislation were those who aspired to pioneer in traditionally male occupations. "The penalty falls more sharply," she decided, "upon those significant minorities who have emerged from the mass into a more self-reliant position." A denial of opportunity to one of these "economic standard bearers in the progress of women," warned Baker, was potentially

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57. WOMEN'S BUREAU, U.S. DEPT. OF LABOR, BULLETIN NO. 65, *THE EFFECT OF LABOR LEGISLATION ON THE EMPLOYMENT OPPORTUNITIES FOR WOMEN* (1928).

58. J. COMMONS, *supra* note 17, at 499-500.

59. Baker, *Protective Labor Legislation* 354, 425-26, in 116 COLUM. U. STUDIES IN HIST., ECON. & PUB. L. (1925).

much more harmful than mere numbers could reveal.<sup>60</sup>

Immigrant women may also have been harmed by the hours laws, although again the evidence is sketchy. The spectacular industrialization of America required cheap labor. Immigrants solved the problem: between the mid-nineteenth and the early twentieth century they provided the bulk of our industrial labor force, especially in the least skilled and lowest-paid positions. Between 1880 and 1910, eighteen million people immigrated to the United States. The peak was in 1907, when 1,285,000 entrants were recorded. By 1910, almost one-seventh of the total population of the United States was foreign-born. New York City contained the largest Jewish population of any city in the world, as many Irish as Dublin, and more Italians and Poles than any other city outside Rome or Warsaw. The Lower East Side had as many as one person per square foot of ground in the worst places—a greater population density than any other neighborhood in the world.

Many upright citizens—including a number of scholars—were aghast at the prospect of having to assimilate so many foreigners, babbling in strange tongues, and more loyal to their races and their leaders than to the precepts of Anglo-Saxon democracy. To Brandeis and others, the proper solution was education in citizenship.<sup>61</sup> This, he never tired of stressing, required leisure, which he thought essential for human development.<sup>62</sup> But the immigrants frequently worked so hard and so long that they had no time for reading or for the civics lessons that idealists of Brandeis's stripe wanted them to take.<sup>63</sup> The answer, Brandeis believed, was maximum hours legislation. With more leisure, workers would be in proper physical and mental condition to study and discuss social and political problems, and to become cultured persons. The shorter working day would thus revitalize democracy.<sup>64</sup> It was a beautiful vision.

Idealists like Brandeis are often joined by quieter men with more tangible stakes: think, for instance, of the pockets that have been lined by zoning, another cause of the progressives.<sup>65</sup> Much of the clout behind the maximum hours proposals came from or-

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60. *Id.* at 427-28.

61. R. HOFSTADTER, *supra* note 1, at 179-80.

62. A. LIEF, *supra* note 11, at 310.

63. *See id.* at 184.

64. *Id.* at 93.

65. S. TOLL, *ZONED AMERICAN* (1969) is my favorite book on the origins of zoning, including pecuniary motivations and the role played by Jewish immigrants in New York City.

ganized labor,<sup>66</sup> whose motivations may not have been wholly admirable. Women were notoriously difficult to organize, as were the new immigrants, because of their mixed nationalities, languages, and religions. Both groups generally worked for lower wages than native males, and the immigrants at least often worked longer hours.<sup>67</sup> Our enormous industrial expansion created an increasing demand for labor, but the natural tendency of this demand to lead to higher wages was retarded by the tremendous immigration between 1900 and 1914.<sup>68</sup> To many Americans, the immigrants appeared to be "strikebreakers and scabs, who lowered wage levels and reduced living standards toward their 'pigsty mode of life,' just as they brought social standards down to 'their brawls and their animal pleasures.'" <sup>69</sup>

The flood tide of immigration coincided closely with the years in which most of the hours laws were passed. Some contemporary observers linked the two phenomena, as in this report by the United States Immigration Commission:

The so-called sweat-shop legislation of American states is legislation directed against tenement-house work. . . . Practically all of the work in tenements governed by these laws is carried on by foreign born men and women, and by the latest arrivals and lowest conditioned of the foreign born.<sup>70</sup>

In a recent article, Elisabeth Landes contends that the unions' support of these laws may have been motivated by their well-known hostility to competition from immigrants.<sup>71</sup> More important, her analysis of census data from several states leads her to the conclusion that hours laws reduced job opportunities among first and second generation immigrant women much more severely than among white women of native parentage. Employment of the latter group, she concludes, was "largely unaffected" by hours laws.<sup>72</sup> But the laws sharply reduced the employment of immigrants and their offspring.<sup>73</sup> This conclusion, concededly based on imperfect data, is sure to be controversial. But it at least

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66. J. COMMONS, *supra* note 17, at 106-07, 465.

67. "Census data on hours worked in manufacturing suggest that foreign-born white women worked longer hours on average than did other women." Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88:1 J. POL. ECON. 476, 485 (1980).

68. J. COMMONS, *supra* note 17, at 60-61, 64.

69. R. HOFSTADTER, *supra* note 1, at 178 (summarizing Edward A. Ross's attitude).

70. 15 REPORT OF THE UNITED STATES IMMIGRATION COMMISSION XXIX (1901).

71. Landes, *supra* note 67, at 476. The labor movement supported several measures to curb immigration, ranging from outright prohibition to a literacy test.

72. *Id.* at 486.

73. *Id.* at 486-88.

serves to illustrate another complexity that constitutional historians have ignored.

Now consider the young white women, of native parentage, and with no aspirations to enter male occupations. Undoubtedly, there were excellent reasons for limiting their hours of work. Even so, Leslie Tentler thinks that many of them were not eager to go home at the end of a long day.<sup>74</sup> A middle-aged married woman with a family to care for may have been exceedingly grateful for shorter hours. But most female workers were young and single, in a transitional stage between school and marriage. At work, they were usually segregated by age as well as by sex. By our standards, and even by theirs, their physical working conditions were often tedious at best, and harshly degrading at worst. But for some of them, as for some men in the army, what mattered most was the exhilaration of fellowship. At work, they were with their gang; at home they were with their parents, many of whom must have seemed severe and backward, especially in immigrant families from the European peasantry. Listen to this diary, kept by a young woman who worked in a glove-making shop in Chicago. Although her job involved much machine work, paid by the piece, this is how she summarized some of her days:

Nov. 7, 1900: We all felt bad about Bryan being defeated. I am awfully tired tonight. This noon all the girls at the shop went out to see Minnie Becker give Jessie Templeman a wheelbarrow ride. The result of an election bet.

Nov. 22, 1900: This has been a fine day. The power was stopped about five hours, but we had a circus around visiting.

Nov. 23, 1900: We had lots of fun today hearing the girls quarreling about having the windows open. It has been rainy.

Feb. 14, 1901: We had lots of fun today at our table. I started on welted work this afternoon.

Feb. 19, 1901: Bitter cold today. I thought I would freeze this morning. We had fun this afternoon trying to keep quiet.

