FACTS, FORMALISM, AND THE BRANDEIS BRIEF: THE ORIGINS OF A MYTH

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The Brandeis Brief has long been central to historical accounts of the struggle and ultimate triumph of progressive jurisprudence over legal formalism. Yet this familiar storyline is difficult to reconcile with the historical record on two counts. The first is its incompatibility with the presence of extra-legal evidence in cases and briefs well predating that of Brandeis. The second is the fact that, contrary to the prevailing account, conservatives were not the vanguard of opposition to such extra-legal evidence. In practice, it was progressive defenders of social legislation who long sought to exclude proof regarding the alleged health and other benefits of legislation from judicial review. This Article offers an alternative reading of the origins of the Brandeis Brief and of its relation to the constitutional conflicts of the Lochner *era. It argues that in marshalling the medical and social evidence on the dangers of long work hours, progressives implicitly capitulated on the most divisive issue in nineteenth-century police power debates: the authority of courts to distinguish true public health measures from "mere pretext."*

This Article locates the origins of the scientific tradition on which the Brandeis Brief drew in early nineteenth-century British efforts to frame labor laws as health interventions to overcome barriers to interference with market relations. In turn, this strategy led to the emergence, first in Britain and later in the United States, of a conservative claim equating common-law constitutionalism with the requirement that courts be made guardians against laws passed under the false pretext of public health. It was in response to this line of ar-

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gument that American progressives, towards the end of the nineteenth century, came to insist that courts owed legislators deference regarding the existence of health justifications for legislation ranging from restrictions on the marketing of margarine to work-hour limits. Lochner*'s ultimate rejection of this presumption forced progressives to shoulder the burden of proof and gave rise to the Brandeis Brief.*

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INTRODUCTION

The "Brandeis Brief"[1] story has long served a key role in the grand narrative on the rise and demise of legal formalism. The brief, largely social and medical in its argument, which the National Consumers League (NCL) submitted on behalf of the state of Oregon in *Muller v.*

1. Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), *reprinted in* LOUIS D. BRANDEIS ASSISTED BY JOSEPHINE GOLDMARK, WOMEN IN INDUSTRY 1 (1969) [hereinafter Brandeis Brief]. The term "Brandeis Brief" is something of a misnomer. Rather than Brandeis, it was Josephine Goldmark, a senior staff member at the NCL as well as Louis Brandeis's sister-in-law, who was primarily responsible for the *Muller* brief. *See, e.g.*, Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 258 & n.69 (1999). Notwithstanding, this Article sticks to the familiar terminology, in keeping with practice of the various sources cited and analyzed.

Oregon,[2] has become a symbol of daring legal strategy in ostensible defiance of the formalist jurisprudence of the times. In the words of one article, "the brief was a brilliant break with the formalist tradition and had a significant impact on legal thought."[3] Another author describes the brief as marking "a creative shift for the Court" that allowed for the introduction and use of "vivid, factual detail as a way to break out of the formalist categories dominating the analysis."[4] A third account speaks of the brief as a successful "gamble," a calculated risk taken in defiance of the "recognized style in devoting only two pages to the traditional legal arguments and citations."[5] The implicit premise cutting across all three statements, and others like them, is the insulation of the legal process up to that point from the type of factual evidence brought by the NCL brief in *Muller*. In interjecting a body of evidence and a line of argument based in social and medical evidence rather than law, the Brandeis Brief radically challenged legal practice, or so has been the common belief.

The success of the Brandeis Brief strategy in *Muller* and a number of subsequent decisions retrospectively reinforced the familiar conception of *Lochner*-era jurisprudence as formalist. In the words of Morton Horwitz, "the Brandeis Brief, by highlighting social and economic reality, suggested that the trouble with existing law was that it was out of touch with that reality."[6] In this fashion, the success of the remedy the Brandeis Brief administered came to be taken as evidence of what was ailing the legal system to begin with. By implication, the judiciary's formalist insistence on abstract logic and strictly legal arguments was the obstacle preventing progressives from adopting the Brandeis Brief strategy earlier.

Familiar as it has become, this storyline is difficult to reconcile with the historical evidence on two counts. The first is the incompatibility of the formalist thesis with the presence of extra-legal evidence in cases and briefs well predating Brandeis's. The portrayal of *Lochner*-era courts as preoccupied with abstract rules (to the exclusion of facts), and of the Brandeis Brief as an exceptional challenge to these formalist norms, is contradicted by the presence of references to encyclopedias, legislative reports, and medical textbooks both in judicial opinions and litigant briefs of the time.[7] While the scope of the Brandeis Brief—as well as the ratio between legal and extra-legal material within it—may have been

2. *Muller*, 208 U.S. at 423 (upholding an Oregon law limiting women's work in laundries to ten hours a day).

3. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 (1993).

4. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 88–89 (1987).

5. PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 60–61 (1993).

6. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 209 (1992). *But see* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 11 (2011).

7. *See* discussion *infra* Part I.A.

unprecedented, the strategy as such was not.

The second, and perhaps more fundamental challenge to the familiar narrative, concerns the notion that the locus of opposition to the introduction of scientific evidence into legal proceedings on social legislation was with conservative opponents of such legislation. In contrast to the prevailing account, it was not formalist conservative judges but progressive defenders of social legislation who long sought to exclude proof regarding the alleged health and other benefits of legislation from judicial review. The progressive perspective on social legislation was that it was entitled to a presumption of constitutionality, independent of any scientific proof of underlying injury to health or any other predetermined rationale.[8] According to this presumption, courts were not to second-guess legislative facts. The exclusion of extra-legal evidence fit with that agenda, whereas it was inconsistent with the interests of conservatives who wanted to subordinate social and economic legislation to greater judicial oversight.[9] The conventional historiography on the Brandeis Brief has thus seemingly gotten this story turned on its head.

Once the reigning legal historical explanation for what was wrong with the *Lochner* era, formalism is rapidly losing much of its earlier explanatory power.[10] As Brian Tamanaha has recently documented, to the extent that the formalist story paints the period in question as suffused with mechanistic and value-neutral models of the nature of legal reasoning, it is inconsistent with the historical record.[11] Repeated statements from judges and legal theorists dating to 1870–1920—ostensibly the heyday of the formalist consensus—describe adjudication as inherently discretionary and uncertain, rather than an abstract and deductive enterprise along the lines attributed to the formalist mindset.[12] Those whose words were invoked in the construction of the formalist story, as it turns out, were more than once quoted out of context or otherwise misinterpreted.[13] Understandings of legal reasoning as a scientific and self-contained enterprise, where these existed, were most often rooted in civil-law institutions, rather than common-law reasoning.[14] In similar fashion, in a recent study of late nineteenth-century legal writers, David Rabban refutes the notion that legal thought during that era was preoccupied with abstract conceptions, to the exclusion of history.[15] Finally,

8. *See infra* notes 79–80 and accompanying text.

9. *See infra* notes 80–81 and accompanying text.

10. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 159–60, 176–77 (2010).

11. *Id.* at 63.

12. *Id.* at 18–21, 29–33.

13. *See, e.g.*, *id.* at 51–53.

14. *Id.* at 24–26.

15. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2012). Earlier, James W. Ely, Jr., argued that rather than a "bastion of legal formalism," the Fuller Court "era witnessed a burst of creativity in both constitution-

focusing on the *Lochner* decision itself, David Bernstein has recently highlighted the fact that much in contrast to its formalist reputation, Justice Peckham's opinion in the case "took explicit account of statistical data regarding the health of bakers."[16] A fresh look at the Brandeis Brief's history can shed important light on the emergence and resilience of the formalist thesis, notwithstanding the above.

The *Lochner* decision gave short shrift to the bakery law's proffered health rationale not because it approached the issue through deductive reasoning or abstract conceptions, but because, quite on the contrary, it assumed the task of evaluating for itself the pertinent legislative facts.[17] In doing so, the *Lochner* Court rejected the longstanding progressive position that social legislation was entitled to judicial deference.[18] In the wake of this loss, progressives reluctantly assumed the task of substantiating the claimed health benefits of social legislation, most famously in the Brandeis Brief. If much of the above seems drastically out of step with long-held conceptions of the Brandeis Brief and its relation to the *Lochner* era, it is due to the degree to which the formalist narrative has become entrenched. Forgotten as a consequence was the fact that, at its inception, the Brandeis Brief emerged as a necessary adaptation rather than a model to celebrate.

Similarly missing from the historical account, until now, are the British origins of the progressives' coupling of health justifications for labor laws with the demand for deferential judicial review. As this Article discusses, health justifications for legislative measures limiting the work hours of women and children first date to early nineteenth-century Britain where the health argument served to fit labor laws within the narrow rationales for state intervention that free-market ideologies allowed.[19] In Britain, parliamentary sovereignty precluded judicial scrutiny of the legislation's purported public health rationales. In the United States, the doctrine of presumptive constitutionality served a similar, though generally unspoken, function. *Lochner*'s rejection of this formula forced defenders of social legislation to play by new and less advantageous rules.[20] Primary among them was a newfound necessity to substantiate the claim on the connection between limits on the workday and better health.[21] Formalism provided a useful, if inaccurate, explanation for why defenders of social legislation did not adopt the Brandeis Brief strategy early

al and private law adjudication." JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 73 (1995).

16. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 23–24 (2011).

17. Lochner v. New York, 198 U.S. 45, 59–62 (1905).

18. *Id.* at 56–57.

19. *See* discussion *infra* Part I.A.

20. *See Lochner*, 198 U.S. at 56–57.

21. *See id.* at 57 ("The act must have a more direct relation . . . before [it] can be held to be valid . . . .").

on.

The remainder of this Article proceeds as follows. Part I locates the origins of the scientific tradition on which the Brandeis Brief drew in early nineteenth-century British efforts to frame labor laws as health interventions in order to overcome political and constitutional barriers to interference with market relations. This strategy is then tied to the emergence of a conservative, constitutional line of argument that expected courts to guard against legislation passed under false pretexts of public health. In Britain, this demand built on historical common-law principles associated with nuisance law.[22] In the U.S., the requirement for judicial review of the facts offered in support of legislation was read into the Due Process Clause after the ratification of the Fourteenth Amendment.[23] American progressives insisted in response that legislatures were entitled to judicial deference regarding the existence of health justifications for social legislation, as Part II discusses.[24] This division played out across policy domains ranging from the marketing of oleomargarine to work-hour limits. Part III tells the story of how *Lochner*'s ultimate insistence on judicial scrutiny of legislative facts forced progressives to shoulder the burden of proof and gave rise to the Brandeis Brief. Part IV next turns to the process through which this history receded from view, and the formalist explanation took hold. It focuses in this regard on the convergence between three sets of influences. The first were criticisms leveled by progressive social scientists against the empirical blindness of free market assumptions on freedom of contract.[25] The second were the writings of Roscoe Pound during the decade leading to World War I, most importantly his call for "sociological jurisprudence" as an antidote to the judiciary's alleged insulation from social facts.[26] And the third was the NCL's own *post hoc* construction of the Brandeis Brief story.[27] The Article concludes with a brief discussion of the role that the argument from formalism came to play in progressive efforts to reconcile their longstanding objection to judicial review of economic legislation with their support for increased judicial protection for civil rights.

22. *See infra* notes 68–69 and accompanying text.
23. *See infra* note 71 and accompanying text.
24. *See infra* notes 98–104 and accompanying text.
25. *See* discussion *infra* Part IV.A.
26. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 611–13 (1907) [hereinafter *Sociological Jurisprudence*].
27. *See* discussion *infra* Part IV.C.

I. LABOR LAW AS PUBLIC HEALTH: BRITISH ORIGINS

The oldest document the Brandeis Brief cited in support of the "Bad Effect of Long Hours on Health" was an 1833 compilation of *Reports of Medical Commissioners on the Health of Factory Operatives.*[28] Out of that report, the brief quoted the opinion of a Leeds surgeon who held that "males and females, whose work obliges them to stand constantly, are more subject to varicose veins of the lower extremities, and to a larger and more dangerous extent, than ever I have witnessed even in foot soldiers."[29] The testimony the Brandeis Brief invoked here was initially offered during parliamentary investigations held during the early 1830s in response to rising demands for legislative limits on the workday.[30]

An understanding of the intellectual and political circumstances behind the Brandeis Brief's line of argument must begin with early nineteenth-century Britain rather than early twentieth-century medical and social science. It was within that same British context that constitutional demands for judicial protection against what some deemed pretextual public health justifications for legislation first gained ground, as discussed below.

