



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

## Lessons Learned from Louis D. Brandeis Presented at Brandeis University, January 28, 2016

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### The Brandeis Brief

In these remarks, I will try to convey Brandeis's impact on me in my years as a lawyer, and then as a judge. I will speak first, and longest, of the Brandeis Brief famously filed in *Muller v. Oregon*. The Supreme Court decided that case in 1908. The Court upheld, as constitutional, a 1903 Oregon law that prohibited employment of women in industrial jobs for more than ten hours per day. In briefs filed in the 1970s, I described the *Muller* decision as obstacles to Supreme Court recognition of the equal citizenship stature of men and women as constitutional principle. While the *Muller* decision was a precedent I sought to undo, the method Brandeis used to prevail in that case is one I admired and copied. Let me explain why I applauded Brandeis' method but not the decision he sought and gained.

In 1903, Oregon adopted a law setting ten hours as the maximum workday for women "employed in any mechanical establishment, factory, or laundry." Promoters of Oregon's law limiting hours for women workers included labor reformers who first proposed an eight-hour day for all workers. When that proposal failed to gain legislative support, the proponents settled on a measure limiting the hours blue-collar women could engage in

paid labor. Their hope was that a law protecting women would serve as an “opening wedge,” leading, in time, to protection of all workers.

Portland laundry owner Curt Muller insisted that laundress Emma Gotcher work more than ten hours on September 4, 1905. That date, it seems, was not fortuitous. It was the day the State had designated Labor Day to encourage employers to give their workers a holiday. The timing, and Emma Gotcher’s membership in the Laundry Workers Union, suggest that Muller and fellow members of the Laundry-Owners’ Association aimed to create a test case. As it turned out, they did. Oregon prosecuted Muller for violating the State’s law. After an unsuccessful defense in Oregon’s courts, Muller asked the U.S. Supreme Court to take the case and declare the State’s 1903 law unconstitutional.

Muller had cause to be hopeful. In 1905, the Supreme Court had ruled, 5–4, in *Lochner v. New York*, that New York had acted unconstitutionally when it enacted a law limiting the hours that bakers could work to ten per day, sixty per week. According to the Court, the hours limitation interfered with the right of bakery owners and bakery workers to contract freely, a liberty the Court lodged in the Fourteenth Amendment’s Due Process Clause, which reads: “[No] State shall deprive any person of life, liberty, or property, without due process of law.”

The National Consumers League, led by social reformer Florence Kelley, wanted to ensure that Oregon would have the best possible representation. Kelley’s first choice was Brandeis, but the League, while Kelley was out of town, had set up an appointment for her with a celebrated New York bar leader, Joseph H. Choate. To Kelley’s relief, Choate declined to take the case. He told Kelley he saw no reason why “a big husky Irishwoman should [not] work more than ten hours a day . . . if she and her employer so desired.” Kelley next went to Boston to enlist Brandeis. She was accompanied by Josephine Goldmark, who was Brandeis’ sister-in-law and Kelley’s associate in the Consumers League.

Brandeis, then age fifty-one, said yes to the League, on one condition. He wanted to be Oregon’s counsel, not relegated to a friend-of-the-Court role, and he wanted to argue the case orally on the State’s behalf. Kelley and Goldmark made that happen. Brandeis

then superintended preparation of a brief unlike any the Court had yet seen. It was to be loaded with facts and spare on formal legal argument.

Josephine Goldmark, aided by her sister Pauline and several volunteer researchers, scoured the Columbia University and New York Public Libraries in search of materials of the kind Brandeis wanted—facts and figures on dangers to women’s health, safety, and morals from working excessive hours, and on the societal benefits shortened hours could yield. Data was extracted from reports of factory inspectors, physicians, trade unions, economists, and social workers. Within a month, Goldmark’s team compiled information that filled 98 of the 113 pages in Brandeis’s brief.

To show that Oregon was no outlier, Brandeis first set out the statutes of the twenty States that had restricted women’s on-the-job hours. He also listed similar hours laws in force in Europe. His basic contention: The due process right to contract for another’s labor is subject to reasonable restraints to protect health, safety, morals, and the general welfare.

To convince the Court, Brandeis had to distinguish *Lochner v. New York*. Bakers, the Court had commented in *Lochner*—a job category overwhelmingly male—were “in no sense wards of the state.” Women, Brandeis urged, were more susceptible than men to the maladies of industrialization, and their unique vulnerabilities warranted the State’s sheltering arm. The brief’s pattern: After a line or two of introduction, Brandeis quoted long passages from the sources Goldmark and her associates had supplied.