Feb. 20, 1901: We had a party at our table this afternoon oranges and chocolates. Another cold day.<sup>75</sup>

After reviewing other anecdotal evidence, Tentler concludes that "the difficulties of work were experienced in the satisfying context of group friendship" and "a truly vital social life at work might make long hours in the shop more attractive to young women than leisure in a restrictive home or neighborhood." These working-class girls, "unlike their brothers, seemed to have no permanent street-corner groups and few single-sex social clubs," so "the workroom provided many young women a unique place of refuge from family and neighborhood surveillance and an oppor-

74. L. TENTLER, *supra* note 1, at 65.

75. *Id.* at 64.

tunity for free sociability with peers.” Work “provided a chance to explore, however tentatively, new styles of speech and manners, and the chance to learn, from the more wordly-wise, about the possibilities of social and sexual experimentation open to the Americanized adolescent.” Tentler credits the testimony of a Massachusetts employer, arguing in 1913 against an eight-hour day proposal. His practice was to dismiss children under fifteen at four-fifteen. Instead of going home, he testified, these girls usually waited outside in the street until the other girls got through at five-o’clock. “Like the fourteen- and fifteen-year-old workers in a later New York study, these Cambridge girls would probably have worked longer than eight hours—and done so cheerfully—were they afforded no legal protection.”<sup>76</sup>

At work they were free—sometimes to swear, often to talk about boys, always to work like adults. The ones who enjoyed it never found their way into Brandeis’s briefs. Hazel Ormsbee described the youngest female workers in New York:

The girls seemed not to complain of the long workday in comparison with the shorter school-day. For most of them, especially for those who wanted to leave school, it is such a welcome change that the novelty of it obscures the effect of the longer day until the difference is forgotten, and yet the hours of work are very long for these fourteen- to sixteen-year-old girls, as long as the law permits, and longer.<sup>77</sup>

Ruth True, investigating women’s work on Manhattan’s West Side in 1914, noticed that “the human factor is strongest with these young girls.” She was disturbed by what she regarded as their irrational complacency about other working conditions:

The girl of this class accepts in a matter-of-fact way conditions of work that impress the outsider as very hard. Sometimes she tells of having cried with weariness when she started. But complaints of the long day, the meager reward, and the monotony are few. She has not thought out the general aspects of the factory.<sup>78</sup>

Youngsters, it seems, have always had peculiar ideas about when it’s time to come home. To Brandeis, shorter hours were “freedom,” not to loaf but to become cultured and to prepare for citizenship. His idea of leisure was an intellectual’s romanticism—fantastically earnest even by adult standards. To some of the young women on whose behalf he labored, freedom had another meaning—not one that we must accept, but one that gives some subtler hues and shadings to the picture of sweatshops.

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76. *Id.* at 66.

77. *Id.* at 75.

78. *Id.* at 77.

## V

Brandeis's argument in *Muller*, we may surmise, was acceptable to the conservative justices for several reasons, including superb advocacy, attitudes toward women, the public denunciations of *Lochner*, and perhaps also because it appeared to be a genuine health law rather than a redistribution of wealth. Notwithstanding *Lochner*, the conservatives were receptive to laws that seemed truly necessary to protect health. The redistributive effects of hours laws, if any, were subtle, and did not seem to be socialistic. The marketplace wage would be maintained, because on the face of it shorter hours could produce a correlative reduction in total pay. (Although by reducing the supply of labor hours laws presumably tended to increase wages.) That may be one reason why in 1917 the Court upheld an hours law for men,<sup>79</sup> citing *Muller* and ignoring *Lochner*. Attitudes toward women may have been less decisive, except perhaps to open the door, than the brief and the opinion in *Muller* made them seem.

Minimum wage laws are another story. In 1910 the National Consumers' League made such legislation for women and children part of its program for the forthcoming decade. In 1911 the Women's Trade Union League joined the ranks of minimum wage campaigners, and in 1912 Massachusetts adopted the first American minimum wage law. In 1913, eight more states followed suit. The minimum wage for women seemed to be on its way to becoming well-nigh universal.

It was not to be. After the banner year of 1913, the movement rapidly lost its momentum. By 1923, seventeen jurisdictions had laws relating to a minimum wage for women: Arizona, Arkansas, California, Colorado, the District of Columbia, Kansas, Massachusetts, Minnesota, Nebraska, North Dakota, Oregon, Puerto Rico, South Dakota, Texas, Utah, Washington, and Wisconsin. But five of the acts were ineffective because the legislature had fixed the minimum rates instead of delegating that task to an administrative body, so that in an inflationary period the rates set were soon below existing wages. In another state no actual minimum wage rates were ever established under the law, leaving at most eleven jurisdictions with workable statutes. When one considers that even these eleven did not apply to adult men, and did not include the most important industrial states,<sup>80</sup> it becomes ap-

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79. *Bunting v. Oregon*, 243 U.S. 426 (1917). Of the four holdovers from the *Muller* Court, only Chief Justice White dissented in *Bunting*.

80. J. COMMONS, *supra* note 17, at 503; I. BERNSTEIN, *supra* note 22, at 227. During

parent that on the whole the politicians rejected the minimum wage before the Supreme Court did so.

In *Stettler v. O'Hara*,<sup>81</sup> decided in 1917, Brandeis defended Oregon's minimum wage for women before the Supreme Court. His brief was in the *Muller* style, and by all accounts his oral argument was magnificent. A long wait ensued, during which Justice Lurton died, and was replaced by Brandeis. The Court rescheduled arguments in the case, and now Frankfurter represented the Consumer's League, submitting his own "Brandeis brief." By an equally divided vote, with Brandeis not participating, the justices upheld the law. In accordance with the Court's rules, this decision was dispositive of the immediate controversy but without precedential significance. No opinion was written.

In *Adkins v. Children's Hospital*,<sup>82</sup> decided in 1923, the Court faced the issue again. In the meantime, several conservative justices had ascended the bench. Brandeis's daughter had become secretary of the minimum wage board that was involved in the case and he therefore chose not to participate. The statute in *Adkins* was an Act of Congress providing for creation of a board empowered to promulgate a minimum wage for women or minors in any occupation in the District of Columbia. After the board fixed a minimum wage for employees of hotels, hospitals, and several related establishments, a hospital and a woman who operated a hotel elevator brought separate suits, alleging that their liberty of contract had been impaired.<sup>83</sup> Once again, Frankfurter filed an enormous brief, loaded with statutes, statistics, and arguments in favor of the law. This time, however, the Supreme Court held the minimum wage unconstitutional. Afterwards, addressing a conference called by the Consumers' League, Frankfurter explained that the problem was not party politics, or who was president. "This issue is far deeper," he said, and "it has a great deal to do with facts." The justices, concluded the professor, need "education."<sup>84</sup>

Frankfurter's evidence in *Adkins* was basically similar to

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the 1915-20 inflation even the administrative wage boards failed to keep up with inflation.  
*Id.*

81. 243 U.S. 629 (1917).

82. 261 U.S. 525 (1923).

83. For women, the minimum wage was to be "adequate to supply the necessary cost of living" to "maintain them in good health and to protect their morals." The board was authorized to issue a special license to any woman whose earning capacity "has been impaired by age or otherwise," authorizing her employment at less than the minimum wage. (Such provisions were standard in wage laws but apparently did not apply to ordinary inefficiency.)

84. L. BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 239 (1984).



what he and Brandeis had relied on in *Stettler*. For a generation, the literature about industrial conditions and wages had been abundant, reformist, and repetitive. Each of the three Brandeis and Frankfurter briefs was a little book, packed with snippets from Australian, English, American, and even some French and German writings. From England alone, Brandeis and Frankfurter summoned the brilliance of such worthies as Hobhouse, Toynbee, the Webbs, Tawney, and Winston Churchill—all enthusiastic advocates of the minimum wage. After them came row upon row of bureaucrats' figures (Washington, Kansas, North Dakota, Massachusetts, the District of Columbia, New York, the Department of Labor, London, and more), social workers' stories, foundation reports, and professors' generalizations. Name an objection to the minimum wage and in these briefs you will find ten or fifteen reports—from all quarters of Western civilization—showing that the objection is unfounded in principle and has not come to pass in practice.

The briefs' major premise was that every employee ought to get a "living wage." This concept, popularized by scores of authors, denoted a sum of money sufficient to cover the costs of necessities, plus a modest allowance for recreation and saving. Even by that minimal standard, studies showed that many workers—especially women—were pitifully underpaid. Some investigators drafted budgets to illustrate the problem. For example, in 1914 the New York Factory Investigating Commission published this "weekly budget for the typical self-supporting girl worker," followed by a few remarks.