A. Political Economy, Social Medicine, and Early British Labor Legislation

During the 1830s and '40s, against growing political unrest at home and revolutionary fervor abroad, Parliament faced increasing pressure to moderate its free-market principles in the name of public health.[31] The fight that ensued was partially semantic. At issue were diametrically opposed conceptions of the social objectives falling under the health umbrella and, by implication, the scope of the state's attendant regulatory authority in this regard. On the one hand were narrow, medically based notions of public health as the prevention of physical injury and disease.[32] On the other were expansive understandings of the range of social and economic dislocations brought about as a result of industrialization, including "hunger, public order, population and conditions of work . . . as issues of health."[33] Whether poverty, as such, could properly be construed as a threat to health was the most important, and most divisive, question raised in this connection. The latter perspective, sometimes

28. 5 FACTORIES INQUIRY COMMISSION, REPORTS FROM COMMISSIONERS, 1833, H.C. A-3 at 1 (U.K.).

29. *Id.* at 73.

30. *See, e.g.*, *id.*; *see also* CHRISTOPHER HAMLIN, PUBLIC HEALTH AND SOCIAL JUSTICE IN THE AGE OF CHADWICK 84–86 (1998).

31. HAMLIN, *supra* note 30, at 84.

32. *Id.* at 91–97.

33. *Id.* at 52.

termed "social medicine," was advanced by reform-oriented physicians across Europe since the end of the eighteenth century.[34] Within this framework, the prevention of disease and general improvements in nutrition, housing, and quality of life, more broadly, were two sides of the same coin. From this followed radical implications with respect to the state's obligation, under its public health mandate, to ensure that all its citizens had sufficient access to the necessities of life.[35]

Against this background, physician testimony regarding sources of injury to laborers, such as the 1833 statement the Brandeis Brief quoted, became a regular feature of parliamentary hearings on factory reform.[36] Physician activism along this model appears to have taken root during the 1780s, almost simultaneously with the crystallization of freedom-of-contract principles in British political thought.[37] In a 1784 report submitted to the Manchester magistrates regarding the causes of a recent typhus epidemic, Dr. Thomas Percival, a renowned Manchester physician, and his colleagues listed "the injury done to young persons through confinement, and too long continued labour" among the causes of the disease.[38] They went on to "earnestly recommend . . . a longer recess from labour at noon, and a more early dismission from it in the evening, to all who work in the cotton mills."[39] By the 1790s, Percival was actively calling for bringing factories under some mode of statutory inspection, in clear departure from the prevailing *laissez-faire* sentiments of the time.[40] Ultimately, he helped influence the passage of the first parliamentary restrictions on the employment of children.[41]

The regulation of children's work conditions had a greater chance of overcoming Parliament's aversion to paternalistic legislation though, as it was generally understood, the workday of children and adults could not

34. GEORGE ROSEN, *What Is Social Medicine?: A Genetic Analysis of the Concept*, *in* FROM MEDICAL POLICE TO SOCIAL MEDICINE: ESSAYS ON THE HISTORY OF HEALTH CARE 60, 61–71 (1974). In a speech he delivered in 1790 the renowned Prussian physician Johann Peter Frank warned that public health legislation would prove useless unless it addressed "the richest source of diseases, *the extreme misery of the people*." Johann Peter Frank, Academic Address on the People's Misery: Mother of Diseases (Henry E. Sigerist trans., May 5, 1790), *reprinted in* 9 BULL. HIST. MED. 88, 90 (1941). Consequently, he advocated both the abolition of serfdom and price controls on vital commodities as public health measures. *Id.* at 90–99.

35. The view of health as a right of citizenship spread throughout Europe in the wake of the French Revolution. *See* DOROTHY PORTER, HEALTH, CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES 97–110 (1999). Likening poverty to a "slow poison" one French writer called on the state to address problems of malnutrition, infant mortality, and dangerous occupations. M. MOHEAU, RECHERCHES ET CONSIDÉRATIONS SUR LA POPULATION DE LA FRANCE 217 (Paris, Moulton 1778).

36. *See* HAMLIN, *supra* note 30, at 97–99.

37. *See* ERIC J. EVANS, THE FORGING OF THE MODERN STATE: EARLY INDUSTRIAL BRITAIN 1783–1870, at 47–56 (2001).

38. J.K. Howard, *Dr. Thomas Percival and the Beginnings of Industrial Legislation*, 25 J. SOC. OCCUPATIONAL MED. 58, 60 (1975) (citing Wheeler's *Manchester Chronicle*, Oct. 16, 1784).

39. *Id.* at 61.

40. *Id.* at 62.

41. *Id.* at 63.

realistically be separated. Even with respect to children, however, proof that existing conditions constituted a health hazard was required for the passage of legislation. For this reason, physician testimony played an important role in the parliamentary investigations that preceded the passage of the 1819 Factory Act.[42] Some of the physicians who appeared in this context linked work in factories to a long list of symptoms and diseases ranging from paleness and loss of appetite to stunted growth, structural deformities, glandular swelling, dyspepsia, scrofula (a form of tuberculosis), and varicose veins.[43] The list evokes the symptoms and diseases the Brandeis Brief associated with long work hours among women.[44]

In addition to children, the dangers that long work hours posed to women was a recurrent theme during early parliamentary investigations. As early as the 1818 Lords' inquiry, we find medical testimony attributing difficulties in child birth to curvature of the spine brought about through factory work.[45] As one witness said: "Throughout I have directed my remarks to the condition of the male sex employed in factories; to the female sex, however, their application is still more forcible."[46] In 1844, Parliament limited women's hours to twelve per day (same as the hours of children between the ages of thirteen and eighteen).[47] Protective legislation directed at women, similar to that aimed at children, could be justified under freedom-of-contract principles, both because of the purported vulnerability of women, and because they were not seen as free agents possessing the requisite freedom to contract in the first place.[48] These "[p]atriarchal values," as Robert Gray has written, "pro-

42. Cotton Mills and Factories Act, 1819, 59 Geo. 3 c.66 (Eng.). The Act prohibited the employment of children younger than nine and limited children under age sixteen to sixteen hours of work per day, though the law was essentially unenforced. *See Early Factory Legislation*, PARLIAMENT.UK, http://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/earlyfactorylegislation/ (last visited Nov. 25, 2012).

43. COMMITTEE OF THE HOUSE OF COMMONS, EVIDENCE OF MEDICAL MEN AND OTHERS IN 1816, H.C. (U.K.), *reprinted in* CHARLES WING, EVILS OF THE FACTORY SYSTEM: DEMONSTRATED BY PARLIAMENTARY EVIDENCE, at cix, cix–xlxv (1967).

44. *See, e.g.*, Brandeis Brief, *supra* note 1, at 29 (citing MASS. BUREAU STAT. LAB., DOMESTIC LABOR AND WOMEN'S WORK (1872)) ("In the cotton mills at Fitchburg the women and children are pale, crooked, and sickly-looking. The women appear dispirited, and the children without the bloom of childhood in their cheeks, or the elasticity that belongs to that age."); *see also id.* (citing REPORT OF THE BRITISH CHIEF INSPECTOR OF FACTORIES AND WORKSHOPS (1873)) ("The house surgeon of a large hospital has stated that every year he had a large number of cases of pulmonary disease in girls, the origin of which he could distinctly trace to long and late hours in overcrowded and unhealthy workrooms.").

45. *The Factory System*, 57 Q. REV. 396, 406–07 (1836).

46. *Id.* at 407.

47. Marianna Valverde, *"Giving the Female a Domestic Turn": The Social, Legal and Moral Regulation of Women's Work in British Cotton Mills, 1920–1850*, 21 J. SOC. HIST. 619, 627 (1988).

48. As Leonard Horner, a factory inspector and one of the leaders of the campaign for factory reform put it, "Twelve hours' daily work is more than enough for anyone; but however desirable it might be that excessive working should be prevented, there are great difficulties in the way of legislative interference with the labour of adult men. The case, however, is very different as respects women;

vided some space for cross-class negotiation and the construction of consensus, including a settlement of the factory question, around the middle of the century."[49]

But the medical profession was not united in this regard, as some physicians disputed the existence of evidence showing a direct cause-and-effect relationship between the length of the work day and particular diseases.[50] This was notable in the course of an 1818 House of Lords investigation into a bill limiting the daily hours of labor for all persons under the age of sixteen to eleven hours.[51] The Lords' committee heard from thirty-four medical men, physicians and surgeons, out of a total of 150 witnesses.[52] Of these, approximately half offered unequivocal support on the dangers children suffered as a consequence of factory employment.[53] For the most part, they focused on the general link between factory employment and various "factory diseases," such as those mentioned above.[54] But, in addition, some spoke directly to the matter at hand and put their expertise behind the call for shortening the workday.[55] Physicians who testified in opposition to such measures, on the other hand, took the view that one "could not . . . *form any idea* of the number of hours a child of eight years ought to be employed in a factory."[56] The medical profession was similarly divided when Parliament again took up the question in 1832–33.[57] Medical men who argued on the side of legislation relied on common sense understandings of the injury inflicted by long work hours.[58] Skeptics demanded more concrete medical evidence on the contribution of long hours to disease or other injuries.[59] The capacity of medical science to answer this question remained in sharp dispute.[60]

The physicians who stepped up to the task of providing factory legislation with the necessary medical imprimatur were importantly aided by the fact that medical theory during the early half of the nineteenth century did not itself clearly distinguish between the socioeconomic and

for not only are they much less free agents, but they are physically more incapable . . . ." *Id.*

49. Robert Gray, *Medical Men, Industrial Labor and the State in Britain, 1830–50*, 16 SOC. HIST. 19, 37 (1991).

50. *Id.* at 24, 28.

51. *The Factory System*, *supra* note 45, at 403.

52. *Id.* at 403–04.

53. *See id.* at 404.

54. Gray, *supra* note 49, at 21.

55. In response to the question, "Are you of an opinion that working thirteen hours and a half in a factory is likely to exhaust young persons?" one physician answered, "I am astonished for my own part that we do not hear of instances of their dropping down dead while at work." *The Factory System*, *supra* note 45, at 407.

56. *Id.* at 405.

57. Gray, *supra* note 49, at 24–25.

58. *Id.* at 27.

59. *See id.* at 26.

60. *Id.* at 35.

medical causes of disease. In the words of Christopher Hamlin, "just as the social issues of the day were significantly medical, so medical theory was significantly social, more alert to social causes of disease than any we have had since."[61] As Hamlin goes on to explain, medical theories throughout the first half of the nineteenth century distinguished between two categories of causes, "proximate" and "remote," and poverty was implicated in both.[62] Where immediate causes were concerned, a prominent theory blamed epidemic diseases, such as cholera or typhus, on "miasmas" or bad air that emanated from decaying matter, contaminated water, and other sources of filth.[63] Within this framework, the deficient sanitary conditions characteristic of the private dwellings and neighborhoods of the poor were considered a direct threat to public health. As to the remote causes, these included "predisposing causes" with the capacity to increase the susceptibility of individuals to disease.[64] Poor nutrition, exposure to cold, impure air, and overwork were among the most frequently cited predisposing causes.[65]

B. Public Health, Legislative Prerogative, and Common Law

Health became the requisite criteria for passing early labor legislation because it remained, even in the eyes of some liberal economists, a viable justification for legislative interference with the market.[66] Scientific facts about *health* seemed to do what straight appeals to socioeconomic justice could not. Within this context, medicine came to serve, quoting Hamlin once again, as "the fuel of authority," fanning "the flames of factory reform."[67]

Conservative opponents insisted in response that, used in this fash-

61. HAMLIN, *supra* note 30, at 52.
62. *Id.* at 55–57.
63. *Id.* at 60–61.
64. *Id.* at 55–60.
65. *Id.* at 57, 62.
66. *See* Gray, *supra* note 49, at 35 ("Speaking about social issues as a medical man positioned the speaker as interpreter of natural laws, often with moral and providential overtones, distinct from, but impinging upon the economic realm.").
67. HAMLIN, *supra* note 30, at 37. In lending their prestige to the cause of social reform, British doctors fit within similar patterns of medical activism elsewhere in Europe. William Coleman provides a detailed account of the work of "French sociomedical investigators" during the first half of the nineteenth century, and their contribution to "popular recognition of the disproportionate risks and inordinate suffering faced by the worker and his family." WILLIAM COLEMAN, DEATH IS A SOCIAL DISEASE: PUBLIC HEALTH AND POLITICAL ECONOMY IN EARLY INDUSTRIAL FRANCE 278 (1982). Similarly, against the backdrop of the 1848 revolutions, the German pathologist Rudolf Virchow concluded his report on the causes of a typhus epidemic in the impoverished district of Upper Silesia with detailed prescriptions on the radical political measures necessary to bring about social transformation in the region. These included education, agricultural and industrial development, and, most importantly, the protection of workers from exploitation and long hours. RUDOLF VIRCHOW, *Report on the Typhus Epidemic in Upper Silesia*, *in* 1 COLLECTED ESSAYS ON PUBLIC HEALTH AND EPIDEMIOLOGY 205, 318–19 (L.J. Rather ed., 1985). The need for limits on the length of the workday followed in turn.

