

“Paying the Precious Price of Equality”

Muller v. Oregon and the Conflict of Protective Legislation

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At the turn of the Twentieth Century, women were struggling to gain political status. They could not vote, and several Supreme Court cases had upheld the statutory limits on their rights. Women could not serve on juries and were barred from certain professions, such as law. Both the Fourteenth Amendment of 1868 and the Fifteenth Amendment of 1870 had failed to provide women with equal protection under the law and voting rights. However, some differences in men's and women's rights at this time were considered beneficial for women. These were laws that protected "the gentler sex" from working long hours in poor conditions. The Supreme Court decision in Muller v. Oregon (1908) brought to light the conflict between paternalistic protection and conceptual equality concerning women's labor.

The concept of women as weaker than men has existed throughout history. However, it was the atmosphere of the Progressive Era in the United States (1890-1920) that caused this belief to manifest itself in the form of protective labor laws. During the Progressive Era many people saw the need for social change in their society. These reformers fought for improvement in many areas, including in the workplace. They wanted all workers, both men and women, to work for no more than eight hours per day, in safe conditions, for fair pay. Unfortunately, the courts had very different ideas about the rights of workers (Woloch 7). Efforts of legislators to expand labor codes had "again and again been balked by the decision of the courts that their enactments were unconstitutional" (Seager 581). This attitude toward protective legislation was seen in 1905 in the Supreme Court case of Lochner v. New York. In this case, the Supreme Court declared a New York law giving bakers a ten hour work day unconstitutional. In the delivery of the opinion of the Court, Justice Peckham upheld the "freedom of contract."

Freedom of contract is “the general right [of a person] to make a contract in relation to his business, [which is] part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor” (198 U.S. 45). Thus, the Court held that employers and employees have the legal right to establish working conditions without government intervention such as minimum wage and maximum hour laws.

When legal obstacles prevented reformers from succeeding in legislating labor codes for all workers, reformers began to focus on protection for women alone. Two significant reasons for this were the entering wedge theory and romantic paternalism. The entering wedge theory is the idea that labor legislation gains for women could pave the path for comprehensive reform for both men and women laborers (Woloch 9). Romantic paternalism played a large role in the development of protective legislation as well. Romantic paternalism is the “romantic” idea that women are the weaker sex and need extra protection. Unfortunately, this perceived weakness motivated the pursuit of not only beneficial protective laws, but also was used to keep women out of the public sphere. Women were thought of as unfit to participate in politics or business. Romantic paternalism fueled arguments that legislation should help and force women to be successful mothers rather than valuable members of the workforce (Cushman 1).

One of the many laws which resulted from the combination of paternalistic and progressive attitudes was a 1903 Oregon law which prohibited launderers from having women work for more than ten hours a day. This law was violated when an overseer working for Curt Muller ordered employee Emma Gotcher to work for more than ten hours on September 4, 1905. When Gotcher complained, Oregon brought criminal charges against Muller. Muller originally pled guilty, but the Laundry Owners’ Association

encouraged him to change his plea to a complaint about the constitutionality of the law. The Oregon Supreme Court upheld the ten hour day and fined Muller ten dollars. However, Muller and other laundry owners were not satisfied and appealed the law several times (Cushman 17). They were determined to use this case to destroy the ten hour day, which was an obstacle in the race to higher profits.

It was after Muller first appealed his case that Florence Kelley and the National Consumers' League became involved in Muller v. Oregon. The National Consumer's League was founded in 1899 to promote community patronization of businesses that treat workers fairly. Soon after, Kelley became general secretary of the group. The two largest issues that the NCL fought for were an end to child labor and protection for women laborers (Lunardini 139). Kelley strongly believed that it was wrong that "seals, bears, reindeer, fish, wild game in the national parks, buffalo, migratory birds, [were] all found suitable for protection; but not the children of our race and their mothers" (Lunardini 140). She also fought for workers' "right to leisure." Kelley held that as machines became faster, the work employees did became more strenuous and, thus, a shorter work day with leisure time was needed for rest (Kelley 121). She advocated two ways of achieving social reform. The first way, education of the consumer, called for boycotts of businesses that did not treat workers fairly. One of the major goals of the NCL was spreading information about which companies were fair and which were not (Kelley 126). Kelley also called for legislation against abuse of workers because efforts are more effective "when directed towards the enforcement of statutes than when confined to persuasion alone" (Kelley 126). Thus, Kelley felt the responsibility for protecting workers lay not only with the consumers, but also with the government.

These beliefs led Kelley and the NCL to take an active role in the case of Muller v. Oregon. She and Josephine Goldmark, the research director of the NCL, asked Louis Brandeis, a lawyer known for his Progressive beliefs, to represent Oregon. Brandeis accepted and began working with Goldmark on what would become his famous brief for the state of Oregon. His strategy was not to try to overturn Lochner v. New York, which barred protective legislation, but rather to slide through a loophole in the decision. In the opinion of the court in Lochner, Justice Peckham had declared the bakery hour law unconstitutional because, “there is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker” (198 U.S. 45). This implied that a law limiting hours of labor might be upheld if it protected the health of either the public as a whole or laborers (Woloch 28). So, Brandeis attempted to prove that laundresses’ health was endangered by working more than ten hours a day. In order to demonstrate this, Brandeis compiled a brief of sociological facts which showed how working long hours “results in general deterioration of health... undermines the whole system... and predisposes to other illness” (Brandeis 28). He used medical and labor statistics from other states and countries where protective laws had been successful. Brandeis also argued that overwork could hurt the general public because working more than ten hours causes “infant mortality [to rise], while the children of married women, who survive, are injured by inevitable neglect” (Brandeis 47). He wrote that working women’s reproductive systems were damaged, causing the rise in infant mortality, and working mothers were incapable of properly caring for children while working more than ten hours a day. The style of brief

presented by Brandeis was highly unconventional in that it cited statistics rather than legal precedent and proved the necessity of a law as well as its constitutionality (Woloch 29).