<u>Expenses</u>	
Half of a furnished room .....	\$1.50
Breakfast and dinner .....	2.10
Lunches .....	.70
Carfare .....	.60
Clothes at \$52 a year .....	<u>1.00</u>
	\$5.90
<u>Receipts</u>	
Wages .....	\$6.00
Less expenses .....	<u>5.90</u>
Balance .....	\$0.10

Now, 10 cents is a narrow margin on which to insure medical care, recreation, membership fees and other incidentals. It is obvious that on this basis a self-supporting and self-respecting girl can save nothing. She is therefore in a precarious situation should the seasonal fluctuation throw her out of work.<sup>85</sup>

As a result of their meager incomes, working women "adrift"

85. Brief for Defendants in Error at 115-16, *Stettler v. O'Hara*, 243 U.S. 629 (1917) [hereinafter cited as Brandeis's *Stettler* Brief].

had to eke out a living by some combination of dangerous, dispiriting, or immoral expedients. Many chose to skimp on food. Some typical tales:

"You see I'm dieting," said a frail slip of a department store girl as she held out her tray upon which the cafeteria cashier, in the presence of the Bureau's agent, put a 2-cent check, covering the cost of the girl's lunch—a small dish of tapioca. She may have been dieting, but the evidences were pathetically against the need thereof, and there were some things telling other tales to a thoughtful observer. The girl's shoes and waist and skirt were plainly getting weary of well doing, and to hold her position as saleswoman they must soon be replaced. . . .

"Oh, my; where would we get our clothes if we bought meat every day?" was the way in which one of the group of four housekeeping girls answered the query as to this detail of housekeeping expenses. . . .<sup>86</sup>

Another girl of twenty-two was sick last winter and absent from work for a week. The doctors called her illness "general anaemia." "Worn out" and "exhausted" were the words which they used. Her story, later learned in detail, was a sufficient explanation of this breakdown. She never eats any breakfasts, having found out by experience that breakfast was the easiest meal for her to leave out. She is a clerk getting \$6 a week as saleslady in the white-goods department of a large up-state store. "You see I've figured it all out," she said, "I pay \$2 for my room—that bill has to be met every week. Then once a month 25c. is taken out of my pay envelope for the store Benefit Fund. That also is regular and can't be cut down. I've got to dress decent to keep my job. If I didn't spend \$1.25 a week on clothes they'd fire me sure. So you see yourself the only thing that is left me to economize on is food."<sup>87</sup>

Being underfed, these woman needed more warm clothing; being poor, they had less to spend for it.<sup>88</sup> Being underfed, they had less energy; being poor and female they often worked ten hours a day in a factory or store and then worked at home in the evening.<sup>89</sup> Having the greatest need for health care, they were least able to afford it, and in fact spent less for medicine than those with adequate incomes.<sup>90</sup> Ill-nourished and sickly though they often were, many avoided a doctor's care because of the expense, and sometimes because they knew that it would mean an order to stop work—an order they considered impossible to fulfill.

"If I were sick now I guess I'd have to steal the money to pay the doctor's bills," said Miss P.C., a nervous, grey woman of thirty-eight who has worked for twenty years at the same candy factory as hand dipper. . . . She lives with her two sisters paying them \$4 a week for board and room. . . . Her teeth need the dentist's care badly. "But," she remarked, "I haven't the money to pay for having them fixed so I just let them go on hurting me." . . . Last winter Miss S. faced a nervous breakdown. The doctor said it was the speed of the machines and the constant pressure necessitated by the piece work system which had worn on her and

86. *Id.* at 73-74.

87. *Id.* at 84-85.

88. *Id.* at 66.

89. *Id.* at 67.

90. *Id.* at 66, 70. "Tonics for the rundown in spring time are dispensed with in a laborer's home." *Id.* at 71.

gradually broken her strength. "Rest" was the prescription and "rest" was the one prescription which she could not afford to take. "Miss S. and her hemming machine are glued together," the forelady laughingly remarked one day. Miss S. is a woman of thirty-nine. After twenty-five years of work with the same firm, the rest which she so badly needs, she cannot even think of taking.<sup>91</sup>

Most of the briefs' evidence was applicable to both sexes, except insofar as women received even lower wages than men. But Brandeis also stressed themes that were reminiscent of the *Muller* brief.<sup>92</sup> Without "adequate food, clothing and shelter, health will inevitably suffer and the race will degenerate physically."<sup>93</sup> Brandeis quoted an article in the *Journal of Political Economy* for the proposition that "no group of . . . women workers should be allowed to unfit themselves . . . for the burden of motherhood which each of them should be able to assume." The state must therefore set a limit to "the exploitation of the improvident, unworkmanlike, unorganized women who are yet the mothers, actual or prospective, of the coming generation."<sup>94</sup> The Nebraska Bureau of Labor and Industrial statistics agreed: "Scientists and thinkers have pointed out that health and vitality are the capital of society. It follows, then, that any lessening or weakening of the natural power of womanhood over the race will be distinctly injurious."<sup>95</sup> The same alarm was sounded by Caroline Gleason, in a report of the Industrial Welfare Commission of the State of Washington: "We cannot expect a race of healthy nor of well governed children if the mothers-to-be are permitted to grow anaemic in their young womanhood."<sup>96</sup> This theme was hammered home with quotations from a German physician;<sup>97</sup> the reports of German factory inspectors;<sup>98</sup> a French physician;<sup>99</sup> a French law professor;<sup>100</sup> an English book on *Women's Work and Wages*;<sup>101</sup> another on *Sweating*;<sup>102</sup> and a Minnesota state report.<sup>103</sup> The

91. *Id.* at 86-87.

92. There was less of this sort of material in Frankfurter's *Adkins* brief. But it too touched upon the familiar themes. See, e.g., Brief for Appellants, Vol. I, at xxix, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) [hereinafter cited as *Adkins* Brief] (low wages "make yielding easier"); xxix (low wages endanger the offspring); xlv-xlvi (plaintiff's "theory of abstract equality" between the sexes is "refuted by the facts" because women lack bargaining power).

93. Brandeis's *Stettler* Brief, *supra* note 85, at 77.

94. *Id.* at 94.

95. *Id.* at 95.

96. *Id.* at 96.

97. *Id.* at 97.

98. *Id.* at 98.

99. *Id.* at 99.

100. *Id.* at 100.

101. *Id.* at 102.

102. *Id.*

103. *Id.* at 94.

Chairman of the Massachusetts Minimum Wage Commission, in the *City Club Bulletin of Philadelphia*, told his readers that they were paying the bill “in the deterioration of the physique and in the inefficiency of the generations that are going to come, because it is the women who are living today who are going to be mothers of the next generation. If thousands of young women are living in a state of semi-starvation and undernourishment, easy prey to disease and nervous collapse, unfit for motherhood and facing an old age of dependence, it is not only matter for wonder that so many are so patient, so uncomplaining, so good, but it is your duty, and my duty, and it is your interest and my interest, as members of society, to find out what we can do to set our house in order . . . .” He added that “if you will look at the records of the tuberculosis camps, if you will look at the records of the hospitals, the cases of anemia and nervous breakdown, to say nothing of other less pleasant records about us, you will find that it is less expensive to pay out that cost directly in wages rather than indirectly as we are paying it now.”<sup>104</sup> And so it went, with expert after expert saying that future generations would pay the price for underpaid women.

The briefs did not pretend that malnutrition was an inevitable consequence of low wages. A woman might instead choose to forego some other essential of civilized life. Substandard housing was one expedient.<sup>105</sup> Caroline Gleason, while recognizing that rooming together “cannot be universally condemned,” said that “frequently it means that to save expenses a room with a bed large enough for one girl will be adapted to two or even three.” Such privations, coupled with dieting, threadbare clothes, and other economies, have a cumulative spiritual effect. It “drags her down, not always in morals necessarily, but in efficiency, in desire for personal progress, in the general sense of being of some value to a community as one of its precious human citizens.”<sup>106</sup>

As Ms. Gleason implied, the poverty of working women had sexual implications. For instance, a woman might be forced to live in a bad part of the city. One, living in “the questionable section of Buffalo,” was in a neighborhood “not yet known as the real ‘red-light’ district, but as Mrs. N. herself put it ‘the lights are getting pinker every year.’”<sup>107</sup> Some women had to sleep in the same bed with the landlady’s children, forfeiting their privacy.<sup>108</sup>

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104. *Id.* at 79.