ion, the term "health" was merely a pretext for radical interference with property rights. First in Britain,[68] and later in the United States, they likewise invoked common-law principles to argue that the state bore the burden of proof on the existence of legitimate public health justifications for social legislation, and that the courts ought to arbitrate that question through the adjudication of nuisance claims.[69] Where the British and American variants of this argument substantially differed, however, was with respect to the implications for judicial review of legislation. In Britain, the argument from common law was directed at Parliament and, more broadly, at public opinion.[70] By contrast, in the United States, similar common-law-based notions of constitutional limitations transformed, subsequent to the ratification of the Fourteenth Amendment, into the claim that the Due Process Clause conferred on courts authority to invalidate state legislation passed under pretense of public health.[71]

The core premise underpinning the distinction between pretextual and sincere public health rationales for legislation was the existence of limits on the proper objectives of legislation. This is because, absent such limits, reformers would have been free to bypass any and all health justifications in favor of explicit labor or social rationales. In other words, in looking to the judiciary to root out legislative pretense regarding health, conservative jurists in Britain and the United States *a priori* presumed the existence of substantive constitutional limits restricting social legislation to conventional health and safety rationales.[72] For advocates of social legislation, both in Britain and the United States, fluid formulations of the requisite health and safety rationales offered an alternative to direct confrontation over the constitutionality of labor legislation as such. Hence, work-hour laws came to be promoted as health laws, as discussed before.[73] The viability of this *de facto* political compromise depended, however, on legislative prerogative regarding the boundaries of public health, a condition that British parliamentary sovereignty well satisfied.[74]

68. *See* Noga Morag-Levine, *Common Law, Civil Law and the Administrative State: From Coke to* Lochner, 24 CONST. COMMENT. 601, 636 (2007) [hereinafter *From Coke to* Lochner]; *see also* Noga Morag-Levine, *Is Precautionary Regulation a Civil Law Instrument? Lessons from the History of the Alkali Act*, 23 J. ENVTL. L. 1, 21–22 (2011) [hereinafter *Precautionary Regulation*].

69. *See Precautionary Regulation*, *supra* note 68, at 21–22.

70. Toulmin Smith, a barrister who led the call for local self government, and attendant nuisance-based limits on public health regulation in Britain during the 1840s and 1850s, explicitly rejected the U.S. model of constitutional review as inapplicable to Britain. J. TOULMIN SMITH, LOCAL SELF-GOVERNMENT AND CENTRALIZATION: THE CHARACTERISTICS OF EACH; AND ITS PRACTICAL TENDENCIES, AS AFFECTING SOCIAL, MORAL, AND POLITICAL WELFARE AND PROGRESS 126–27 (1851).

71. *See From Coke to* Lochner, *supra* note 68, at 641–42 (discussing parallels between conservative British ideas regarding common-law limits on public health regulation and Cooley's constitutional doctrines subsequent to the ratification of the Fourteenth Amendment).

72. *Id.*

73. *See supra* Part I.A.

74. On parliamentary sovereignty in Britain of the nineteenth century, see JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 221–28 (1999).

Thus, whereas parliamentary investigations considered the link between long hours and injury to health at great length, the validity of any subsequent legislation was entirely independent of the persuasiveness of the evidence.[75] The situation was far different, however, in the United States where legislation faced a direct threat from judicial review, and where conservatives called on judges to scrutinize the purported health benefits of legislative interferences with the *laissez-faire* principle.[76]

II. PUBLIC HEALTH, PRETEXT, AND JUDICIAL REVIEW

Following Britain, early U.S. work-hour laws similarly focused on children and women.[77] And, again in keeping with the British precedent, these legislative efforts found support in medical arguments regarding the danger faced as a consequence of long work days.[78] In the absence of parliamentary sovereignty, progressives invoked a presumption of constitutionality in search of *de facto* immunity from judicial review.[79] Under this formula, all that was necessary to insulate legislation from the courts was for the legislature to justify its action in reference to well accepted substantive ends such as health, safety, or public welfare.[80] The decision on what these three terms meant in practice, and what means might best serve their purpose, would be left entirely to the legislature. Not surprisingly, as discussed below, conservatives advanced a radically different understanding of the judiciary's responsibility. Under this view, the danger that legislatures would abuse their power required rigorous judicial scrutiny of purported justifications for legislation. U.S. courts wavered between these perspectives during the final three decades of the nineteenth century across a diverse array of regulatory controversies.

The U.S. Supreme Court first encountered the claim that the Fourteenth Amendment conferred on courts the authority to invalidate state laws when passed under the pretext of public health in the *Slaughterhouse Cases*.[81] But the majority of the Justices refused to second-guess

75. *See* William Forbath, *Law and the Shaping of Labor Politics in the United States and England*, *in* LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 201, 203 (Christopher L. Tomlins & Andrew J. King eds., 1992).

76. *See id.* at 201, 203 (discussing the larger impact of U.S. constitutional doctrines of judicial supremacy on the U.S. labor movement and its divergence from its British counterpart).

77. *See* MARION COTTER CAHILL, SHORTER HOURS: A STUDY OF THE MOVEMENT SINCE THE CIVIL WAR 108–16 (1932).

78. *See* discussion *infra* (discussing *Ritchie*'s, *Holden*'s, and *Lochner*'s review of public health justifications for legislative limits on the workday).

79. Brandeis Brief, *supra* note 1, at 9–10.

80. *See id.*

81. 83 U.S. (16 Wall.) 36 (1873). *Slaughterhouse* concerned an 1869 Louisiana statute that centralized and otherwise regulated slaughtering in New Orleans. In their brief to the Supreme Court, the plaintiffs challenged the state's claim that the law was enacted as a sanitary measure and instead alluded to "legislative caprice, partiality, ignorance or corruption." Brief for Plaintiffs at 2, Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), *reprinted in* 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 535, 537 (Philip B. Kurland & Ger-

the evidence behind the relevant legislative policies. Writing in dissent, Justice Field insisted that courts had a duty to root out legislation passed "under the pretence of prescribing a police regulation."[82] His opinion, through a list of subsequent cases, remained a minority view on the Court. The high-water mark of judicial deference to legislative facts was likely reached in 1877 with Chief Justice Waite's words in *Munn v. Illinois*: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."[83]

By the 1880s, however, the judiciary's earlier deference to legislative facts showed signs of erosion, first at the state level, and later in the Supreme Court. An important arena on which this controversy played out was litigation over the constitutionality of legislation limiting the manufacturing or sale of oleomargarine, a butter substitute made of beef fat churned with milk.[84] While oleomargarine was a topic of political significance in its own right, the implications for the judiciary's role in the review of labor laws were an implicit subtext.

A. Litigation over Oleomargarine Regulation

Pressure from the U.S. dairy industry propelled at least thirty-four states or territories to enact legislation by 1886 requiring that oleomargarine be clearly labeled so as to avoid its confusion with butter.[85] More drastically, nine states passed laws that outright banned the manufacture and/or sale of oleomargarine.[86] The oleomargarine industry quickly challenged the constitutionality of these bans, and between 1882 and 1887, the high courts of three states, Missouri,[87] New York[88] and Pennsylvania,[89] ruled on the issue. Whereas the Missouri and Pennsylvania courts upheld the bans, the New York Court of Appeals did not.[90] The relevance, and, hence, the admissibility of testimony pertaining to the safety of oleomargarine was the most important bone of contention.[91]

In all three of the above cases, the defendants were prosecuted for the sale of oleomargarine in violation of the ban, and each of these defendants offered to present expert testimony regarding the wholesome-

hard Casper eds., 1975).

82. *See Slaughterhouse Cases*, 83 U.S. at 87 (Field, J., dissenting).

83. Munn v. Illinois, 94 U.S. 113, 132 (1877).

84. Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 101–02 (1989); *see also* McCray v. United States, 195 U.S. 27 (1904).

85. Miller, *supra* note 84, at 109.

86. *Id.* at 113–14.

87. State v. Addington, 77 Mo. 110, 117–18 (1882).

88. People v. Marx, 2 N.E. 29, 33–34 (N.Y. 1885).

89. Commonwealth v. Andrews, 60 A. 554, 554 (Pa. 1905).

90. *Compare id.*, *and Addington*, 77 Mo. at 117–18, *with Marx*, 2 N.E. at 33–34.

91. *See, e.g.*, *Marx*, 2 N.E. at 30–31.

ness of the product they sold.[92] The trial courts in all three states refused this testimony on grounds of irrelevance, a decision with which, of the three, only the New York Court of Appeals disagreed.[93] Hidden within the seemingly technical division over the admissibility of the contested evidence were fundamentally divergent conceptions regarding the limits of the state's regulatory authority and the judiciary's related oversight function. Implicit in the offer of evidence regarding the wholesomeness of oleomargarine was an assumption that a statute banning the marketing of a harmless product would be unconstitutional.[94] To the extent that the defendant was able to show that the law lacked a health based or otherwise legitimate justification, the law's invalidity would be established.[95] Judges who refused this evidence rejected that underlying assumption. The Missouri Supreme Court was explicit as to this point: "[t]he legislature may do many things in the legitimate exercise of [the police] and other powers, which, however unwise or injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative authority."[96] Judicial scrutiny of the underlying justifications for legislation threatened to bring the emergent administrative state to a standstill, as the Missouri court explained:

> Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State; overthrow every law the wisdom of which could not bear the test of scrutiny. Proceeding on such a theory, a man arrested for killing game at an unlawful season, might appropriately offer to prove that the birds killed were injurious to the public or were destructive to crops. Or, made to submit to sanitary regulations, might claim that there was no disease on board his ship, and, therefore, the law which compelled him to remain at quarantine, was an arbitrary infringement of his constitutional rights.[97]

Three years later, the New York Court of Appeals emphatically disagreed when it invalidated an 1884 New York statute that prohibited the manufacture of any article not from milk or cream "designed to take the place of butter or cheese."[98] In reaching this decision, the New York court cited the testimony of "distinguished chemists that oleomargarine was composed of the same elements as dairy butter."[99] The testimony was initially presented at the trial but was stricken from the record on the motion of the district attorney, in keeping with the earlier practice of the

92. *See Andrews*, 60 A. at 554; *Marx*, 2 N.E. at 30; *Addington*, 77 Mo. at 111.
93. *See Andrews*, 60 A. at 554; *Marx*, 2 N.E. at 30; *Addington*, 77 Mo. at 111.
94. *See, e.g.*, *Addington*, 70 Mo. at 117.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Marx*, 2 N.E. at 29.
99. *Id.* at 30.

Missouri courts.[100] But unlike in Missouri, the New York Court of Appeals reversed the lower court on this ground, and considered the previously excluded evidence when it concluded that the dairy industry's naked interest in driving out competition for milk substitutes was behind the law.[101] In reviewing the evidence underlying the New York legislature's health rationale for the oleomargarine ban, the New York Court of Appeals forced into the open the core issue: the constitutionality of a law that was enacted solely so as to serve the economic interests of one industry at the expense of another.[102] Cornered into this framing of the issue, the district attorney took the position that the law would not be "beyond the power of the legislature" "even if it were certain that the sole object of the enactment was to protect the dairy industry in this state against the substitution of a cheaper article made from cheaper materials."[103] The answer was arguably consistent with the Supreme Court's language in *Munn* that the proper remedy for legislative abuses was democratic, rather than judicial,[104] but this was a controversial and risky line of argument.