Some of those sources would hardly pass go today. For example, Brandeis quoted a medical expert who reported: “[I]n the blood of women, so also in their muscles, there is more water than in those of men.” Less imaginary, Brandeis emphasized the effect of overworking women on the general welfare: “Infant mortality rises,” he told the Court, “while the children of married working-women, who survive, are injured by the inevitable neglect. The overwork of future mothers,” he added, “directly attacks the welfare of the nation.”

On the benefit side, Brandeis stressed that shorter hours allowed women to attend to their family and household responsibilities. According to a source he quoted: “[F]ree

time [for a woman] is not resting time, as it is for a man. . . . For the working-girl on her return from the factory, there is a variety of work waiting. She has her room to keep clean . . . her laundry work to do, clothes to repair and clean, and, besides this, she should be learning to keep house if her future household is not to be [a] disorderly . . . failure.” To allay the concern that shorter hours were bad for business, Brandeis excerpted studies of more contemporary resonance showing that maximum hours laws improved productivity.

The brief’s bottom line: Decades of well-documented experience at home and abroad showed that Oregon’s Legislature had good reason to believe that public health, safety, and welfare would be advanced by limiting women’s paid work to ten hours per day.

Counsel for laundry owner Muller scarcely anticipated the mountain of social and economic material the State, through Brandeis, would present. But Muller’s brief made a point equal rights advocates of my day embraced: Most of the disadvantages facing women in the labor market derive from society, not biology, Muller argued. “Social customs [not inferior ability],” he urged, “narrow the field of [their] endeavor.” “[O]stensibly,” the brief continued, Oregon’s law was “framed in [women’s] interest.” But was it intended, Muller asked, perhaps “to limit and restrict [their] employment,” in order to give a boost to “[women’s] competitor[s] [for blue-collar jobs] among men?”

The Supreme Court heard argument in the *Muller* case only five days after receiving the voluminous Brandeis brief. (Such short time between briefing and argument would not occur today.) Less than six weeks post argument, the Supreme Court unanimously upheld Oregon’s law. Justice Brewer, who was a member of the 5–4 majority that invalidated New York’s maximum hours legislation in *Lochner*, authored the Court’s relatively short opinion. Brewer took the unusual step of acknowledging the “copious collection” of statutes and reports, domestic and foreign, in Brandeis’ brief.

Then, Brewer put his own spin on the materials Brandeis presented. The Justice found in those materials confirmation of eternal, decidedly unscientific, truths about men and women. According to Brewer, “history [shows] that woman has always been dependent upon man.” “[I]n the struggle for subsistence,” he wrote, “she is not an equal competitor with her brother.” “[S]he is so constituted that she will rest upon and look to him for

protection.” Brewer then switched images from man as protector to man as predator. Woman’s “physical structure and a proper discharge of her maternal functions,” he wrote, “justify legislation to protect her from the greed as well as the passion of man.”

Did the Justices rule in Oregon’s favor in *Muller* because they were impressed by the extraordinary quality of the Brandeis brief? Or did they hold for Oregon because the Brandeis brief shored up their own preconceptions about the relationship between the sexes, the physical superiority of men, women’s inherent vulnerability, and society’s interest in “the well-being of wom[e]n” as actual or potential mothers? Would Brandeis’s technique work when social and economic data was inconsistent with traditional views about “the way women are” and was used to challenge, not defend, sex-based classifications in the law?

As a law student in the late 1950s, I learned in my Constitutional Law class that *Muller* marked a first break from the Court’s refusal to uphold social and economic legislation attacked as invading the liberty to contract once thought to be secured by the Fifth and Fourteenth Amendments’ Due Process Clauses. *Muller* was a decision to applaud, New Deal oriented professors taught us.

Just over a decade later, briefing gender discrimination cases in or headed for the U.S. Supreme Court, I looked at *Muller* differently. The decision, I appreciated, was responsive to “turn of the twentieth-century conditions when women labored long into the night in sweat shop operations.” But, I observed in 1970s briefs, “[a]s the work day [for industrial workers, male and female] shortened from twelve hours to eight, and the work week from six days to five,” laws limiting only women’s work were in many instances “‘protecting’ [women] from better-paying jobs and opportunities for promotion.” However well intended, such laws could have a perverse effect—they could (and all too often did) operate to protect men’s jobs from women’s competition. (Recall that the same point was made by Curt Muller’s lawyer, but it carried less credibility in 1908, when unregulated work weeks, with no overtime pay, could run seventy-two hours or more.)