105. *Id.* at 69.

106. *Id.* at 83.

107. *Id.* at 116.

108. *Id.* at 117.

Boarding and lodging houses usually had no proper place where a young woman could talk to a man. According to a Senate report, “[f]ifty-five percent of the boarding and lodging women had no house sitting room and no place other than their rooms in which to receive friends.” The landlady rarely objected “to a girl entertaining her gentlemen friends in her bedroom, provided that they do not stay too late” and don’t “disturb the whole house.” “Unfortunately the ‘gentlemen friends’ are not always deserving of the name, the girls are often weak and easily led astray, and the free and easy intercourse which is nobody’s business may end most disastrously.”<sup>109</sup>

After dark, the city lights beckoned:

Between the crowding and bad air, both at home and at their work, and the kind of food they eat, and the long hours and monotony of their employment, they are constantly in an abnormal state. They are feverish and uncomfortable; they want something, but they don’t know what is it. They crave, with an intensity we can hardly realize, something to make them forget their discomfort, to divert their minds from the weariness of their lives. That is why they flock to these cheap amusement places, which are the only ones they can afford. There they find temptation on every hand, but they are in poor condition to resist it. The great wonder to me is that so few yield.<sup>110</sup>

Some of the women solved their financial problems by acquiring a male provider. New York State investigators described one case:

Said Miss H.A.: “Why! if I had to buy all of my meals I’d never get along.” Her breakfasts and suppers she cooks in her small furnished room, her lunches she usually buys. When she knows that her friend is coming in the evening she eats only a sandwich and a cup of tea for supper and then lets his treat of an ice cream soda, or candy make up for the rest of her dinner. “Sunday dinner I always count on him for,” she ingenuously admitted. “As it is now my food bill rarely runs above \$2.”<sup>111</sup>

“Such instances,” declared the investigator, “at least throw light upon the acceptance of the doubtful invitation and make it easier to understand the free and easy attitude towards men of many working girls.”

In the early years of the century, vice crusaders inveighed against the exploitation of young women—fresh off the farm, or the immigrants’ ship—by pimps and madams who lured them into prostitution. The campaign against white slavery had familiar progressive themes: the inefficiency of “wasted lives”; the importance of women’s suffrage as a remedy; the perfidies of the rich;

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109. *Id.* at 128.

110. *Id.* at 129 (a social worker).

111. *Id.* at 133.

and the pathos of poverty, often described as a cause of prostitution. Brandeis cited several authorities for the connection between poverty and prostitution. According to Henry R. Seager, in the *Annals* of the American Academy of Political and Social Science, "the \$8-a-week girl . . . has more power to resist the temptations which our cities constantly present than the \$5-a-week girl."<sup>112</sup> The Board of Public Welfare of the Bureau of Labor Statistics reported that "[s]eventy of the 300 inmates of houses of ill fame in Kansas City stated the cause of their downfall was low wages."<sup>113</sup> Like most of Brandeis's authorities on this subject, the board was careful to concede that low wages are only one of several causes of prostitution. A Washington State report asserted that the decision to become a prostitute "results not because at that particular moment she wants a square meal. It is more likely to be due to the fact that constant cravings of hunger have weakened her physical condition, her mental poise and her outlook on life." Hunger alone might not cause her fall, were it not "accompanied with chill of body and cheerless surroundings." But wages enter directly into her decision to remain a prostitute: "once having entered upon a life of degradation and having enjoyed again the comfort of pleasant shelter and plenty of nourishing food, the inadequate wage she has left and the impossibility of receiving a higher one is the effectual bar which keeps her from returning to a moral life."<sup>114</sup> The brief described a Dickensian case from a report of the Massachusetts Commission on Minimum Wage Boards:

Annie's mother died when she was a child and she was brought up by an older sister. Her father was a fireman and two brothers were also working, so they had a comfortable home. But her father was ill for a year and a half, and then died, all his savings consumed, just as Annie got started as a bundle girl at \$2.50 a week. Soon after this both her brothers died, one by accident and the other of consumption, and later in the same year the sister died, too, and Annie was left alone, with \$2.50 as her sole income. Friends were good to her and helped her as they could, but they too were poor, and Annie plainly could not live on what she could earn. She now earns \$6 a week, but she works very irregularly. The forelady says: "Annie is so sweet and kindly that I always try to hide the fact that she is a continual absentee. I know nothing of her outside life. Yes, she has changed greatly in her appearance; she was such a pretty young thing and now she does look dissipated. But, poor girl, she has had a frightful time and girls can't live on their wages." Annie's wage card gives an average of \$3.20 a week. She says she pays \$4.84 a week for her room and board and 25 cents for light. When asked how she managed to pay more than she earned she began to cry bitterly and said: "But you know, no girl can live on \$6 a week, let alone the \$2.50 which was all I had when I first had to support myself. No girl can get by

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112. *Id.* at 132.

113. *Id.* at 125.

114. *Id.* at 133. A Senate report reached the same conclusion. *Id.* at 127.

on that."<sup>115</sup>

Sidney and Beatrice Webb wrote grimly about London's slums, where "children part with their innocence long before puberty, in which personal chastity is virtually unknown, and in which 'to have a baby by your father' is laughed at as a comic mishap."<sup>116</sup>

The briefs rebutted various conceivable objections to the minimum wage. It was important, for example, to show that women's wages were not determined by an iron law of economics. Brandeis and Frankfurter produced copious evidence that neither the value of the service rendered nor what the employer could afford was determinative. Two companies in the same business, in the same locale, would often pay radically different wages for comparable work. Not infrequently, the smaller firm paid more. Wages, said Brandeis's experts, were determined by chance, guesswork, and custom, not by scientific standards.<sup>117</sup> The employers' superior bargaining power enabled them to dictate just about whatever wages their consciences would allow. "In one and the same industry employers would be found who so graded their rates that the average employee would be able to earn fair wages, the usual employee, of course, under such a system earning very good wages; employers who took foreign women because they could get them for lower wages than American women, and employers who sought girls under 16 for all the occupations they could fill on the admitted ground that 'they could do as much as a woman and would work for less.'<sup>118</sup> Along the same lines, the Massachusetts Commission on Minimum Wage Boards mentioned that "the constant and even increasing tide of immigration is an important element in the situation."<sup>119</sup>

The villains of the briefs were the unscrupulous sweatshop proprietors, paying inadequate wages to the least proficient workers, and by this "cutthroat competition" forcing more humane employers to underpay their employees. The theory was that an employer who pays less than a living wage is necessarily receiving an undeserved subsidy. The deficit must be made up somehow: by private or public charity; by "future inefficiency of the worker herself and by her children"; and most often by the industry which employs her father, who supports her.<sup>120</sup>

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115. *Id.* at 131.

116. *Id.* at 121.

117. *Id.* at 136-57.

118. *Id.* at 140.

119. *Id.* at 143.

120. *Id.* at 232.

## VI

Dismissing the *Adkins* brief, Justice Sutherland's opinion for the majority called Frankfurter's materials "interesting but only mildly persuasive." Scholars have generally assumed that this characterization was outrageously inaccurate. On a premise of judicial restraint, that is a reasonable reaction to Sutherland's disingenuous opinion. If, as the majority professed to believe, "every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt," by "clear and indubitable demonstration" of unconstitutionality, then the Brandeis and Frankfurter briefs were unanswerable and Sutherland's comment was ludicrous. Indeed, if Justice Sutherland had accurately described the majority's approach to judging, no brief would have been necessary—a justice like Holmes didn't need social workers' reports. Why didn't "mildly persuasive" evidence suffice to create a "rational doubt"? It was only by having invented a constitutional "liberty of contract," and then construing that liberty in the light of its own economic preferences, that the Court invalidated the act.