With state courts sharply divided in this fashion, the U.S. Supreme Court took up the constitutionality of legislative bans on milk substitutes in *Powell v. Pennsylvania*. The issue arrived before the Court as an appeal from a decision of the Pennsylvania Supreme Court which left standing a prohibition on the manufacture and sale of oleomargarine, after it refused, on grounds of irrelevance, to allow testimony on the safety of oleomargarine along the exact lines on which the Missouri court relied.[105] Writing for the majority of the Justices on the Court, Justice Harlan upheld Pennsylvania's oleomargarine law. Notably his starting point, similar to that of the New York Court of Appeals in *Marx*, was that "the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of [the] rights of liberty and property, as guaranteed by the Fourteenth Amendment," and that the Pennsylvania law would unconstitutionally infringe on this privilege in the event that it lacked "real or substantial relation" to the protection of "public health."[106] The difference in result followed from the two courts' divergence over the degree of judicial scrutiny to be given to legislative findings as to the existence of such "real or substantial relation."[107]

100. *Id.*
101. *Id.* at 32.
102. *Id.* at 32–33.
103. *Id.*
104. *See* Munn v. Illinois, 94 U.S. 113, 132–33 (1876). In similar fashion, Justice Harlan stated in *Powell*, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment . . . ." Powell v. Pennsylvania, 127 U.S. 678, 685–86 (1888) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
105. *Powell*, 127 U.S. at 681–82.
106. *See id.* at 684.
107. *Id.*

The Supreme Court revisited the oleomargarine question a decade later in *Schollenberger v. Pennsylvania,* a Commerce Clause challenge to the Pennsylvania statute left standing in *Powell*.[108] The success of this challenge depended, in part, on whether unadulterated oleomargarine was safe to consume and, as such, a legitimate article of interstate commerce (a corollary to whether oleomargarine posed a risk to health sufficient to justify regulation under the police power).[109] This time around, the Court, with Justices Gray and Harlan dissenting, voided the law.[110] The opinion's author was Justice Peckham, who cited both the Encyclopedia Britannica and a report by the Commissioner of Agriculture in support of the conclusion that unadulterated oleomargarine was indeed safe to consume.[111] Contrary to the conventional narrative, Peckham, who would shortly go on to author the *Lochner* decision, was an "early adopter" of the category of extra-legal materials generally associated with the Brandeis Brief.

B. A Court Not "Bound by Mere Forms": The Court Hints at the Limits of Deference

A comparison between Justice Harlan's opinion in *Powell* and Chief Justice Waite's in *Munn*, a little over a decade earlier, already suggests a subtle shift in the Court's conception of its oversight role. Most important here is the difference between the two opinions' answer to the theoretical threat of legislative abuse of power. Whereas *Munn* left the solution entirely up to democratic processes, *Powell* recognized an authority, indeed an obligation on the part of courts, to overturn legislation that was "plainly forbidden by the Constitution."[112] But because this power "is always one of extreme delicacy," as Harlan explained, courts must reserve invalidating legislation to instances of "clear or palpable" constitutional violation.[113]

As an example of the type of legislation justifying such intervention, Justice Harlan offered legislation passed "under the pretence of guarding the public health, the public morals, or the public safety."[114] At the same time, the requirement that laws be unconstitutional on their face before they could be invalidated by the courts implied, in turn, that in reaching any such conclusion, courts could only take into account commonly known facts of which they are required to take "judicial cognizance."[115]

108. Schollenberger v. Pennsylvania, 171 U.S. 1, 24–25 (1898).
109. *Id.* at 6–7.
110. *Id.* at 25.
111. *Id.* at 9–10.
112. *Powell*, 127 U.S. at 686.
113. *Id.*
114. *Id.* at 686–87.
115. *Id.* at 685.

Most emphatically, Justice Harlan argued at the time, "[i]t is not a part of [courts'] functions to conduct investigations of facts entering into questions of public policy."[116] What this meant was that whereas the authority of courts to invalidate legislation passed under the pretense of public health existed in principle, the evidentiary barriers blocking such an eventuality almost precluded it in practice. A year earlier, Justice Harlan confronted the same set of issues in *Mugler v. Kansas*,[117] where he wrote an opinion upholding a statute banning the manufacture and sale of intoxicating liquor.[118] His language there seemed to impart to the judiciary a somewhat less deferential stance:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.[119]

Neither in *Powell*, nor in *Mugler*, did Harlan indicate the circumstances under which he would be inclined to conclude that the legislature had indeed exceeded its authority. But the fact that the highly controversial statutes in both cases did not rise to that standard made it clear that any such circumstances would be both extreme and rare. Notwithstanding, Harlan's language in both opinions hints at an impending change. This is perhaps most evident in his notice that courts are not "bound by mere forms" and would not shy, where necessary, from undertaking inquiry into "the substance of things."[120] The juxtaposition of such judicial inquiry with form-bound legal reasoning anticipates realist critiques of legal formalism. Under the influence of the realists, current observers have become accustomed to equating formalism with judicial insulation from social facts.[121] By contrast, in the context within which Justice Harlan made the comment above, a willingness to uphold legislation under an unwavering presumption of constitutionality, irrespective of facts, is what critics thought of as a court "bound by mere forms."[122]

Justice Fields quoted Harlan's language in *Mugler* on the Court's

116. *Id.* Regarding the defendant's failed attempt to provide the trial court with facts speaking to the safety of oleomargarine (and hence the absence of a health rationale for the law), Justice Harlan invoked the rather technical claim that:

> [T]he offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health.

Id. at 684.

117. Mugler v. Kansas, 123 U.S. 623 (1887).

118. *Id.* at 675.

119. *Id.* at 661.

120. *Id.*

121. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL LEGAL SOCIAL SCIENCE 20 (1995).

122. *Mugler*, 123 U.S. at 661.

not being bound by "mere forms" in his own dissent in *Powell*.[123] Notably, he did so immediately after he offered the New York Court of Appeals decisions in *Marx* and, more importantly, in *In re Jacobs* as models for emulation.[124] In the latter decision, the New York Court of Appeals invalidated a union-backed law that prohibited the manufacture of cigars in tenement-houses in the absence of sufficient evidence justifying the legislation's purported health rationale.[125] In injecting *In re Jacobs* into the discussion, Justice Field made explicit the otherwise unspoken political subtext of both the *Mugler* and the *Powell* decisions: the constitutional status of labor legislation.[126]

C. Evolving Strategies in the Defense of Labor Laws

The mid 1880s in the United States were a time of unprecedented conflict between labor and capital, prompted in part by declining wages in the wake of widespread economic depression.[127] Workers' demand for an eight-hour day galvanized strikes and demonstrations across the country with, at times, violent consequences.[128] In its refusal to defer to the legislature's declaration that the cigar law was "intended for the improvement of the public health," and its insistence that it was up to it to "determine the fact declared and enforce the supreme law,"[129] a New York court forced defenders of labor legislation to rethink key aspects of their political and legal strategies.[130]

The legal transformation is made evidently clear through a comparison between the arguments put forth in defense of the cigar law in *In re Jacobs*, and the brief that the State of Illinois submitted a decade later to that state's supreme court in *Ritchie v. People*.[131] In an effort to provide a health justification for a law forbidding cigar manufacturing in tene-

123. Powell v. Pennsylvania, 127 U.S. 678, 697 (1888) (Fields, J., dissenting) (quoting *Mugler*, 123 U.S. at 661).

124. *Id.* at 692.

125. *In re Jacobs*, 98 N.Y. 98, 112–15 (1885).

126. *See, e.g.*, *Powell*, 127 U.S. at 692, 695–96 (Fields, J., dissenting).

127. Davis Rich Dewey, *National Problems: 1885–1897*, *in* 24 THE AMERICAN NATION: A HISTORY 3, 40–56 (Albert Bushnell Hart ed., 1907).

128. *See id.* (describing rise of organized labor out of reactions to poor working conditions and low pay); *see generally* PAUL AVRICH, THE HAYMARKET TRAGEDY (1984) (discussing a pivotal moment in the labor movement).

129. *In re Jacobs*, 98 N.Y. at 110.

130. *See* FLORENCE KELLEY, SOME ETHICAL GAINS THROUGH LEGISLATION 230–40 (1905) (discussing the impact of the *Jacobs* decision on efforts to regulate tenement manufacturing); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 40, 42 (1991) (discussing the *Jacobs* decision as a "landmark" in the "political evolution" of Samuel Gompers, a labor movement leader who served as vice president of the Cigar Makers International Union at the time of the decision, away from reliance on legislation towards an emphasis on the use of economic power, via "strikes and agitation").

131. Brief and Argument of Defendant in Error, Ritchie v. People, 40 N.E. 454 (Ill. 1895), *available at* http://florencekelley.northwestern.edu/legal/court.

ments, the Cigar-Makers International Union (CMIU) argued before the New York legislature that home workers sick with tuberculosis were liable to spread the disease to smokers who consumed tenement-rolled tobacco.[132] Notably, however, this argument failed to make its way into the briefs defending the law before the New York state courts. Rather than put forth a vulnerable scientific theory, the law's defenders bet on judicial deference. The *Jacobs* court defied this expectation, changing the rules of the game.

Labor's stinging defeat in *Jacobs* was likely before the eyes of the Illinois progressives in charge of mounting the state's defense in *Ritchie*. The Illinois law at issue in *Ritchie* limited women's employment in factories to eight hours a day, or forty-eight hours a week, and was passed through the efforts of Progressive reformers, among them Florence Kelley, who was subsequently put in charge of enforcing the legislation when she was appointed as Illinois's First Chief Factory Inspector.[133] Later on, Kelley, who at that time was a student at Northwestern University Law School, took part in developing the legal strategy deployed in defense of the legislation.[134]

Rather than cast its lot entirely on the demand for judicial deference, the *Ritchie* brief hedged its bets by coupling insistence that the law was properly entitled to a presumption of constitutionality, with the presentation of evidence supportive of the health benefits associated with reduced work hours for women.[135] Much like the far more famous brief in *Muller*, Illinois's *Ritchie* brief included citations to medical and other sources suggestive of the particular susceptibility of women to inju-

132. ALAN M. KRAUT, SILENT TRAVELERS: GERMS, GENES, AND THE "IMMIGRANT MENACE" 180 (1994). Concerns about germ dispersal were not the actual drive behind the push for legislative restrictions on tenement manufacturing. Two sets of actors coalesced behind the New York legislature's enactment in 1884 of the prohibition on home manufacturing of cigars which the *Jacobs* court struck down. The first was the Cigar-Makers International Union (CMIU), whose members worked in cigar factories. *Id.* Relations between this Union and tenement cigar workers had been strained since 1877 when CMIU blamed the tenement workers for the failure of a strike that year. *Id.* Soon thereafter, the Union began to lobby the legislature to abandon tenement manufacturing with the objective of improving working conditions in cigar-making factories. They were joined by progressive reformers who objected to the rampant employment of children in tenement manufacturing. EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES 32–39 (1994); Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor, 1885–1905*, 27 LAW & SOC. INQUIRY 489, 516 (2002).

133. KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830–1900, at 237, 254 (1995).

134. *Id*. at 248.

135. At the same time, somewhat inconsistently, the same brief argued for the inadmissibility of evidence that challengers of the law might have wanted to present that a "particular occupation did not need regulating, or that the defendant was carrying on his business in such manner as to render it nearly or wholly innocuous." Brief and Argument of Defendant in Error, *supra* note 131, at 28. The reason offered was that "[i]t would be impracticable to admit proof in such cases" and that "if this were admitted the enforcement of a general police regulation by a state or city would be practically impossible." *Id.*

ries associated with long hours.[136]

Notwithstanding, the Illinois Supreme Court invalidated the law as unconstitutional class legislation after finding that

> [t]here is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow.[137]

The State, in other words, bore the burden of proof on the justifications behind the specific eight hour limit, a burden which, notwithstanding the inclusion of medical evidence, the Illinois brief failed to meet. Nowhere, however, did this court's otherwise unsympathetic justices question the *Ritchie* brief's reliance on extra-legal evidence, a challenge the formalist thesis would lead us to expect.

