



BRANDEIS BRIEF MYTHS

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THE STANDARD MYTH of the Brandeis Brief goes something like this. In 1908, famed attorney Louis Brandeis was called upon to rescue the cause of Progressive reform from a reactionary Supreme Court. Three years earlier, the Court had ruled in *Lochner v. New York*¹ that the Constitution protects the right of liberty of contract. On that basis, the Court invalidated a state law that limited bakers' hours to ten per day and sixty per week.

Lochner represented a triumph of formalistic legal reasoning over attention to the actual social conditions facing workers in early twentieth-century America. It also reflected the Supreme Court's unflinching devotion to laissez-faire ideology. Reformers feared that the Court was poised to extend *Lochner* and invalidate other legislation, including an Oregon law that limited women factory workers' hours.

The National Consumers' League, a reformist organization, persuaded Oregon's attorneys to invite Brandeis to defend the law before the Supreme Court in the case of *Muller v. Oregon*. Brandeis recognized that ordinary legal argument was insufficient when faced with a recalcitrant Court that ignored social realities. So he boldly invented a new form of legal argument, a brief that presented "soci-

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¹ 198 U.S. 45 (1905).

ological” data to the Court. Indeed, Brandeis practically forced the Court to consider this information by almost entirely eschewing case citations in his brief.

The brief was a masterpiece. Relying on the able research talents of his sister-in-law, Josephine Goldmark, Brandeis presented a lengthy brief showing that long hours of labor harmed women’s health. The result was a unanimous decision by the Court upholding the law.² Justice Brewer, one of the leading pro-laissez-faire Justices, was so taken by Brandeis’s handiwork that he not only wrote the majority opinion, he also took the extraordinary step of acknowledging the influence of Brandeis’s brief.

Since then, the “Brandeis Brief” – heavy on social science data and policy analysis, light on legal citation – has been a staple of American argument. Advocates used such briefs to successfully defend additional Progressive reforms after *Muller*.

The Brandeis Brief myth contains kernels of truth, but it also contains a great deal of exaggeration and some outright falsehoods. First, social reform was not in nearly as much danger from *Lochner* as the standard story suggests. Before *Lochner*, the Supreme Court had upheld a maximum hours law for miners,³ laws that regulated how workers were paid,⁴ and a law limiting workers’ hours on public works projects to eight per day,⁵ among other labor laws. None of these cases attracted more than three dissenters, and some were unanimous.

Five Justices voted against New York’s Bakeshop Act because it raised unique issues – the Act singled out bakers without apparent good cause; threatened small business owners with jail time if they merely permitted a baker to work more than ten hours in one day; and, unlike other maximum hours laws, it had no provision for emergency overtime. The law also received a very tepid defense from New York’s attorney general, and, as we will see, a creative

² *Muller v. Oregon*, 208 U.S. 412 (1908).

³ *Holden v. Hardy*, 169 U.S. 366 (1898).

⁴ *E.g.*, *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

⁵ *Atkin v. Kansas*, 191 U.S. 207 (1903).

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defense from *Lochner*'s attorneys that anticipated the Brandeis Brief.⁶ *Lochner* was an anomaly, not the leading edge of a Supreme Court war on Progressive legislation.

Second, while any rules-based system is "formalist" to some degree, the supposed simple-minded formalism of late nineteenth and early twentieth-century judges has been called into serious question by recent scholarship.⁷ *Lochner* itself is said to exemplify the Supreme Court's rigid formalism and inattention to "social facts," yet Justice Rufus Peckham's opinion for the Court specifically addressed bakers' health. He noted that "in looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others."⁸

Third, Brandeis's *Muller* brief was not as original as his admirers have suggested. Brandeis was not the first attorney to present "sociological" information to a court considering a challenged to a labor law.⁹ Most significant, Joseph *Lochner*'s brief in *Lochner v. New York* included an appendix that provided statistics suggesting that bakers were at least as healthy as workers in other common professions. One or more of the Justices was likely persuaded by this information that singling out bakers for shorter hours for alleged health reasons was arbitrary.¹⁰

Admittedly, Brandeis's *Muller* brief was unique in focusing almost entirely on sociological argument to the exclusion of tradition-

⁶ For a detailed history of the litigation over New York's Bakeshop Act, culminating in the Supreme Court's decision in *Lochner*, see David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* ch. 2 (2011).