It is much less clear that Sutherland was wrong about the wisdom of the law. Let us put aside the canon of judicial restraint and judge the *Adkins* decision as if it were a legislator's speech. On that basis, Justice Sutherland's reasoning, so vacuous when judged as jurisprudence, becomes unimportant; legislators need be neither scholarly nor candid nor consistent. A thoughtful legislator might vote for the *Muller* law but against the *Adkins* law. The hours laws were at least superficially health measures. The minimum wage was indirectly a health law, insofar as higher wages are good for your health. But a politician might prefer to subsidize medical care, or the poor, more directly. The same legislator who supposed that an hours law would benignly spread the work, reducing unemployment, might conclude that a minimum wage would have the opposite effect. Even if our hypothetical legislator rejected every other distinction between the laws, he might decide that the arguments for limiting the law to women are more persuasive in the case of hours laws than in the case of wages. Of course, any of these contentions might be invalid, but a scrupulous legislator could distinguish between the two statutes, as a scrupulous judge could not.

A modern critic would probably emphasize two faults of the *Stettler* and *Adkins* minimum wages. First, they were applicable only to women—protective gender discrimination of a type that legislatures have since repealed and that feminists now deplore.



Sutherland's lackluster opinion did make this point. He proclaimed that while the "physical differences" between the sexes "must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." "To do so," he continued, "would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships."<sup>121</sup> Justice Sutherland had battled against discriminatory treatment of women throughout his political career; he was, for instance, an advocate of women's suffrage in the Senate. But of course he was also a champion of *laissez faire*, and so the *Adkins* opinion has been thought of primarily as a reactionary tract.

The basic rationale of the minimum wage was redistributive: it was designed to alleviate poverty. By a tolerant, Holmesian standard of judicial review, it clearly was well enough adapted to this legitimate end. Yet, as Holmes himself emphasized, the legislative merits were not so clear. One question was whether the right people would receive the benefits of this redistribution of wealth, another was whether the right people would pay for those benefits.

The apparent beneficiaries were those women who would otherwise have earned less than the minimum wage but whom the employer would retain (or hire) despite having to pay the legal minimum. This class, the Brandeis and Frankfurter briefs emphasized, was generally impecunious. On the other hand, as Sutherland said, the law took no account of "any independent resources she may have." That comment could have been made more pointed. As the briefs acknowledged, most female workers were young, single girls and women living with their parents until marriage. In most of these families the father was the major source of income, and in some the mother also worked. According to one study, the father typically earned about 90 percent of the family income; the mother, children and miscellaneous sources accounted for the rest.<sup>122</sup> "The girls were not so much interested in the amount earned as in the amount given back by their mothers

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121. 261 U.S. at 553.

122. J. COMMONS, *supra* note 17, at 55.

for spending money,” noted Hazel Ormsbee in 1927 of young factory workers in New York, “and an increase in weekly wage interested many of them only if it resulted in more spending money.”<sup>123</sup> Descriptions of the financial plight of underpaid women living alone were therefore not directly applicable to the more typical beneficiaries of such laws. Low wages presumably reinforced women’s dependence and passivity. To that extent, the minimum wage was potentially liberating. Perhaps it enabled some women to leave home and live independently, but one scholar thinks that the minima were too modest for that.<sup>124</sup> Thus, the minimum wage functioned in many cases to augment family rather than individual income. Brandeis and Frankfurter did a pretty convincing job of showing that most of these families were necessitous, that hardly any of the young women were merely working for “pin money,” and that not infrequently they had dependents such as a disabled father.<sup>125</sup> But the briefs did not undertake to show that the families were typically poorer than most working-class families, or than the families of those who would ultimately pay for the minimum wage. As a legislative issue, this was an important point.

Who pays for a minimum wage? To this question, several different answers can be found. No doubt much of the rhetorical and political appeal of the concept derived from what might be called the Robin Hood assumption—that much or all of the money would come out of the profits of greedy employers. The briefs, with their references to unscrupulous sweatshop owners, suggested that at least part of the cost would be paid in this way.<sup>126</sup>

Yet the briefs were also full of testimonials to the popularity of the minimum wage among businessmen, after they got used to it. If they were paying for it, why did they like it? One theory, prominent in the briefs, was that it protects responsible businessmen from unfair competition. Next, the briefs argued that the minimum wage will be largely or wholly free, because it will in-

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123. L. TENTLER, *supra* note 1, at 74.

124. *Id.* at 16.

125. Brandeis’s *Stettler* Brief, *supra* note 85, at 211-24.

126. The briefs also dealt at great length with the possibility that businesses would pass on the cost of higher wages to their customers, in the form of higher prices. Some experts denied that this would occur; others argued that the price increases would be miniscule, because commonly the labor cost is only a small fraction of the total price, and because “cheap labor is dear”—companies that pay good wages are often more efficient and hence able to undersell their competitors. (The briefs did not explain why, in that event, legal compulsion was necessary, except by references to the ignorance of employers.) To the extent that higher prices do occur, said the experts, it is appropriate for consumers to pay the cost of the labor that makes the product.

duce greater efficiency on the part of both employers and employees. This was Brandeis's pet theory. He believed that if employees were paid more they would be more "valuable" and consequently managed better by employers, just as one takes better care of an animal or a tract of land if it is costly.<sup>127</sup> His dealings with corporations had convinced him that they usually needed much more scientific management, and were often capable of huge economies.<sup>128</sup> In fact, he became famous by arguing against a proposed railroad rate increase on the ground, evidently largely true, that the railroads could save a million dollars a day by becoming more efficient.<sup>129</sup> He also knew businessmen who had prospered despite or (as he believed) because of generous policies toward their employees.<sup>130</sup> In Brandeis's view, responsibility improved companies just as it improved individuals. To pay less than a living wage was irresponsible. Higher wages, according to a tenet of scientific management, would create incentives to increased efficiency and so would *lower* the employer's costs.<sup>131</sup>

Accordingly, Brandeis argued that necessity is the mother of invention. Saddled with the additional expense of paying a living wage, companies will respond by finding other ways to cut production costs. They will train their workers better, to make them worth the minimum wage.<sup>132</sup> They will improve managerial techniques.<sup>133</sup> They will invent labor-saving devices, reducing the number of workers.<sup>134</sup> They will, said H.R. Seager, hire employees more selectively, and "the higher average of ability would en-

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127. STATE OF NEW YORK, 5 FOURTH REPORT OF THE FACTORY INVESTIGATING COMMISSION 2882 (1915) (testimony of Louis D. Brandeis). Conceding that some unemployment might be caused by the minimum wage, Brandeis defended this on the grounds that in "many" cases it would lead to "their employment in occupations where they could be more efficient than the one in which they found themselves, and it would be an immense incentive to the employee himself to become more efficient." *Id.* at 2884. In addition, increases in wages would lead to increases in competency. *Id.* at 2885. These theories appear in the briefs as well, and on this critical issue, at least, there appears to be no substantial difference between Brandeis as a citizen and Brandeis as an advocate.

128. A. LIEF, *supra* note 11, at 192-202, 301.

129. *Id.* at 198.

130. Filene's, a Boston department store, may have helped to persuade him that generosity is good business. See A. GAL, *supra* note 6, at 60, 62. Filene thought that businessmen need to be forced to pay adequate wages before they will realize it helps them. *Adkins* Brief, *supra* note 92, Vol. I, at 389. Brandeis knew that wages in the shoe industry were higher than in the textile industry, and employer-employee relations were better. Part of the reason was that the textile industry drew from an enormous pool of the unskilled, including more women and children. In consequence, employers could afford to be militantly anti-labor, while shoe manufacturing required skilled employees that employers did not want to lose. A. GAL, *supra* note 6, at 63.