Rather than the judges, it was the brief's authors who harbored ambivalence on this issue. Concerned that their extra-legal brief would be taken as a concession on the all-important matter of the presumption of constitutionality to which social legislation was entitled, they offered this revealing disclaimer:

> [A]lthough we have shown that such labor is particularly prejudicial to health, and therefore particularly subject to the restraining influence of the state under its police power, it has not been necessary for us to do so.
>
> The question whether or not the particular employment regulated by the law is unhealthful or dangerous will not be inquired into by the courts; the law being, upon its face, an exercise of the police power, the exclusive right to determine whether it is an employment which needs regulating must be left with the legislature.[138]

While state courts grappled, inconsistently, with the constitutionality of work-hour restrictions throughout the 1880s and the early 1890s, the Supreme Court remained above the fray. The Court upheld the presumption of constitutionality across a list of challenges to economic and social legislation but none of these touched on the explosive topic of work-hour restrictions. At long last, that issue reached the Court in *Holden v. Hardy*, an appeal of the Utah Supreme Court decision that upheld work-hour limits for miners and smelters.[139] In an opinion signed by seven Justices, the United States Supreme Court affirmed the lower court's decision, finding the law to be "a valid exercise of the police power of the

136. *See* Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, *in* 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS 239, 245 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

137. Ritchie v. People, 40 N.E. 454, 459 (Ill. 1895).

138. Brief and Argument of Defendant in Error, *supra* note 131, at 26.

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

state."[140] Writing for the majority, Justice Brown quoted the Court's opinion in *Lawton v. Steele* for the proposition that "a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'"[141] At the same time, he stopped well short of any broad pronouncements regarding the law's presumptive constitutionality. Instead, his opinion upheld the law on the relatively narrow ground pertaining to the particular dangers inherent to work in mines or smelters.[142] "These employments, when too long pursued," Justice Brown wrote, "the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."[143] The existence of such reasonable grounds was, however, contingent on whether "such determination is supported by the facts."[144]

Notwithstanding the Court's qualified language in *Holden*, its victory in the case lulled the labor movement into believing that it had won the larger battle over the regulation of work hours, at least where dangerous occupations were concerned. Writing a few months after the decision, Florence Kelley termed *Holden* a "decision of the highest national importance."[145] Once the Court had finally taken a position on the issue, Kelley believed, there would be no turning back. "Once for all," she wrote, "it is convincingly laid down by this decision that state legislation restricting the hours of labor of employés in occupations injurious to the health will not be annulled by the federal supreme court on grounds of conflict with the fourteenth amendment to the constitution of the United States."[146]

Kelley continued to celebrate *Holden* in her book, *Some Ethical Gains Through Legislation*, where she wrote "[i]ncalculable importance attaches to this decision of the Supreme Court of the United States, because it reproves and, in the end, must effectively check that blighting tendency of the state Supreme Courts."[147] First and foremost, she had in mind here her own bitter defeat in *Ritchie v. Illinois.* Reading *Holden* as having settled the question of "[w]ho shall decide which occupations are sufficiently injurious to justify the restriction of the hours of daily labor of persons employed in them," Kelley singled out the Illinois Supreme

140. *See id.* at 398.
141. *Id.* at 392 (quoting Lawton v. Steele, 152 U.S. 133, 136 (1894)).
142. *Id.* at 395–96.
143. *Id.* at 395.
144. *Id.* at 398.
145. Florence Kelley, *The United States Supreme Court and the Utah Eight-Hours' Law*, 4 AM. J. SOC. 21, 21 (1898).
146. *Id.* at 27.
147. KELLEY, *supra* note 130, at 147–48.

Court for its arrogance on this question.[148] At the root of the problem was that court's failure to defer to the Illinois legislature's finding on this issue. Within that context, she offered the following assessment of the Illinois court's investigative capacity:

> The court was naturally not in a position to investigate the conditions of work in the factories and workshops of Illinois. That is not its function. But the legislature of 1893, which enacted the statute then under consideration by the court, had been in a position to investigate the conditions of manufacture throughout the state . . . . All this no court can do; it has no apparatus for such investigations . . . .[149]

The above comment, it is quite clear, was not intended to spur improved investigative capacity for courts, whose relative deficiency in this regard was inherent to their nonlegislative function. If courts had "no apparatus" for factual investigations, this was as it should be, at least as far as Kelley saw things in 1905.[150] She, along with much of the era's reform movement, would be in for a shock when, seven years after *Holden*, the Court reversed course in *Lochner*—and held work-hour limits in bakeries to be in violation of the Due Process Clause.[151] By that time, Kelley, who lost her job as Illinois's Chief Inspector in 1896 following the election of a new governor, was serving as the general secretary of the National Consumers League, the organization whose name would soon thereafter become synonymous with the Brandeis Brief.

III. FROM *LOCHNER* TO THE BRANDEIS BRIEF

The *Lochner* decision and the Brandeis Brief have long stood as twin pillars of the formalist narrative. Within this narrative *Lochner* is identified with judicial antipathy towards review of legislative facts, and the Brief has been constructed as a groundbreaking corrective. Though the *Lochner* decision may well have been critical to the emergence of the Brandeis Brief, it was for converse reasons than those the familiar narrative has long put forth.

A. The Dangers of Bakery Work and Judicial Review: Lochner *Across Three Divided Courts*

At issue in *Lochner* was the constitutionality of a New York law that limited work in bakeries and confectionaries to ten hours a day, or sixty hours a week.[152] Convicted for violating this law, Joseph Lochner,

148. *Id.* at 155.
149. *Id.* at 156.
150. *See id.*
151. *See* Lochner v. New York, 198 U.S. 45, 64 (1905).
152. *See id.*

the owner of a bakery, challenged his conviction through three separate rounds of appeal, bringing his case before the Appellate Division of the Supreme Court of New York,[153] the New York Court of Appeals,[154] and ultimately, the United States Supreme Court.[155] A comparison of the opinions of the judges on each of the panels reveals the extent of disagreement over judicial review of legislative health justifications for work hours.

During the first round of appeal before the New York Supreme Court, three of the five judges voted to uphold the law, while two dissented without writing an opinion.[156] Writing for the majority, Judge Davy began his analysis with the proposition that "nothing but a clear usurpation of power prohibited by the constitution will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void."[157] In support, he cited both the U.S. Supreme Court's decision in *Munn v. Illinois* and the New York Court of Appeals in *People v. Budd*, which, following *Munn*, upheld a New York act that set a maximum charge for elevating grains by stationary elevators.[158] With these examples in mind, Judge Davy concluded, the circumstances at hand offered little reason to question the legislature's judgment:

> When we consider the intense heat of the rooms where baking is done, and the flour that floats in the air and is breathed by those who work in bakeries, there can be but little doubt that prolonged labor, day and night, subject to those conditions, might produce a diseased condition of the human system, so that the employés would not be capable of doing their work well, and supplying the public with wholesome food.[159]

Next, before the New York Court of Appeals, four of seven judges voted to uphold, though, under substantially divergent rationales.[160] Most importantly, the judges differed on whether social legislation of the category in question was indeed entitled to judicial deference and a presumption of constitutionality.[161] Notably, this disagreement divided not only the majority from the dissenters, but also split the majority judges themselves, as the respective opinions of Chief Judge Parker and Judge Vann reveal.[162] Invoking *Holden*, Chief Judge Parker warned against the tendency of some courts to "substitute their judgment for that of the Legis-

153. People v. Lochner, 76 N.Y.S. 396 (N.Y. App. Div. 1902), *aff'd*, 69 N.E. 373 (N.Y. 1904), *rev'd*, 198 U.S. 45.
154. People v. Lochner, 69 N.E. 373 (N.Y. 1904), *rev'd*, 198 U.S. 45.
155. 198 U.S. 45.
156. *Lochner*, 76 N.Y.S. at 402.
157. *Id.* at 398.
158. *Id.*; *see also* People v. Budd, 22 N.E. 670 (N.Y. 1889).
159. *Lochner*, 76 N.Y.S. at 402.
160. *Lochner*, 69 N.E. at 381–82, 389.
161. *See id.* at 381 (Gray, J., concurring).
162. *See id.* at 382 (Vann, J., concurring).

lature."[163] As to the evidence justifying the classification of baking as a dangerous occupation in line with the Court's holding in *Holden*, Chief Judge Parker restricted his discussion to the following:

> The published medical opinions and vital statistics bearing upon that subject standing alone fully justify the section under review as one to protect the health of the employés in such establishments, and it is the duty of this court to assume that the section was framed not only in the light of, but also with full appreciation of the force of the medical authority bearing upon, the subject . . . .[164]

Judge Vann's concurring opinion began, by contrast, with an emphatic rejection of Parker's deferential stance towards the legislature's proffered health rationale. Instead, he used the first sentence in his opinion to declare that "[t]he power of the Legislature to pass what it may consider 'health laws' is not unlimited, but is bounded by the duty of the courts to determine whether the act has a fair, just, and reasonable relation to the general welfare."[165] Making mention of neither *Holden* nor the principle of deference for which this case had come to stand in Parker's opinion, Vann declared instead: "I do not think the regulation in question can be sustained unless we are able to say from common knowledge that working in a bakery and candy factory is an unhealthy employment."[166] In an effort to address this question, Vann's opinion incorporates quotations from no fewer than twenty sources. Some pertinent medical journals and encyclopedias offered theories on why exposure to dust predisposed workers to lung infection, and others compared mortality rates across various occupations.[167] "The evidence," Vann stated, "while not uniform, leads to the conclusion that the occupation of a baker or confectioner is unhealthy, and tends to result in diseases of the respiratory organs."[168] The risk was not as great as that of "those who work in stone, metal, or clay," but sufficient to validate the legislation as a health law.[169] In insisting on the court's duty to scrutinize the underlying legislative facts, Vann was closer in principle to the view of the two dissenting judges in the case. Where Vann parted from the latter two, however, was over the capacity of the available evidence to withstand such scrutiny.

The two dissenting judges who wrote opinions in the case, Judge O'Brien and Judge Bartlett, found that the evidence presented was insufficient to establish a valid health rationale. Of the two, only Bartlett directly engaged with Vann's arguments on the evidence supporting the law.[170] In this connection, he particularly disputed the relevance of an encyclopedia article which found higher risk of consumption among bakers exposed to dust produced in the course of grinding flour and sugar.[171] Because most bakers, by that time, no longer engaged in such grinding,

163. *Id.* at 377 (majority opinion).
164. *Id.* at 380–81.

Bartlett dismissed the pertinence of findings based on exposure to grinding dust when it came to the dangers associated with the baking profession.[172]

These same divisions remained in place when the case reached the Supreme Court. Writing for a majority of five Justices, Justice Peckham placed the burden of proof squarely on the State when he wrote:

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[173]

The bakery law failed this test, Peckham concluded, due to the absence of material distinction between the dangers that bakers faced and those encountered in a long list of occupations—printing, carpentry, dry goods clerking, and banking, to cite a few.[174] The argument appeared to draw on information included in the appendix to Lochner's brief, which cited to a number of studies offering comparative mortality statistics across various occupations.[175]

Of the two Justices who wrote dissenting opinions in the case, Harlan and Holmes, only Harlan responded directly to Peckham's argument regarding the State's failure to prove that baking was a particularly dangerous occupation deserving of special protection.[176] Whereas Harlan disagreed with Peckham regarding this conclusion, his opinion suggests a shift away from his earlier rejection in *Powell* of judicial "investigations of facts entering into questions of public policy."[177] Instead, similarly to Peckham, Harlan's starting point was "that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to

165. *Id.* at 382 (Vann, J., concurring) (citations omitted).
166. *Id.*
167. *See id.* at 382–84.
168. *See id.* at 384.
169. *Id.*
170. *Id.* at 389 (Bartlett, J., dissenting).
171. *Id.* at 389.
172. *Id.*
173. Lochner v. New York, 198 U.S. 45, 57–58 (1905).
174. *Id.* at 59–60.
175. Brief for Plaintiff in Error at 7, Lochner v. New York, 198 U.S. 45 (1905) (No. 292), *reprinted in* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 653, 660 (Philip B. Kurland & Gerhard Casper eds., 1975).
176. *Lochner*, 198 U.S. at 69 (Harlan, J., dissenting).
177. Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

the protection of health."[178] Where he differed from Peckham was over the amount of deference courts ought to grant legislative findings in this regard. All that was necessary, in his mind, for the law to be upheld as a legitimate piece of health and safety legislation was for the court to know "that the question is one about which there is room for debate and for an honest difference of opinion."[179] He then proceeded to establish the presence of such disagreement by countering the authority of the information Peckham cited on the relative safety of baking, with references to a number of treatises and medical textbooks that categorized baking as a dangerous occupation.[180] In this, Harlan differed not only from Justice Peckham's insistence that "[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness,"[181] but also from the much more searching judicial oversight which Vann seemingly endorsed in the court below.[182]

What distinguished Justice Holmes's dissent in the case, and set it apart from both Harlan and Peckham's approach, was an apparent effort to reframe the debate away from whether the ten-hour limit could properly be justified as a health law to the more fundamental question of whether the Fourteenth Amendment's protection of liberty necessarily required that it be so justified. The evidence for and against categorizing baking as a dangerous occupation or otherwise justifying the ten-hour limit as a health law received no mention in Holmes's dissent.[183] Instead, he aimed his challenge at the very premise that the Fourteenth Amendment's protection of liberty implied that paternalist legislative interventions in market ordering were unconstitutional per se.[184] Holmes's cryptic dissent was ambiguous on the circumstances under which a statute might be found to have violated the Fourteenth Amendment. The message imparted, however, supported judicial deference not only regarding the means, but, more fundamentally, the ends advanced through legislation.