In briefs and commentary, I included *Muller* in a trilogy of cases that “b[ore] particularly close examination for the support they appear[ed] to give [to] . . . perpetuation of the treatment of women as less than full persons within the meaning of the Constitution.” The other decisions in the trilogy were *Goesaert v. Cleary*, which, in 1948, upheld a Michigan statute prohibiting women from working as bartenders, citing moral concerns; and *Hoyt v. Florida*, which, in 1961, upheld a state statute excluding women from the obligation to serve on juries because of their place at “the center of home and family life.”

While equal rights advocates attacked the substance of the *Muller* decision, they were hugely inspired by Brandeis’s method. The aim of the Brandeis brief was to educate the Judiciary about the real world in which the laws under inspection operated. That same aim motivated brief writers in the turning-point gender discrimination cases, *Reed v. Reed*, decided in 1971, and *Frontiero v. Richardson*, decided in 1973. *Reed* was the first case ever in which the U.S. Supreme Court disapproved a classification based on gender. The Idaho statute involved in *Reed* was once typical; it provided: As between persons “equally entitled to administer [a decedent’s estate], males must be preferred to females.” Two federal statutes, also typical of the time, were involved in *Frontiero*. Both laws granted fringe benefits to married male military officers but withheld them from most married female officers.

The Brandeis brief presented economic and social realities in justification of protective labor legislation challenged as unconstitutional. In *Reed*, *Frontiero*, and later 1970s gender discrimination cases, Brandeis-style briefs explained that, as the economy developed and society evolved, laws premised on women’s subordinate status violated the Constitution’s guarantee of “the equal protection of the laws” to all persons.

The social and economic facts urged in *Reed* and *Frontiero* aimed to open jurists’ eyes. Copying Brandeis’s method was useful to that end. Laws once thought to operate benignly in women’s favor—keeping them off juries and relegating them to “women’s work” in the military, for example—in time, came to be seen as measures impeding

women's opportunity to participate in and contribute to society based on their individual talents and capacities.

### **Judicial Authority to Repair Unconstitutional Legislation**

Another lesson learned from Brandeis. Much legislation into the 1970s was based on the premise that men were breadwinners; women, men's dependents. So, for example, when Stephen Wiesenfeld's wage-earning wife died in childbirth, he sought the social security benefits that would enable him to care personally for his infant son. They were called "child in care" benefits, available when a wage earner dies with a spouse and young child surviving. If the deceased wage earner was a man, there were monthly benefits for widow and child. But if the wage earner was a woman, as Paula Wiesenfeld was, there were no benefits for the widower.

On behalf of Stephen Wiesenfeld, I asked the Court essentially to write into the statute the fathers Congress had left out, to convert the "mother's benefit" into a "parent's benefit." Can't be done, some of my academic colleagues told me. The Court might nullify the mother's benefit, leaving it to Congress to start over from scratch. But it would be out of bounds for the Court, lacking the power of the purse, to order payments to widowed fathers.

That is just what the Government initially argued. In the district court, the Government urged dismissal of Stephen Wiesenfeld's complaint. "It is clear," the Government maintained, that the "plaintiff does not complain about what Congress enacted [a mother's benefit], he complains about what Congress [did] not enact [a father's benefit]. [He] has therefore chosen the wrong forum [for] the relief he seeks. He should take his complaint to Congress." That argument, had it been accepted, would have immunized from judicial review statutes that confer benefits unevenly—on women only or men only. The legislature would have power, unchecked by the judiciary, to diminish the equal protection principle.

Was my position radical? Precedent was slim, but what there was had heft. It started with Brandeis in a case decided in 1931 involving state taxation, *Iowa-Des Moines*

*National Bank v. Bennett*. Complainants were a national and a state bank. Their complaint, Iowa officials taxed them at a rate higher than the rate charged corporations in competition with them. Brandeis wrote for a unanimous Court that the banks were entitled to a “refund of the excess taxes exacted from them.” He explained:

The petitioners’ rights were violated . . . when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners’ grievances would have been redressed. . . . The right invoked is that to equal treatment; and such treatment will be attained if either their competitors’ taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Typically clear expression from Brandeis’ pen.