131. A. LIEF, *supra* note 11, at 197.

132. Brandeis's *Stettler* Brief, *supra* note 85, at 253, 267.

133. *Id.* at 253, 257-58.

134. *Id.* at 258-60, 266.

able a smaller number to do the work formerly performed by a larger number.”<sup>135</sup> Brandeis put the argument this way: with a minimum wage employers will be stimulated “to develop and to keep the most efficient workers . . . .” The workers, in turn, will be stimulated “to prove themselves the most efficient.”<sup>136</sup>

Furthermore, adequate food and clothing will increase efficiency. For example, an article in the *Political Science Quarterly*: “No watchfulness of foreman or superintendent and no pressure from above can take the place of the willing brain, added to the zealous hand of a happy, well-paid, well-placed, well-equipped, and contented workman.”<sup>137</sup> Or, as B.S. Rowntree said, “[i]f his diet be liberal, his work may be mighty.”<sup>138</sup> In other words, many workers would be worth a higher wage if they received it. Naturally, the briefs did not discuss the possibility that this theory was inapplicable to immigrants who were already receiving much more than they were used to in the old country, or to girls whose well-being was not determined primarily by their individual incomes.

Does the minimum wage cause unemployment? In *Stettler*, Brandeis skipped lightly over this possibility. His argument about greater “selectivity” in hiring seemed almost to make a virtue of unemployment. It remained for Frankfurter to assemble evidence to rebut this common objection to a minimum wage. Citing studies in Oregon, Australia, and Britain, he claimed that such fears were “groundless.”<sup>139</sup> In Massachusetts, a study of the brush industry found that the minimum wage had not caused female unemployment.<sup>140</sup> Professor M.B. Hammond, studying results of Australia’s minimum wage, found evidence “that few workers had been displaced.”<sup>141</sup> Utah’s Commissioner of Immigration, Labor and Statistics was willing to “positively state that I do not know of a single employee who is suffering the loss of employment because of this law.”<sup>142</sup> An English investigator reported that, in the period of prosperity prior to World War I, employment in the trades subject to the minimum wage had risen.<sup>143</sup> Summarizing data from Australia, a New York commission declared that experience

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135. *Id.* at 257.

136. *Id.* at 253.

137. *Id.* at 254.

138. *Id.* at 88.

139. Brief for Defendants in Error upon Re-Argument at 663, *Stettler v. O’Hara*, 243 U.S. 629 (1917) [hereinafter cited as Frankfurter’s *Stettler* Brief].

140. *Id.* at 670.

141. *Id.* at 672.

142. *Id.* at 673.

143. *Id.* at 674.

had not confirmed fears that the minimum wage would result in "a wholesale discharge of workers." Some hardships admittedly occurred. In Victoria, there was "considerable distress among the boot and clothing workers" because "many of the old, inefficient and slow workers were discharged." Despite such problems, "the great majority of industries have flourished and employed a larger number of hands with each succeeding year, once the period of readjustment is past."<sup>144</sup>

R.H. Tawney, interpreting data from 36 firms in the English tailoring industry, concluded that in response to the minimum wage one firm dismissed 37 percent of its women workers, one dismissed 20 percent, one dismissed 16 percent, three dismissed 10 percent and two dismissed 7 percent. But this displacement had usually been gradual and, "since the trade is constantly growing, there is no reason to anticipate any considerable unemployment of workers who are already in the trade."<sup>145</sup>

Another English study, of the box-making industry, found that "out of ninety-six firms, employing some 6,800 women workers, only thirty-two replied that they had dismissed any of their women, the number affected being not more than 300, or about 4.4 percent."<sup>146</sup> Conceding that these figures were only rough approximations, the author quoted a Birmingham employer's view that "the Act has hit the inefficient worker and large firms are discharging them frequently."<sup>147</sup> Nevertheless, concluded the study, "the appearance of anything like unemployment on a serious scale, as a result of the minimum rates, has not yet taken place and is not likely to take place in the future."<sup>148</sup> Another English expert was equally optimistic, cautioning that careful wage determinations may cause "slight local and temporary dislocations," but "such dislocations accompany all industrial developments."<sup>149</sup>

As some of these commentaries imply, advocates of the minimum wage generally were not alarmed by the prospect that it would cause moderate increases in unemployment. Expressing a common attitude, one report said that "it is desirable to eliminate the incompetent and defective workers from competition with competent ones, because they have been 'driving down wages.'"<sup>150</sup> Professor E.R.A. Seligman advanced the remarkable

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144. *Id.* at 675-77.

145. *Id.* at 682.

146. *Id.* at 683.

147. *Id.*

148. *Id.* at 684.

149. *Id.* at 685.

150. *Id.* at 671 (quoting STATE OF NEW YORK, 1 FOURTH REPORT OF THE FACTORY INVESTIGATING COMMISSION 43-44 (1915)).

argument that “if the law will lead to a sifting out of those who do not want or are not able to work, the public will be in a better position to deal with the problem of unemployment.”<sup>151</sup>

In our more affluent age, the unemployed receive much of the public sympathy that was once bestowed on workers in general. In Brandeis’s time, most working-class families were not far from the brink of poverty. That may be one reason why, in the early minimum wage debates, marginal employees were treated with a brusqueness that at times sounds Spencerian and callous, as in these remarks by Walter Lippman:

There are nevertheless classes of workers whose productivity is very, very low. They may be old, or weak-minded, or physically feeble, or so utterly untrained and illiterate that under American conditions they cannot be employed at a living wage. They should not be permitted to debauch the labor market, to wreck by their competition the standards of other workers.<sup>152</sup>

Similarly, Frankfurter suggested in *Adkins* that those who are unable to obtain employment because of the minimum wage may “accept the status of a defective to be segregated for special treatment as a dependent” of the government which “may determine how defectives shall be supported,” and not be compelled to grant an indirect subsidy.<sup>153</sup> After Hitler, such language went out of fashion. To the progressives, on the other hand, it must have sounded like an axiom of rational social policy. Frankfurter said as much: “Congress therefore, may use means, like the present law, for sorting the normal self-supporting workers from the semi-employables or the unemployables and then deal with the latter appropriately as a special class, instead of permitting an indiscriminate, unscientific lumping of all workers, with a resulting wasteful confusion of standards.”<sup>154</sup> “Unscrupulous” employers who hire these defectives at wages below their “cost” are in effect drawing “upon a public subsidy” that enables them to engage in “cutthroat competition” by underselling competitors. An employee who sells her labor at a price below cost, with an outside subsidy, is also guilty of unfair competition.<sup>155</sup>

Justice Sutherland’s *Adkins* opinion mentioned the danger of unemployment only in a single passing sentence: “No real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or

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151. *Adkins* Brief, *supra* note 92, Vol. I, at 413.

152. Lippman, *Campaign Against Sweating*, NEW REPUBLIC, Supp. Mar. 27, 1915, at 7.

153. *Adkins* Brief, *supra* note 92, Vol. I, at xlv.

154. *Id.*

155. *Id.* at xlviii.

above the minimum; that will come in periods of depression and struggle for employment when the efficient will be employed at the minimum rate while the less capable may not be employed at all."<sup>156</sup> Modern critics have been much more articulate. They contend, basically, that the minimum wage harms some people who are poorer than the law's beneficiaries. To that extent, it perversely "taxes" the very individuals who ought to be the beneficiaries of wealth redistribution. This is why, although unions still lobby for increases in the statutory minimum, many reputable economists—including three American recipients of the Nobel Prize—now disparage the minimum wage.<sup>157</sup>

Recent studies indicate that minimum wage laws have their most severe impact on young blacks. As Paul Samuelson remarks, "what good does it do a black youth to know that an employer must pay him \$2.00 per hour if the fact that he must be paid that amount is what keeps him from getting a job?"<sup>158</sup> Milton Friedman reports that with the 1956 increase in the minimum wage from 75 cents to \$1 an hour, the unemployment rate of young black males rose from between 8 and 11 percent to 24 percent.<sup>159</sup> There is more than a little irony in all this, since Brandeis believed that irregular employment was the greatest cause of waste and suffering in America.<sup>160</sup>

Frankfurter cited a study, done by the Bureau of Labor Statistics, which found a substantial decrease in female employment after passage of Oregon's wage law. But the study attributed this decrease to other causes such as a general business depression and a new policy, adopted by the Portland Retail Merchants' Association, of charging for alterations of garments, which reduced demand and hence employment.<sup>161</sup> In an article written in 1958, John Peterson reexamined this study, concluding that the bureau was mistaken in exonerating the minimum wage.<sup>162</sup> He pointed out that the new policy of charging for alterations may well have been adopted because of the wage law. Peterson also observed that the wage law had only a slight impact on wages in Oregon. In 1913, 21 percent of all women received less than the minimum,

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156. 261 U.S. at 560.