B. Lochner*: Why No "Brandeis Brief"?*

While the *Lochner*[185] decision has become synonymous with formalism in American legal history, what exactly made the decision formalist has not been easy to pinpoint. Those who have taken up this question have generally advanced one of two lines of argument. The first locates

178. *Lochner*, 198 U.S at 69 (Harlan, J., dissenting).
179. *Id.* at 72.
180. *Id.* at 70–71.
181. *Id.* at 59 (majority opinion).
182. *See* People v. Lochner, 69 N.E. 373, 382 (1904) (Vann, J., concurring), *rev'd*, 198 U.S. 45.
183. *See Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting).
184. *Id.* at 75–76.
185. *See Lochner*, 198 U.S. 45.

the pertinent formalism in the reasoning process responsible for the Court's construction of freedom of contract as a protected liberty under the Fourteenth Amendment.[186] This claim finds the key to *Lochner*'s formalism in the Court's allegedly strictly deductive reasoning process, and, by extension, its failure to acknowledge the decision's economic and political context. The second claim is related to the first, but is quite distinct. It accuses the *Lochner* Court of buying into a *laissez-faire* ideology under which free bargaining unconstrained by governmental action was inherently desirable, taking as given the capacity of workers to bargain over the terms of their employment.[187] In the latter case, formalism is a feature of the pertinent economic ideology itself, rather than the legal reasoning process responsible for reading that theory into the Constitution. In the first instance, it was the Court's alleged denial of the interpretive choices involved through artificial deductive reasoning that is deemed formalist. By contrast, in the second case, it is the gap between *laissez-faire*'s vision of freely bargaining individuals and the actual inequalities impeding such bargaining that taints the theory, and by extension the Court, with formalism.

Cutting across both understandings of *Lochner*'s formalism is the shared assumption that, at the core of the case, was the constitutional status of freedom of contract. But while the Court indeed considered freedom of contract to be protected under the Fourteenth Amendment, this conclusion was not in fact called into question by any of the parties to the case.[188] Instead, the State of New York defended the ten-hour limit as a health measure, and, as such, a recognized exception to freedom of contract.[189] Justice Peckham alluded to this exception when he stated that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."[190] Consistent with this statement, the main thrust of his opinion dealt with the sufficiency of the evidence regarding the health hazards associated with extended work in bakeries, rather than the constitutional

186. *See, e.g.*, Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 558–59 (1996) ("The justices interpreted the concept of liberty broadly. They elevated property rights to the status of fundamental rights and treated some property rights as essential attributes of liberty. . . . They deduced rules from these natural law concepts, as well as from the common law, then employed formal reasoning to apply these rules to decide individual cases. Often they asserted that their decisions resulted from the formal application of mandatory principles and rules, rather than from political or economic theories."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511 (1988) ("The formalism in *Lochner* inheres in its *denial* of the political, moral, social, and economic choices involved in the decision, and indeed in its denial that there was any choice at all.").

187. Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 554 (2009) ("Thus, in *Lochner*, it is the formal individual—that is, the one endowed with the same legal rights as every other—who is free to contract as he or she sees fit regardless of the economic realities.").

188. *See Lochner*, 198 U.S. at 53.

189. *Id.*

190. *Id.*

status of freedom of contract as such. The evidentiary question at issue, thus, was the existence of cause-and-effect relationship between a shorter workday and identified health benefits. The actual capacity of employees to bargain over the terms of their employment was irrelevant to this line of inquiry. If the Court gave short shrift to the health claim, it was not because it approached the issue through deductive reasoning or abstract conceptions, but because it refused to defer to the judgment of the legislature and insisted on its own evaluation of the underlying facts.[191]

The absence of a "Brandeis Brief" in *Lochner* was not due to formalist aversion to facts (or the incompetence of the Attorney General in charge, as some have argued).[192] Rather the decision to refrain from putting forth a factual brief of this type can well be defended on strategic grounds. Having won in the lower court, and relying on *Holden*, Julius Mayer, the New York Attorney General, offered no concrete evidence on how workday limits in bakeries protected public health.[193] Instead, he put forth a demand for judicial deference in the form of the following rhetorical question:

> Who shall say where the line shall be drawn in the exercise of the police power in a subject of this character? Shall it be the courts, or shall it be the Legislature, which must be presumed to have had before it all the facts upon which it could make a deliberate and intelligent judgment?[194]

The lack of scientific or other factual justification for the ten-hour limit in Mayer's brief for the State of New York sharply contrasted with the approach that Frank Harvey Field and Henry Weismann, the attorneys who represented Joseph Lochner in his challenge to the law, chose by offering medical and statistical reports aimed at showing that "the baker's trade is fully up to the average healthfulness of all trades,"[195] information on which Justice Peckham relied in his majority opinion, as mentioned before.[196]

The incentives for including empirical evidence in the briefs differed substantially between the opposing sides in the case. Having lost across three rounds of litigation in the New York courts, Mr. Lochner had one

191. *See id.* at 45.

192. *See* PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 112–13 (1990) (presenting a range of potential explanations for Mayer's failure to match Lochner's data-laden brief with one of his own, including over-confidence, perceived tactical advantage in silence regarding the scope of the police power, Mayer's conservative political leanings, and his distraction by seemingly more important cases); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 19 n.77 (1991) (describing Mayer's brief as "pathetic").

193. *See* KENS, *supra* note 192, at 111–12.

194. Brief for Defendants in Error at 16, Lochner v. New York, 198 U.S. 46 (1905) (No. 292), *reprinted in* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 175, at 715, 731.

195. Brief for Plaintiff in Error, *supra* note 175, at 660.

196. *See supra* notes 108–11 and accompanying text.

remaining hope: his ability to persuade the Supreme Court that there existed no reasonable health-based justification for regulating the hours of work in bakeries. Conversely, for the state, there was little reason to reopen the question regarding the law's justification once that had been settled in its favor. Moreover, even had they chosen to undertake this evidentiary effort, it would have been difficult for the state's representative to improve upon Judge Vann's opinion at the New York Court of Appeals.[197] Rather than reiterate and elaborate on this information, Mayer's brief simply referred to Vann's opinion in support of "[t]he unhealthful character of the baker's occupation."[198] Lochner's attorneys, by contrast, needed to refute the New York court's finding that the bakery law could reasonably be viewed as a health law if they were to overturn the lower court. Their success in this respect forced progressive defenders of labor laws to return to the briefing strategy that was reluctantly initiated in *Ritchie* and prematurely abandoned after *Holden.*

IV. FORMALISM AND THE BRANDEIS BRIEF

Doctrinal uncertainty over the constitutional status of work-hour laws compelled their defenders to walk a tightrope between strategies designed to advance their preferred outcome—deference to the legislature—and those that offered the best chance of success in the event of judicial scrutiny of the underlying legislative facts. Both the *Ritchie* and the *Muller* briefs revealed this precarious balancing effort.[199] But whereas the first resulted in failure and was soon forgotten, the success of the second retroactively transformed it from a reluctant concession into an ostensibly bold antiformalist strategy. The process through which this transformation unfolded is described below.

A. "The Gospel Has Been Widespread": The Reinvention and Marketing of the Brandeis Brief

In the wake of the Brandeis Brief an invigorated National Consumers League (NCL) amended its bylaws to rename Goldmark's "Committee on Legislation" the "Committee on Legislation and on the Legal Defense of Labor Laws," and entrusted that Committee with the additional duty of assisting "in the defense of the laws by supplying additional legal counsel and other assistance."[200] The change was emblematic of a larger transformation in the NCL's identity. What began as a reluctant conces-

197. *See* People v. Lochner, 69 N.E. 373, 382–84 (N.Y. 1904) (Vann, J., concurring), *rev'd*, 198 U.S. 45.

198. *See* KENS, *supra* note 192, at 111; Brief for Defendants in Error, *supra* note 194, at 733.

199. *See* Brandeis Brief, *supra* note 1; Brief and Argument of Defendant in Error, *supra* note 131.

200. Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 275 (1957).

sion to the evidentiary demands of the courts thus became a key element of the NCL's mission.

Under the title *Fatigue and Efficiency: A Study in Industry*, Josephine Goldmark published a book in 1912 detailing both the science and the strategy behind the *Muller* Brief, as well as others that have followed by then.[201] There, in language that would become the standard description of the Brandeis Brief going forward, she illustrated the Brief's novelty by pointing out that only two of its hundred and some pages were devoted "to the legal aspects of the case, and over 100 to a new kind of testimony—mankind's experience, physical and moral, with respect to women in industry and the duration of their working hours."[202] Goldmark's concern in the book was entirely with what she termed "the new empirical evidence contained in the brief."[203] The legal arguments received no further mention, and were implicitly dismissed as irrelevant. Following Goldmark, discussions of the Brandeis Brief have rarely dwelt on its legal argument, long seen as tangential to the Brief's far more novel and extensive empirical section.

In truth, however, the legal argument—insisting that the law was entitled to a presumption of constitutionality in the first place—was the Brief's most important line of defense. It began with a reading of *Lochner* that seamlessly weaved Justice Peckham's majority opinion together with Justice Harlan's dissent, in a fashion that led one to believe that the presumption of constitutionality suffered little erosion in the transition between *Holden* and *Lochner*.[204] This was best evident in the Brief's citation of Harlan's language in dissent that legislation was to be upheld unless "plainly and palpably unauthorized by law."[205] Notably missing, however, was any indication, with the exception of a reference to the pertinent page number, that the quote came out of a dissent, rather than the Court's majority opinion. In keeping with this strategy, the Brief's concluding paragraph, citing *Holden* and ignoring *Lochner*, emphasized that the facts and legislative precedents presented were sufficient to refute the argument that the Oregon legislature "had no reasonable ground" for the law.[206] Importantly, however, the Brief refrained from making the

201. JOSEPHINE GOLDMARK, FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY (1912)

202. *Id.* at 252.

203. *Id.*

204. Brandeis Brief, *supra* note 1, at 9–10.

205. *Id.*

206. The full relevant sentence in the Brief reads as follows:

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

Id. at 113 (emphasis added). The italicized "not" in the quoted sentence was likely a typographical error. Making sense of this paragraph, however, requires us to surmise that the likely intent behind it was that "it cannot be said that the Legislature of Oregon had no reasonable ground for believing that

alternative positive argument, i.e., that the evidence showed that the legislature *had* reasonable ground for the legislation, since that claim was entitled to a presumption of constitutionality under the Brief's legal argument.[207]

The pertinent empirical evidence cited a long list of authorities for the proposition 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."[208] This was later followed by a quote attributing the female inferiority "in strength as well as in rapidity and precision of movement" to the presence of greater amounts of water in the blood and muscles of women, relative to men.[209] Elsewhere, the Brief alluded to what it described as a universally recognized connection between "long hours of standing" and "pelvic disorders."[210] Moving from health to morality, the Brief explicitly linked long work hours with increased sexual promiscuity and alcoholism among women.[211] As to the particular moral dangers women faced as a consequence of long hours in laundries, which was the focus of the Oregon legislation, the Brief quoted from a British study that blamed "[t]he prevalence of the drink habit" among laundry women on the "thirst-inducing effect" of the heat and chemicals typical of laundry atmosphere.[212]

The Brief's success retrospectively confirmed the scientific respectability of its medical and moral arguments, perhaps most importantly, in the eyes of the NCL staff. It was seemingly at this point that the formalist narrative came forward to explain what took so long for these "scientific" facts to make it to court.[213] Subsequently obscured was the degree to which, in putting forth its medical and moral arguments, the Brandeis Brief won the court case only at the expense of capitulating to the conservative assumption that judges could review social and health legislation for factual errors.

The historical premise that the brief was conceived as a vehicle for

the public health, safety or welfare" required (as it in fact did) the ten-hour limitation. *Id.; see* Clyde Spillenger, *Revenge of the Triple Negative: A Note on the Brandeis Brief in* Muller v. Oregon, 22 CONST. COMMENT. 5, 7–10 (2005).

207. *See* Spillenger, *supra* note 206, at 7–10.