⁷ Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2009).

⁸ *Lochner*, 198 U.S. at 59.

⁹ Both the plaintiff's and defendant's briefs in *Ritchie v. People*, 40 N.E. 454 (Ill. 1895), like *Muller* a case regarding the constitutionality of maximum hours laws for women, contained "sociological" arguments with references to health studies, though neither brief emphasized this information.

¹⁰ Bernstein, *supra* note 6.

al legal argument. However – and this addresses a fourth inaccuracy in the standard account – Brandeis’s brief was not as bold as often portrayed, because Oregon’s attorney general filed a traditional brief focusing on the relevant legal precedents, freeing up Brandeis to emphasize extra-legal argument.¹¹ Almost all accounts of Brandeis’s role in *Muller* ignore the existence of Oregon’s brief.¹²

Fifth, Brandeis’s brief, rather than being a social science masterpiece, consisted largely of a “hodgepodge”¹³ of reports of factory or health inspectors, testimony before legislative investigating committees, statutes, and quotes from medical texts, among other miscellany. Some of the “scientific” arguments presented in the brief are nonsensical, even given the state of medical knowledge at the time. For example, the brief reports that “there is more water” in women’s than in men’s blood and women therefore are “inferior to men” in certain physical tasks, and that women’s knees are constructed in such a way as to prevent them from engaging in difficult physical tasks.¹⁴ Brandeis himself seemed aware that the evidence he presented was hardly definitive. His argument was not so much that the law clearly protected women’s health, but that there was sufficient supporting evidence in the public domain that a legislator could reasonably believe that the law did so, and therefore the law should be upheld.¹⁵

Sixth, it’s unlikely that the brief influenced a single vote on the Supreme Court. In retrospect it’s clear that the leading case on maximum hours laws was not *Lochner*, but *Holden v. Hardy*, which upheld a law restricting the hours of miners. The only dissenters in

¹¹ Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908), in *Landmark Briefs and Arguments of the Supreme Court of the United States* 37 (Phillip B. Kurland & Gerhard Casper eds., 1975).

¹² This includes Mel Urofsky’s superb recent biography, Melvin I. Urofsky, *Louis D. Brandeis: A Life* 85-86, 363-65 (2009).

¹³ Owen Fiss, *The Troubled Beginnings of the Modern State* 175 (1993).

¹⁴ See John Louis Recchiuti, *Civic Engagement: Social Science and Progressive-Era Reform in New York City* 135 (2007).

¹⁵ See Noga Morag-Levine, *Formalism, Facts, and the Brandeis Brief: The Making of a Myth* (2011) (unpublished manuscript on file with the *Green Bag*).

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Holden were Justices Peckham and Brewer, and they were the only Justices who, based on their voting patterns, were plausibly going to vote to invalidate the law at issue in *Muller*. While Justice Brewer, who had no sympathy for Brandeis's Progressivism, made the unusual gesture of acknowledging Brandeis's brief in a footnote,¹⁶ Brewer only stated that the brief provided evidence supporting the "common belief" that long hours of labor were harmful to women and their progeny.¹⁷ Under *Lochner* and other precedents either common knowledge or scientific evidence was sufficient to justify labor regulation as a proper "health law" under the police power.¹⁸ Brandeis's sociological presentation was therefore legally superfluous.

Later that year, Brewer defended his opinion without reference to the famous brief. Instead, he argued with regard to women that "[t]he race needs her, her children need her; her friends need her, in a way that they do not need the other sex."¹⁹ Moreover, Brewer's opinion won support across the political spectrum, including from sources (such as *The Nation*) that had supported *Lochner*.²⁰ Protective labor laws for women were simply thought to be in a different category than laws that "protected" healthy male bakers.

Seventh, while "Brandeis Briefs" quickly became commonplace in constitutional litigation over social reform, such briefs did not have any clear significant effect on the outcome of Progressive-era cases. Even Justices who were inclined to uphold Progressive legislation were not enamored of Brandeis's style of argument.²¹ For

¹⁶ *Muller*, 208 U.S. at 419.