157. Friedman, *Minimum-Wage Rates*, in P. SAMUELSON, READINGS IN ECONOMICS 226, 227 (7th ed. 1973); P. SAMUELSON, ECONOMICS 395 (10th ed. 1976); Stigler, *The Economics of Minimum Wage Legislation*, 36:2 AM. ECON. REV. 358 (1946).

158. P. SAMUELSON, *supra* note 157, at 395-96.

159. Friedman, *supra* note 157, at 227.

160. A. LIEF, *supra* note 11, at 92, 334, 399.

161. Frankfurter's *Stettler* Brief, *supra* note 139, at 663.

162. Peterson, *Employment Effects of State Minimum Wages for Women: Three Historical Cases Re-examined*, 12 INDUS. & LAB. REL. REV. 406, 409-13 (1958-59).

but to raise them to the minimum required an increase in female payrolls of only 2.4 percent, amounting to a 1.2 percent increase in total employee payrolls. Peterson concluded that the law leads to “relatively adverse employment effects [from] even modest imposed wage increases.”<sup>163</sup>

Brandeis’s theory—that employers would respond to the minimum wage by becoming more efficient—seems to have been valid but oversimplified. Recent studies suggest that this “shock effect” can reduce the disemployment from a minimum wage but probably cannot completely overcome it.<sup>164</sup> The shock effect theory was probably truer in the early stages of scientific management, when Brandeis urged it, than it is today.

To be fair, economists disagree about how much unemployment is due to the minimum wage. One recent summary says that “estimates of the effect of a 10 percent increase in the minimum wage on teenage unemployment rates range from zero to over three percent, but estimates from 0 to .75 percentage points are most plausible.”<sup>165</sup>

Much of the information furnished in the briefs to show that the minimum wage does not cause an unacceptable level of unemployment is, from a purely empirical standpoint, strikingly similar to the data adduced by modern laissez-faire economists to demonstrate that the minimum wage *does* cause too much unemployment. The different conclusions seem to be due more to different predilections than to different facts. Lester Thurow contends that “[w]hat is fought over as if it were a dispute about economic facts is really a dispute about the values that society ‘ought’ to follow. The pertinent economic facts are widely accepted by all economists, whether they are for or against the minimum wage laws.”<sup>166</sup> All agree, he says, that the minimum wage will create some unemployment for those whose productivity is below that wage; that it will raise the wages of other “intramarginal” workers who remain employed and get the new higher minimum wage; that the total income going to those in the low wage group (employed and unemployed) probably will rise; that the gender-neutral minimum wage raises the income and employment of adults, especially women, while concentrating unemployment among teenagers; that many who benefit from increases in the minimum are not poor, with most of the redistribution of wealth occurring among the wo-

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163. *Id.* at 422.

164. Brown, Gilroy & Kohen, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LIT. 487, 489-90 (1982).

165. *Id.* at 524.

166. L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS 26 (1983).



men and children of lower-middle-income families; and that the minimum-wage laws are only loosely enforced, with millions of workers illegally paid less than the minimum wage.

Given all the agreement, why the enormous disputes about the minimum wage in general and a [proposed] subminimum for teen-agers in particular? The answer is simple. The minimum-wage dispute is not a quarrel about economic facts, but a political dispute about whether government should or should not intervene in the market to alter incomes. Is the good society a laissez-faire society or one in which government intervenes to produce a 'good' distribution of income? It is an important question, but not primarily an economic one.<sup>167</sup>

As justifications for legislative policy, the minimum wage briefs were, precisely, "mildly persuasive"—just as Sutherland said.

## VII

Insofar as we have exaggerated the cogency of Brandeis and Frankfurter's factual arguments, we may have undervalued the legal and institutional reasons for upholding the wage and hour laws. Granted, those contentions have also been made, and frequently. But they have been treated, at most, as equal to the empirical arguments in the briefs. In truth, Brandeis and Frankfurter's legal position was the strongest part of their briefs.

Whatever one may think of judicial restraint in other contexts, it was desirable in the wage and hours cases. Neither the constitutional text nor any principled division of responsibility between courts and legislatures justified a judicial veto of these types of laws. Modern conceptions of equal protection might provide an adequate rationale for invalidating the laws that applied only to women. But in the days of *Muller* and *Adkins* no such body of law existed, and neither the justices nor the people were ready to create it.

On a more pedestrian lawyer's level, the Brandeis-Frankfurter briefs were enormously powerful. For every economic regulation that had been struck down as a violation of "liberty of contract," many more had been upheld. The cases involving maximum hours laws were the most pertinent precedents in *Adkins*. *Muller* had upheld a law limited to women; *Bunting* had upheld one that applied to both sexes; *Lochner* had been overruled *sub silentio*. A legislator might distinguish hours from wages, but it was absurd to pretend that the due process clause authorized the judiciary to do so, except of course on the unarticulated theory

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167. *Id.* at 27.

that judges should be as ad hoc, intuitive, and political as legislators.

Old-fashioned jurisprudence stresses impartiality, reason, and consistency. As T.R. Powell demonstrated in a fine critique of *Adkins*, the result in that case violated these norms.<sup>168</sup> Prior to the Court's decision, minimum wage proposals had encountered much more resistance in the legislatures than in the courts. State courts had uniformly sustained the minimum wage for women; excepting the last opinion of the court of appeals, so had the federal courts. Twenty-nine judges of state and lower federal courts had voted to uphold such statutes, with only four judges dissenting.<sup>169</sup> When the issue first came before the Supreme Court in *Stettler*, a majority of the justices would have voted to sustain the Oregon law, if Brandeis had participated. In *Adkins*, three justices dissented and Brandeis again declined to participate. "Adding these Supreme Court votes to the votes in the lower courts, we have a total of thirty-two judges voting in favor of the constitutionality of minimum-wage legislation and nine judges voting against it."<sup>170</sup> Five of the nine negative judges happened to be in the most critical place at the critical time: on the Supreme Court in 1923.

Of the five justices who voted against the legislation in 1923, three (McKenna, Van Devanter, and McReynolds) were on the bench when the Court was divided four to four. They presumably gave three of the four votes against the law in *Stettler*, and Holmes presumably voted to uphold it, just as he did in *Adkins*. "Followers of Supreme Court divisions can be certain also that Mr. Justice Clarke was on the same side."<sup>171</sup> Almost certainly Chief Justice White (rather than Justice Day or Pitney) cast the fourth vote in opposition. If so, then (after Chief Justice Taft replaced White) the Supreme Court from October, 1921, to June, 1922, contained six justices who thought minimum wage legislation constitutional: Brandeis, Taft, Holmes, Day, Pitney, and Clarke. "If, therefore, any state case or the District of Columbia case had been argued before and decided by the Supreme Court between November, 1921, and June, 1922, the decision would, in all probability, have been five to three in favor of minimum wage legislation."<sup>172</sup>

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168. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545 (1924).

169. *Id.* at 548.

170. *Id.* at 549.

171. *Id.*

172. *Id.* at 550.