Unfortunately, the arguments which Brandeis used for Oregon not only helped to protect women from abuse by their employers, but also forced them back into traditional roles in the private sphere and allowed them to be labeled as second class citizens. The brief treats all women as mothers or future mothers, implying that women's only important role in society is as a mother. It also depicts women as too weak to do the same things that men do. One comment included in the brief suggests that women are "badly constructed" (Brandeis 19) and another says they are "fundamentally weaker" (Brandeis 18). Ultimately, the facts and ideas in the Brandeis briefs reinforced the romantic paternalist view of women in the early Twentieth Century.

While Brandeis's argument for Oregon made women appear weak and incapable, the opposing brief for Muller, somewhat ironically, argued strongly for women's equality under the law. Muller's lawyers, William Fenton and Henry Gilfry, argued that prohibiting women from working in laundries for more than ten hours violated their freedom of contract. They cited the case of Ritchie v. People, (1895) in which Justice Magruder said, "woman is entitled to the same rights, under the Constitution, to make contracts with reference to her labor as are secured thereby to men" (Woloch 135). Muller's lawyers contended that the Oregon law was discriminatory, just as a law which forbade white men but not black men to work for more than ten hours would be discriminatory. (Woloch 137).

Ultimately, the Supreme Court ruled in favor of the state of Oregon and upheld the ten hour workday. They accepted Brandeis's proposition that society is hurt by women's overwork. When Justice Brewer delivered the opinion of the Court, he gave valuable

support to reformers. However, he also presented a sexist attitude concerning women and their differences from men. Brewer stated that women are dependent on men, and that nothing, not even legislation, could change that. He went on to say that even when women are given equal rights to men, “there is that in her disposition and habits of life which will operate against a full assertion of those rights” (208 U.S. 422). Brewer also said that protective laws are necessary for women and without them a female “is not an equal competitor with her brother” (208 U.S. 422). Finally, Brewer put women into their own class based on the “inherent difference between the two sexes, and in the different functions in life which they perform” (208 U.S. 423). Thus, Justice Brewer failed to adapt his opinions to women’s changing role in society.

Although he degraded women, Justice Brewer provided an important compromise between reformers and the government in his delivery of the opinion of the court. At one level, the decision itself appears to whole-heartedly support labor regulation. However, upon close examination of the opinion of the Court, one sees that Brewer and the Court still supported the laissez-faire policy of limited government interference with business. The decision to allow protective labor legislation for women was just a consolation for reformers. The Court did not overturn their decision in Lochner v. New York (Woloch 38). Rather, it continued to support “the general right to contract in relation to one’s business” (208 U.S. 421). It only amended this right for women.

When the decision of Muller v. Oregon was announced, most people saw it as positive. For labor reformers, it was an important step forward, which opened the doors for more than a decade of increasing women’s protective legislation (Novkov 131). Some women’s rights groups, such as the NCL and the Women’s Trade Union League, believed

that the Supreme Court's support of protective legislation for women would "do for women what labor organizations ought to have done but had so far failed to do" (Degler 401). Part of the reason why women wanted protection through the law was because labor unions which protected men often did not support women. Although some labor organizations allowed women to unionize, women were a minority in unions. Thus, their needs were frequently overlooked. Also, women were rarely given roles of leadership in unions (Degler 399). Male workers were also pleased with the decision to allow protective legislation because they saw it as an advantage for themselves. Many businesses wanted employees who would work for long hours. Since protective legislation prevented women from doing this, men were more likely to be given jobs by these businesses (Degler 401). Even business owners were not upset by this ruling because Justice Brewer had specified that protective legislation in general was not constitutional and no precedent was established for government interference (Woloch 40). Thus, the decision of Muller v. Oregon was not originally highly controversial.

However, not all women were pleased with the decision to allow gender specific protective legislation. Susan B. Anthony had opposed protective legislation for decades because it "seemed to set women apart from men" (Degler 401). After women gained suffrage in 1920, more began to speak out against protective legislation. In 1923, Alice Paul, the leader of the National Women's Party, began to speak out on behalf of an equal rights amendment. This would prohibit legal discrimination against women and bring an end to gender specific protective legislation (Degler 402). The debate about an equal rights amendment created a major rift in the women's rights movement. In the next major case

concerning women's protective legislation, Adkins v. Children's Hospital, the NCL and the NWP fought on opposite sides of the case (Degler 403).

Ultimately, Muller v. Oregon gave women protection from manipulating employers, but at the precious price of their equality to men. Reformers succeeded in using the Muller ruling as an entering wedge for other legislation. In the decade following the decision, women's protective legislation appeared in numerous states throughout the country. However, this success ended in 1923 when a women's minimum wage law was struck down in Adkins v. Children's Hospital. At this same time, protective legislation caused a conflict among feminists that would not be overcome for almost half a century. Hopefully women will continue to unite for fair treatment and refuse to allow legislation to divide them.