¹⁷ *Id.* at 420.

¹⁸ Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* 108 (2001).

¹⁹ David J. Brewer, *The Legitimate Exercise of the Police Power on the Protection of Healthy Women, Charities and the Commons*, Nov. 8, 1908, at 21.

²⁰ See Jacob Andrew Lieberman, *Their Sisters' Keepers: The Women's Wage and Hours Movement in the United States, 1890-1925*, at 126-29 (Ph.D. diss. Columbia Univ. 1971).

²¹ See Jonathan Lurie, *Chief Justice Taft and Dissents: Down with the Brandeis Briefs!*, 32 *J. Sup. Ct. Hist.* 179, 182-83 (2007).

example, the National Consumers' League filed a brief before the Supreme Court in *Stettler v. O'Hara* authored by Brandeis, Goldmark, and Felix Frankfurter.²² As in *Muller*, the brief relied heavily on various extra-legal sources to support its arguments. Chief Justice (and *Lochner* dissenter) Edward D. White, clearly unimpressed with the brief, sardonically remarked that he "could compile a brief twice as thick to prove that the legal profession ought to be abolished."²³

And here's a bonus bit of mythbusting: biographies of Brandeis, especially in popular sources, often suggest that he was champion of women's rights.²⁴ Such a claim is hard to square with the outright sexism of Brandeis's brief in *Muller*. Like his collaborator Frances Kelley,²⁵ Brandeis was far more interested in the general cause of social reform than in women's legal equality. Brandeis also evinced little sympathy for women's rights in other contexts. Brandeis, for example, was a late and unenthusiastic convert to the cause of women's suffrage.²⁶ By contrast, his Supreme Court nemesis, George Sutherland, tirelessly advocated for women's voting rights when he served as a Senator from Utah. Justice David Brewer, despite his decision in *Muller*, was also a strong supporter of women's suffrage and contemporary efforts to improve women's status.²⁷ Brandeis's reputation as a champion of women's rights seems more a product of modern views of what an early twentieth-century Progressive *should have* stood for than Brandeis's actual record on the

²² 243 U.S. 629 (1917).

²³ Quoted in Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* 31 (1968).

²⁴ E.g., Lita Epstein, *The Complete Idiot's Guide to the Supreme Court* 93 (2004); 2 Charles R. Geisst, ed., *Encyclopedia of American Business History* 57-58 (2006); Shelley Kapnek Rosenberg, et al., *History of the Jews in America: The Twentieth Century and Beyond* 69 (2005).

²⁵ See Bernstein, *supra* note 6, ch. 4.

²⁶ Phillipa Strum, Louis D. Brandeis: Justice for the People 127-31 (1984); Urfosky, *supra* note 12, 85-86, 363-65.

²⁷ See Michael J. Brodhead, David J. Brewer: The Life of a Supreme Court Justice 1837-1910 (1994).

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subject.

All of this is not to deny that Brandeis's *Muller* brief was innovative, and, more important, received sufficient attention that it influenced the way future cases were argued before the Supreme Court and otherwise. But that raises the question of why instead of being satisfied with this relatively modest claim about the brief's significance, historians and legal scholars have for decades exaggerated the significance and perspicacity of the original Brandeis Brief.

The short answer is that historiography with roots in partisan Progressive preferences has dominated the study of the Supreme Court for decades. This historiography has long posited that legal struggles over early twentieth-century Progressive reform were struggles between the forces of progress, represented by Progressive lawyers and Justices, and the forces of reaction, led by corporations and conservative lawyers and judges. The virtues of the likes of Brandeis have therefore been greatly exaggerated, and their vices downplayed or ignored. Contrariwise, the virtues of the non-Progressive players in the fight over Progressive legislation have been ignored or downplayed, and their vices exaggerated.

Of course, history does not so conveniently provide us with such a neat divide between entirely farsighted and public-spirited heroes and their antediluvian and thoroughly narrow-minded villains. Like many other events of the pre-New Deal period, the history of the Brandeis Brief, traditionally lauded as a brilliant and unambiguous triumph for the forces of progress, has been drastically oversimplified by scholars indulging in winners' history.