208. Brandeis Brief, *supra* note 1, at 18.

209. *Id.* at 21 (quoting HAVELOCK ELLIS, MAN AND WOMAN: A STUDY OF HUMAN SECONDARY SEXUAL CHARACTERISTICS 155 (1894)).

210. *Id.* at 28.

211. *Id.* at 45 (quoting U.S. SENATE COMMITTEE, 48TH CONG., 1 RELATIONS BETWEEN LABOR AND CAPITAL 647 (1883) (testimony of Robert Howard) ("Drinking is most prevalent among working people where the hours of labor are long.")).

212. *Id.* at 46 (quoting Lucy A.E. Deane, *Laundry Workers*, *in* DANGEROUS TRADES: THE HISTORICAL, SOCIAL, AND LEGAL ASPECTS OF INDUSTRIAL OCCUPATIONS AS AFFECTING HEALTH, BY A NUMBER OF EXPERTS 663, 672 (Thomas Oliver ed., 1902)).

213. HORWITZ, *supra* note 6, at 188–89 ("This attack on the juristic methods of the old order has been called the 'revolt against formalism' or the shift to 'scientific naturalism.'"). Horwitz subsequently offers the Brandeis Brief as an example of this shift.

providing judges with objectively valid scientific facts has rarely been called into question. Initially, the brief garnered unqualified adulation as the "spirit of modern science," but by the end of the 1970s, criticism of some of the substantive arguments and underlying methodology had begun to emerge.[214] Almost without fail, however, these critics explained the deficiencies in reference to the rudimentary state of scientific knowledge at the time.[215] For example, Justice Ruth Bader Ginsburg noted in a speech that while some of the materials in the Brief "look dubious to the modern eye,"[216] the "Brandeis brief purported to present 'scientific' facts'" at the time.[217] A particularly spirited defense of the Brief along similar lines appears in Melvin Urofsky's recent biography of Brandeis: "They worked with what they had, and when Brandeis claimed that the brief presented the 'facts of common knowledge,' these were indeed the facts as known at that time."[218]

Contrary to this assumption, however, it is possible to infer that Brandeis himself harbored doubts regarding the veracity of some of the evidence in his briefs. In oral arguments before the Supreme Court in 1914, six years after the Oregon case, Brandeis presented another brief offering evidence on the link between insufficient wages and poor health and immorality among women.[219] Anticipating a question on whether "this brief contains also all the data opposed to minimum wage laws," Brandeis preemptively answered: "Each one of these statements contained in the brief . . . might upon further investigation be found to be erroneous; each conclusion of fact may be found afterwards to be unsound; and yet the constitutionality of the act would not be affected thereby."[220] As Brandeis went on to explain, the brief's scientific truth was simply irrelevant to the constitutionality of the law in question. The latter was to be presumed unless there existed "no ground on which they could, as reasonable men, deem this legislation [an] appropriate" response to a perceived problem.[221] And when it came to meeting this minimal threshold, all that mattered was the existence of a body of scientific or otherwise expert opinion that suggested a connection between low wages and

214. *See, e.g.*, JUDITH A. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 57–61 (1978); David P. Bryden, *Brandeis's Facts*, 1 CONST. COMMENT. 281, 293–311 (1984).

215. *See, e.g.*, Bryden, *supra* note 214, at 324 ("Obviously, criticism of the details of Brandeis's briefs should be tempered by a generous allowance for how long ago they were written. . . . Compared to the works of other social theorists of the time, the briefs—taken as a whole—do not sound extraordinarily foolish.").

216. Ruth Bader Ginsburg, Muller v. Oregon*: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 363 (2009).

217. *Id.* at 365.

218. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 222 (2009).

219. Louis D. Brandeis, *The Constitution and the Minimum Wage: Defense of the Oregon Minimum Wage Law Before the United States Supreme Court*, 33 SURV. 490, 491 (1915).

220. *Id.* at 521.

221. *Id.*

the decline of women's health and morality. The scientific validity of this evidence was beside the point.

In this respect, *Fatigue and Efficiency* reveals a crucial shift. Published with the help of a grant the NCL received from the Russell Sage Foundation for a review of the literature on the connection between working hours and fatigue, the book cited and discussed a growing body of scientific work attributing "the pathogenic nature of industrial overfatigue" to "the unbalanced metabolism," an essential poisoning of the blood through the accumulation of waste products.[222] Mostly coming out of Europe, this work supplied Goldmark the hitherto absent "statistical or definite proof of the causal connection between industrial overstrain and actual illnesses."[223] With this missing piece finally in place, she subsequently proclaimed, "science can give its authoritative sanction to labor legislation."[224] Unlike earlier attempts to ground work-hour restrictions in the need to limit exposure to workplace toxins and dust, an "unbalanced metabolism" provided a rationale for limiting the workday across all occupations.[225] In addition, the necessity of expelling toxins through rest provided a clearer rationale for limiting the length of the workday than the more indirect connection between extended exposure to pollution and other toxins in the workplace (along the lines of the argument used to justify, in *Holden*, limits on work hours in mines).[226]

The NCL's sociological briefing strategy reached its high-water mark with the thousand-page brief it submitted in 1916 in *Bunting v. Oregon*.[227] The case concerned an Oregon law that restricted work hours in all mills, factories, or manufacturing establishments.[228] The brief urged the Supreme Court to distinguish the case at hand from *Lochner* on the basis of newly discovered evidence on the dangers of fatigue (citing the information Goldmark compiled in her book).[229] When the Court upheld the law, the victory appeared to justify Goldmark's earlier quoted statement on the ability of newly developing science to "give its authoritative sanction to labor legislation."[230] The NCL responded with an extensive publicity campaign. It printed 4000 copies of the *Bunting* Brief and sent copies to "462 law schools, colleges, and libraries in forty-five states" as well as 717 individuals.[231] "[I]ts gospel has been widespread," Josephine Goldmark wrote of the *Bunting* brief's wide-ranging, missionary-like, dis-

222. *See* GOLDMARK, *supra* note 201, at 115–16.
223. *Id.* at 101.
224. *Id.* at 9.
225. *Id.* at 115.
226. *See* Holden v. Hardy, 169 U.S. 366, 395–97 (1898).
227. *See* Ginsburg, *supra* note 216, at 366.
228. Bunting v. Oregon, 243 U.S. 426, 433–34 (1917).
229. Brief for Defendant in Error at 63–173, Bunting v. Oregon, 243 U.S. 426 (1917).
230. GOLDMARK, *supra* note 201, at 9.
231. Vose, *supra* note 200, at 288.

tribution.[232]

The briefs were for Goldmark part of a larger shift in the jurisprudential practices of the day, as she explained in *Fatigue and Efficiency*:

> [T]he point at issue had in fact wholly shifted from relation between the fourteenth amendment and the police the state's abstract right to restrict individual rights, to the practical necessity for every such restriction. The question was no longer abstract and legal, but rather in a deep sense social and medical. It followed that the purely legal defense of these laws was falling wide of the mark. It had long been unreasonable to expect that judges, trained in schools remote from factories and workshops, should be conversant with those underlying practices and conditions which alone could justly weight the scales. The men upon the bench needed for their guidance the empirical testimony of the working woman's physician, the factory inspector, and the economist. They needed, in a word, to know the facts.[233]

Here, we find, perhaps for the first time, an outline of what would become the received wisdom, beginning with the notion that briefs including extra-legal evidence were largely unprecedented and continuing with the juxtaposition between what was once "abstract and legal" and a newfound emphasis on "empirical testimony" and facts on the ground.[234]

By 1935 this narrative was deeply entrenched within the NCL. A pamphlet published that year in commemoration of the organization's thirty-fifth anniversary described the transformation brought about through the fifteen "Brandeis Briefs" the NCL presented by that time in the following fashion: "Never again can laws restricting, in the interest of the public health and welfare, the freedom of contract of wage-earning people be dismissed on mere legalistic grounds of precedent and abstract theory. Henceforth, the human aspects of such statutes and rulings are forever more to be the deciding consideration."[235] The language here, similarly to Goldmark's words above, reads as a paraphrase of Roscoe Pound.

B. Pound, Lochner*, and Sociological Jurisprudence*

In a flurry of articles and lectures he produced during the decade immediately following *Lochner*, Roscoe Pound created the prism through which we have become accustomed to viewing the legal phenomena of that era.[236] Most important in this regard was the construed

232. NAT'L CONSUMERS' LEAGUE, REPORT FOR THE YEARS 1914–1916, at 50 (1917).

233. GOLDMARK, *supra* note 201, at 249–50.

234. *Id.*

235. NAT'L CONSUMERS' LEAGUE, *supra* note 232, at 8.

236. TAMANAHA, *supra* note 10, at 27 ("Roscoe Pound's 1908 'Mechanical Jurisprudence' was seminal in creating the image of judging as an exercise in mechanical, deductive reasoning.").

dichotomy between "mechanical jurisprudence" and "sociological" jurisprudence.[237] The argument depicting *Lochner* as formalist (abstract, deductive, or mechanistic, in the terminology of the time) dates to this body of work, although *Lochner* was rather tangential to Pound's primary concern with private law, in these articles.[238] Pound's role in the initial construction of the *Lochner* decision as formalistic merits a separate article. The discussion here touches on this topic only so far as is necessary for understanding Pound's influence on subsequent formalist constructions of the Brandeis Brief.

The starting point in this regard is Pound's 1908 article "Mechanical Jurisprudence." There, writing partially in reference to *Lochner*, Pound offered the following argument:

> The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated.[239]

The familiar argument critiquing the Court's reasoning in *Lochner* as an exercise in misguided logical deduction likely makes its first appearance in this article. At the same time, we also find within this paragraph language suggestive of the second meaning associated with *Lochner* formalism, i.e., adherence to abstract principles as to workers' bargaining capacity irrespective of the facts on the ground, as will be shortly discussed.[240]

As Brian Tamanaha has noted, "Later generations of scholars have often repeated Pound's claims that judges engage in highly abstract conceptual reasoning with little attention to real conditions."[241] But, "[a]t the time, the main criticism of *Lochner* . . . was not that the judges, beguiled by an abstract understanding of liberty of contract, failed to pay attention to the facts, but the opposite."[242] In support, Tamanaha quotes a critical essay Ernst Freund published in 1910 on *Lochner* and other recent freedom-of-contract decisions whose conclusion was that "[n]o other construction can be placed upon these decisions than that the courts assume the power to look into the question of fact."[243]

It is likely that Pound's thinking here was partly the result of his contacts and friendship with a number of social scientists, most im-

237. *Id.* at 27–28.

238. *Id.* at 32–33 (citing Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312 (1905); Edward B. Whitney, *The Doctrine of* Stare Decisis, 3 MICH. L. REV. 89 (1904); Emlin McClain, *The Evolution of the Judicial Opinion*, 36 AM. L. REV. 801 (1902)).

239. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908). In addition to *Lochner*, Pound referred in this paragraph to the Court's decision in *Adair v. United States*. *Id.* (citing 208 U.S. 161 (1908)).

240. *Id.*

241. TAMANAHA, *supra* note 10, at 36.

242. *Id.*

243. *Id.* (quoting Ernst Freund, *Constitutional Labor Legislation*, 4 ILL. L. REV. 609, 620 (1910)).

portantly the sociologists Edward Alsworth Ross and Lester Ward.[244] Pound cited Ward on the first page of his article "Liberty of Contract" where he contrasted Justice Harlan's statement in *Adair v. United States* that "the employer and employé have equality of right"[245] with the following quote from Ward: "Much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy."[246] The juxtaposition served to illustrate the gap between the theoretical assumptions behind constitutional conceptions of "liberty of contract" and the facts as seen through the eyes of social science.[247] He cited the progressive economist Richard T. Ely to reiterate the same point: "For one who really understands the facts and forces involved, it is mere juggling with words and empty legal phrases."[248]

Unlike *Lochner*, the Court in *Adair* squarely confronted the constitutional status of freedom of contract. The case concerned a federal law that prohibited employers from discharging employees on the basis of union membership.[249] The Court invalidated the law after finding that it exceeded Congress's authority under the Commerce Clause as well as the Fifth Amendment's Due Process Clause.[250] The criticism leveled in response from social scientists focused on the place of a fictitious conception of symmetric bargaining power between employers and employees within the Court's reasoning.[251] The necessary corrective was for the judiciary to remove the blinders that prevented it from seeing the structural inequalities inherent to employment relations.[252] Nowhere here is there any suggestion that courts investigate facts pertaining to the health justifications for social legislation, such as those at issue in the *Lochner* decision. This type of suggestion, as already discussed, would have been inconsistent with the progressive demand for judicial deference to legislative fact-finding in this regard.[253] By ignoring this distinction, Pound's article, by contrast, imperceptibly seemed to lump facts pertaining to the validity of the freedom of contract concept with those that spoke to the existence of health justifications for limiting its application. In this fashion, Pound listed among the factors responsible for "American constitutional decisions upon liberty of contract" what he termed a "sharp line

244. JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 220 (2007).

245. Adair v. United States, 208 U.S. 161, 175 (1908).

246. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) [hereinafter *Liberty of Contract*] (quoting LESTER FRANK WARD, APPLIED SOCIOLOGY 281 (1906)).