But for an historical accident, that is what might have happened. On the first hearing of *Adkins* before the Court of Appeals of the District of Columbia, Judge Robb was unable to sit because of illness. The decision, on June 6, 1921, was two to one in favor of the statute. A rehearing was denied. This decision might have reached the Supreme Court for adjudication some time before June, 1922, "when there were certainly only four Justices . . . opposed to the legislation and, in all probability, only three opposed to it. Thus the state laws would surely have been saved for the time from annulment, and almost certainly both state and national legislation would have been sustained by a decision that would have been accepted as settling the issue forever."<sup>173</sup> But later that summer Judge Robb, having recovered, joined the dissenting judge in ordering a rehearing. This intervention postponed the ultimate decision in the court of appeals until November 6, 1922. The appeal from this decision reached the Supreme Court for argument in March, 1923, and was decided less than a month later. By then, Justices Clarke, Day and Pitney had been succeeded by Sutherland, Butler and Sanford, turning "either a possible tie vote of four to four or, more probably, a five-to-three vote in favor of minimum wage legislation . . . into a five-to-three vote against it."<sup>174</sup>

This change, like Brandeis's failure to participate, was not due to President Harding's leanings—the four new justices that he appointed were evenly divided on the issue. As T.R. Powell concluded, minimum-wage legislation became

unconstitutional, not because the Constitution makes it so, not because its economic results or its economic propensities would move a majority of judges to think it so, but because it chanced not to come before a particular Supreme Court bench which could not muster a majority against it and chanced to be presented at the succeeding term when the requisite, but no more than requisite, majority was sitting.<sup>175</sup>

Could anything be more contrary to the suppositions of traditional jurisprudence?

## VIII

We are born ignorant, and only learn to hide the defect. As a citizen, not just as an advocate, Brandeis probably exaggerated the commonalities of interest, between immigrants and native-born; men and women; children and adults; incompetent and competent

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173. *Id.* at 551.

174. *Id.*

175. *Id.* at 552.

workers; all workers and businessmen. He was a prophet, as many have said, and a man of action. Neither type is disposed to acknowledge many doubts and complexities. Committed to regulated capitalism, he was not inclined to believe in irreconcilable conflicts of interest among social classes. With less excuse, most academic critics of the hour and wage laws also simplify; instead of claiming that everyone's interests are harmonious, they seem to say that a law is bad if it hurts anybody who is poor or female. The laissez-faire economists talk as if economic science had proved that minimum wage laws are on the whole harmful, rather than merely that they have some perverse effects. The feminists sometimes talk as if a labor law that applies only to women necessarily does more harm than good, an assumption whose validity in Brandeis's time is hardly self-evident.

Obviously, criticism of the details of Brandeis's briefs should be tempered by a generous allowance for how long ago they were written. Most of his authorities came to their conclusions within a few years before or after the first skyscrapers, movies, and automobiles. Holmes liked to say that as a rule no book lasts over twenty years. Compared to the works of other social theorists of the time, the briefs—taken as a whole—do not sound extraordinarily foolish. One should bear in mind that some of the most amusing portions of the briefs made more sense sixty or eighty years ago, when sexual liaisons were indeed dangerous to women. And are we sure that children need less care than our ancestors thought? A competent debater could still defend Brandeis's positions, and would still use some of his evidence. To expect more would be unreasonable.

Nevertheless, the factual portions of the briefs are considerably less compelling than traditional accounts would have us believe. That is so even of some issues having nothing to do with gender—for example, the relationship between long workdays and alcoholism, and the desirability of a minimum wage. A streak of wishful thinking runs through much of Brandeis's thought—why deny it? Evaluation has been clouded by contrasts between the “realities of industrial life,” supposedly depicted in the briefs, and the “legalism” attributed to the conservative justices, as if Sutherland's legal reasoning was superior to his understanding of economics. The false implication is that good social science was all on Brandeis's side, as against archaic but conventional lawyers' logic on the other side. It would be more accurate to say that the good legal logic was all on Brandeis's side, as was most of the eloquence, while the factual merits were doubtful. It is by the

standards of traditional jurisprudence, not those of modern social science, that Brandeis's briefs can most surely be justified.

Even if the hour and wage laws were, on balance, good measures, the conventional appraisals of Brandeis's evidence have certainly been hyperbolic. What explains this odd lapse of scholarly judgment? There are two easy answers. One is that attitudes toward women have changed. The other is that the effects of the laws have been studied more extensively, and with more sophisticated methodologies than were employed by Brandeis's experts. It seems likely that there is a third and more fundamental explanation. Brandeis's briefs expressed the creed, and to a degree the interests, of the twentieth-century American intelligentsia. His advocacy of gradual, experimental reforms—satisfactory to enlightened businessmen as well as to reformers—was in the mainstream of our liberal tradition.<sup>176</sup> To persuade our intensely practical and conservative people, "the facts" work better than socialist dogma. From this perspective, the briefs exemplified the conservative side of our intellectual heritage, as contrasted with European radicalism. Yet the briefs were also weapons in the long battle to establish a welfare state. As a class, intellectuals have been on Brandeis's side of that battle.

James Gilbert provides a clue to the relationship between the form and the substance of the briefs, in his description of progressive fact-gathering:

Armed with the language of science and a fairly sure understanding of what they were looking for, reformers sought answers about society by studying its most glaring failures. The slums of the Lower East Side Manhattan or the South Side of Chicago became their Galapagos. Along with individual forays, research bureaus invaded such areas in an effort to understand poverty and violence. The enormous growth of fact-gathering organizations and the publication of their research helped to support the intellectual revolution which the collectivists preached. The Russell Sage Foundation, the Brookings Institution, the National Industrial Conference Board, the National Bureau of Economic Research, the Twentieth Century Fund, and similar organizations were all founded during the decade before World War I.

Just as the work of individual social scientists was generally accepted as objective, so institution-sponsored research was for the most part assumed to be unbiased. The results of this work, it was argued, had one further benefit: its objective facts about sociological and political behavior seemed almost revolutionary at a time when special-interest groups or great fortunes appeared to rule America.<sup>177</sup>

Brandeis's briefs expressed the convictions of a growing "social service" intelligentsia—social workers, club women, journal-

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176. See generally L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

177. J. GILBERT, *supra* note 1, at 45-46.

ists, bureaucrats, and of course academics.<sup>178</sup> Their habitat was the universities, settlement houses, reform leagues, and journals such as *Outlook*, the *Independent*, and later the *New Republic*. Although they were in a loose sense collectivist (ranging from mildly reformist to socialist), they tended to emphasize their role as neutral experts, above the battle of avaricious and short-sighted interests, informed by the facts of social science, ready to pronounce impartial judgments about what the public interest required. As one put it, "the golden rule will be put into practice through the slide rule of the engineer."<sup>179</sup> That was an engineer speaking, but it could have been Brandeis or Frankfurter appraising their own roles, with social scientists' reports replacing the slide rule. That this flattering self-image was partly true as a description, and wholly admirable as an aspiration, does not gainsay its function as a myth that exalted the intelligentsia.

As late as the 1870s-1880s, college professors were a conservative class. During the progressive era the academic community, though still largely conservative, became increasingly self-conscious and critical of business. Many distinguished social scientists of the time were reformers: for example, John R. Commons, Richard T. Ely, E.R.A. Seligman, and Thorstein Veblen. The style of the Brandeis briefs, with their emphasis on facts gathered by experts, testified as much to the intellectuals' importance as to what they had to say. And since the class engaged in research tended to be the class that advocated reforms, to emphasize "the facts" was to emphasize the values of this class—values that often shaped the inquiries and the interpretations of data. These biases helped to create the awesome reputation of Brandeis's facts.

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178. Their modern counterparts are discussed in *THE NEW CLASS?* (B. Bruce-Briggs ed. 1979).

179. Quoted in B. EHRENREICH & D. ENGLISH, *supra* note 1, at 64.