In a 1970 decision, *Welsh v. United States*, Justice Harlan followed and expanded upon Justice Brandeis’ lead, explaining:

Where a statute is defective because of under inclusion, there exist two remedial alternatives: a court may either declare it a nullity . . . or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Thanks in part to the Brandeis and Harlan opinions, the Court saw the light. In *Frontiero*, it did not nullify benefits enjoyed by married male officers; instead, it extended those



benefits to married female officers. And in *Wiesenfeld*, instead of nullifying benefits enjoyed by widowed mothers, it extended them to widowed fathers. In several later cases, the Court followed the same path.

### **Brandeis's Legacy**

In connection with a soon to be published book titled *Louis D. Brandeis, An American Prophet*, author and head of the Constitution Center in Philadelphia, Jeffrey Rosen, asked me about Brandeis' influence on me. I spoke, of course, about the Brandeis brief and the brief written in the turning point 1971 *Reed v. Reed* case. Self-consciously Brandeisian, the *Reed* brief attempted to document, through citation to economic, social, and historical sources, the artificial barriers imposed on women by law and custom, suppressing their aspirations and opportunities to achieve.

I also spoke of Brandeis as Justice, his craftsmanship, sense of collegiality, ability to combine a dedication to judicial restraint with a readiness to defend civil rights and liberties when the values our Constitution advances required it. "Brandeis worked hard on his opinions," I responded to Jeff, "as evidenced by the number of drafts he composed. He cared not only about reaching the right bottom line judgment; he cared as much about writing opinions that would enlighten other people."

I also admired Brandeis, I told Jeff, "for his determination to dissent or concur separately only when he felt the public really needed to hear his separate views." Alexander Bickel published a book in 1957 compiling Brandeis's unpublished opinions. "Not many jurists," I observed, "would go through the hard labor of writing an opinion, then step back and ask, *Is this opinion really needed?*" His dissents were all the more influential because of his self-imposed restraint.

A further admirable quality, Brandeis's views could change when information and experience showed his initial judgment was not right. In the 1880s he opposed extending suffrage to women. Men were doing well enough in conducting the nation's political affairs, he thought, and they had obligations women escape. Military service, for example. He might have added jury duty.

By the 1910s, however, Brandeis had become a strong supporter of votes for women. Perhaps it was the influence of his wife and a daughter who took a year off between college and law school to campaign for women's suffrage. Perhaps it was the able women he encountered among social reformers: Jane Addams, Florence Kelly, his sister-in-law, Josephine Goldmark, and a number of others. Voting was a citizen's right, he recognized, but it was also a citizen's obligation. No class or section of the community is so wise or just, he came to see, that it can safely be trusted to govern without the participation of other classes or sections.

What of interpretive approach, Jeff asked. "[Brandeis'] purposive interpretation of statutes and our fundamental instrument of government place him high among jurists who interpret legal texts sensibly," I answered. "He certainly was not an admirer of what was once called legal classicism, which seems to me similar to today's originalism." As an example, I mentioned the June 2015 health care decision. Brandeis, I have no doubt, would have agreed with the majority's decision to salvage, not destroy, the Affordable Care Act. He would not say, as the dissenters did, that because the Act used the words "exchange established by the state," the text must be interpreted in a way that would undermine the entire Act. One could not attribute to a responsible member of Congress an outcome so bizarre.

I ventured, too, that Brandeis would have deplored the Court's 2010 decision in *Citizens' United v. FEC*, which struck down restrictions on corporate campaign spending. Brandeis had pointed out in 1933, in his dissent in *Louis K. Liggett Co. v. Lee*, that legislatures throughout the nineteenth and early twentieth centuries had imposed a host of regulations designed to ensure that the corporate form would not threaten equality of opportunity and the autonomy of individuals.

When Brandeis retired in 1939 after 23 years of distinguished service on the Supreme Court bench, he had written 448 opinions of the Court, 10 concurring opinions, and 64 dissenting opinions. It is fitting to conclude these remarks with the appraisal of his work at the Court by his colleagues, expressed in their farewell letter:

Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.

That influence, I can attest, continues to this day.

**\*Ruth Bader Ginsburg** is an associate justice of the Supreme Court of the United States. President Clinton nominated her to the Supreme Court, and she took her seat on August 10, 1993.

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