247. *Id.*

248. *Id.* at 454 n.3 (quoting Richard Ely, *Economic Theory and Labor Legislation*, AM. ECON. ASS'N Q., Apr. 1908, at 124, 141).

249. *Adair*, 208 U.S. at 168.

250. *Id.* at 180.

251. *Id.* at 187–88; *see, e.g.*, *Liberty of Contract*, *supra* note 246, at 481.

252. *Adair*, 208 U.S. at 187–88; *see Liberty of Contract*, *supra* note 246, at 481.

253. *See supra* notes 77–151 and accompanying text.

between law and fact in our legal system," a line that he blamed, in turn, for the lack of "effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes."[254]

In viewing the gap between law and facts as the source of the judiciary's failure to adjust to the reality of industrial relations, Pound followed in the path of leading social scientists during his time. But, whereas the latter wrote from a perspective that was fundamentally skeptical of the policymaking function of courts, restoring the judiciary's capacity to respond to the problems of the times was the impetus behind Roscoe Pound's call for "Sociological Jurisprudence."[255] As John Fabian Witt has written, "[i]f Ross the sociologist wrote that the law was losing its grip on modern social life, Pound the lawyer saw sociology as the way for law to reclaim its authority."[256] Against a sense of rapid decline in public respect for judges and courts, Pound published in 1907 an article titled "The Need of a Sociological Jurisprudence."[257] In it he argued for the necessity of integrating contributions from the various social sciences into legal analysis, if courts are to retain their policymaking function.[258] As he wrote, "[l]egal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood."[259] In other words, his goal was to rescue the common law from itself, or as he put it elsewhere in the same article: "[I]t is the duty of teachers of law . . . to create in this country a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to insure that the common law remain, what its exponents have always insisted it is—the custom of the people . . . ."[260] Within a year of the publication of Pound's call for "Sociological Jurisprudence" the NCL launched its "Brandeis Brief" strategy, fusing in the process its own project with that of Pound.

C. The Limits of the "Brandeis Brief" Strategy and the Return of Judicial Deference to Legislative Facts

According to a pamphlet published in 1935 commemorating the NCL's thirty-fifth anniversary, the NCL had presented briefs in approximately fifteen cases.[261] The NCL ran into the limits of its sociological briefs, however, when it tried to replicate the strategy it successfully used

254. *See Liberty of Contract*, *supra* note 246, at 457–58.
255. *Sociological Jurisprudence*, *supra* note 26, at 609.
256. WITT, *supra* note 244, at 220.
257. *Sociological Jurisprudence*, *supra* note 26, at 607.
258. *Id.* at 610–12.
259. *Id.* at 612.
260. *Id.* at 615.
261. NAT'L CONSUMERS' LEAGUE, THIRTY FIVE YEARS OF CRUSADING: 1899–1935, at 10 (1935).

regarding work-hour laws in the defense of minimum-wage legislation. In *Adkins v. Children's Hospital*,[262] which concerned a District of Columbia minimum-wage law for women, Felix Frankfurter, who took over for Brandeis, justified the need for protecting women's income as a matter of public health:

> Charged with the responsibility of safeguarding the welfare of the women and children of the District of Columbia . . . Congress . . . found that alarming public evils had resulted, and threatened in increasing measure, from the widespread existence of a deficit between the essential needs for decent life and the actual earnings of large numbers of women workers of the District. The health of large sections of the present generation was thereby suffering from undernourishment, demoralizing shelter and insufficient medical care. Inevitably, the coming generation was thereby threatened.[263]

A majority of the Justices (Holmes, Sanford, and Taft dissenting, and Brandeis recusing himself), rejected the argument this time around. The Court acknowledged that "[a] mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of" the benefits conferred through the operation of similar statutes elsewhere, but ultimately dismissed the information as "interesting but only mildly persuasive."[264] Resurrecting *Lochner* from what appeared to be its near death in *Bunting*, the *Adkins* Court offered a long string of citations to Justice Peckham's opinion in the case, the bottom line of which was encapsulated in the warning that "[t]he mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . . ."[265]

In the wake of *Adkins*, the NCL's faith in its recent briefing strategies was shaken. Florence Kelley, in particular, was moved to support a number of radical reform proposals including court packing and congressional legislation declaring all legislation constitutional unless overturned by seven Justices (in the case of a state law), or a unanimous Supreme Court (in the case of federal law).[266] In 1923, the NCL held a national conference to discuss possible responses to the *Adkins* case and published the papers presented there in 1925 under the title *The Supreme Court and Minimum Wage Legislation.*[267] Roscoe Pound contributed an

262. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

263. Brief for Appellees at viii, xix–xx, Children's Hosp. v. Adkins, 284 F. 613 (D.C. Cir. 1922) (Nos. 3438 and 3467).

264. *Adkins*, 261 U.S. at 560.

265. *Id.* at 549.

266. *See* Vose, *supra* note 200, at 276.

267. NAT'L CONSUMERS' LEAGUE, THE SUPREME COURT AND MINIMUM WAGE LEGISLATION: COMMENT BY THE LEGAL PROFESSION ON THE DISTRICT OF COLUMBIA CASE (1925) [hereinafter SUPREME COURT AND MINIMUM WAGE].

introduction to the volume in which he expressed "little faith in the projects which have been urged in the course of agitation aroused by judicial decisions on social legislation."[268] Instead, in keeping with the principle behind his initial call for sociological jurisprudence almost two decades before, he wrote, "We shall find the true remedy not in ambitious political programs but in a more scientific development of our law. We need to work out a better apparatus of informing the courts as to the social background of the statutes on which they pass . . . ."[269] He favored this instead of propositions for recall of judges, referenda on judicial decisions, or "requiring a different majority for a precedent on a question of constitutional law."[270] Shortly thereafter, Roscoe Pound would part ways with the Progressive movement and go on to lead the American Bar Association's campaign for greater judicial oversight of administrative agencies.

By 1938 the tables would turn once again, and economic legislation would come to enjoy presumptive constitutionality. The landmark case reviving this doctrine concerned the Filled Milk Act, which Congress passed in 1923.[271] The Act, recalling the oleomargarine legislation of the end of the nineteenth century, prohibited the shipment in interstate commerce of "skimmed milk compounded with any fat or oil other than milk."[272] In *United States v. Carolene Products*, the Court upheld the statute against the claim that Congress had deprived manufacturers of compounded milk products of their property without due process of law when it declared that these products were injurious to health and a fraud upon the public.[273] In rejecting this argument, Justice Stone noted that "The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified," evidence that was later incorporated in the relevant legislative reports that were before the Court.[274] But, in a historical shift, he went on to emphasize that:

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[275]

268. Roscoe Pound, *Introduction* to SUPREME COURT AND MINIMUM WAGE *supra* note 267, at xxvi.
269. *Id.* at xxvii.
270. *Id.* at xxvi.
271. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
272. *Id.* at 145–46.
273. *Id.* at 148.
274. *Id.*
275. *Id.* at 152.

With the exception of gross indication of ill intent, legislative intervention in the economy required no evidentiary justification before the courts.

CONCLUSION

Writing in 1935, Felix Cohen, a leading figure in U.S. legal realism, memorably referred to the function of courts under the rational basis test for due process as "lunacy commissions sitting in judgment upon the mental capacity of legislators."[276] In other words, short of extreme irrationality, legislation, under this test, was entitled to deference. Notably, he pointed to the Brandeis Brief as based in "some such conception" of the low bar sufficient for legislation to be upheld under due process.[277] The Brief, as Cohen described it, did no more than "marshal[] the favorable opinions entertained by individuals of undisputed sanity towards legislation restricting the hours of industrial labor for women."[278] Cohen, in contrast to many current commentators, seemingly harbored no illusions regarding the objectivity of the Brandeis Brief's science.

The political and legal requirement that social and economic reforms be framed as traditional health measures gave rise to a body of social scientific work aimed at providing the requisite justifications for legislation. Whereas this reformist intellectual tradition is closely associated with the progressive era in U.S. history,[279] its roots date back over a century to the investigations of physicians such as Dr. Percival in Britain of the early nineteenth century. Much like their later U.S. counterparts, early nineteenth-century reformers cited "surveys, case studies, social experiments, and stacks of facts" to justify their missions in the face of growing social unrest.[280] The frequently overlooked common denominator underlying both the early nineteenth-century British and early twentieth-century U.S. incarnations of this intellectual tradition was the need to fit (often redistributive) regulatory interventions within a legal and political environment committed to market ordering.

Labor laws acquired in this process a long list of medical justifications that, over time, grew to include not only the prevention of varicose

276. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935).

277. *Id.*

278. *Id.*

279. As James Gilbert writes regarding the rise of social-scientific investigations during the progressive era, "[a]rmed 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 enormous growth of fact-gathering organizations and the publication of their research helped to support the intellectual revolution which the collectivists preached." JAMES GILBERT, DESIGNING THE INDUSTRIAL STATE: THE INTELLECTUAL PURSUIT OF COLLECTIVISM IN AMERICA, 1880–1940, at 45 (1972). Florence Kelley's investigations into workplace injuries and the statistics of child labor provide a paradigmatic example of this body of work. Batlan, *supra* note 136, at 244.

280. HAMLIN, *supra* note 30, at 84.

veins and fertility problems, but also dissemination of germs and accumulation of fatigue-triggered toxins.[281] Some of these theories were well supported within the scientific conventions of the time, whereas others might best be described as creative speculations. Irrespective, they served to diffuse potentially violent conflicts by reconciling the enactment of social legislation with the ideological suppositions of the reigning *laissez-faire* regime. For this compromise to work, it was essential that it not be upended by the courts. This goal was achieved, over time, through a variety of approaches. The first was British parliamentary sovereignty, the second, presumptive constitutionality, and the third, following *Lochner*, was the one epitomized by the Brandeis Brief. Because it made the fate of social legislation contingent on scientific proof, the latter approach signified a substantial increase in the power of the judiciary, relative to its two predecessors. In marshalling the evidence on how fatigue poisoned workers' blood or otherwise put them at risk, progressives conceded the dividing issue across nineteenth-century police power debate: the authority of courts to distinguish true public health measures from mere pretext.

If formalism was not the real obstacle before judicial review of legislative facts earlier on, the formalist myth served in this context at least two related functions. In defining the pertinent problem as an inherently correctible judicial ignorance of the connection between social legislation and the protection of health, formalism bypassed direct engagement over the existence of substantive limits on legislation, in keeping with the longstanding progressive strategy. At the same time, this problem definition was consistent with the desire on the part of some progressives, most famously evident in Justice Stone's footnote four in *Carolene Products*, to retain the judiciary's ability to limit majoritarian power where the rights of "discrete and insular minorities" were at stake.[282] From the vantage point of later twentieth-century writers, the Brandeis Brief served as proof of the value of empirical social science for progressive legal agendas. In this vein, historians have pointed to the Brandeis Brief as the inspiration behind the use of social science evidence in *Brown v. Board of Education* and many other cases.[283] Along the way, we have lost sight of

281. GOLDMARK, *supra* note 201, at 3, 9–42.

282. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). On the emergence during the 1930s of "a new generation of liberals" who looked to the judiciary "to protect American rights from being trampled by a too powerful state," see Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187, 198–99 (2009). Likewise, on "the evolving image of the Court as protector of civil liberties" during the 1930s, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 220–22 (2009).

283. *See* Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 455 (1988) ("The Warren Court also drew on the earlier efforts of Sociological Jurisprudence and Legal Realism to insist that legal rules cannot be evaluated outside of a social con-

the fact that at issue at the start of the twentieth century was not fundamentally the legal methods to be used in judicial review of the emergent administrative state, but the substantive scope of that state's authority and the judiciary's role in policing its boundaries.

text. The Brandeis Brief . . . was a forerunner of the controversial footnote in *Brown* describing the sociological effects of segregation on black school children.").