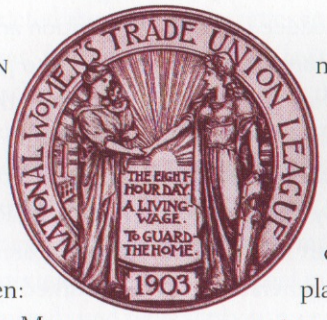
FEBRUARY 24, 1908

AFFIRMING THE SEXUAL DIVISION OF LABOR

BY ALICE KESSLER-HARRIS

WHEN IT CAME DOWN ON February 24, 1908, the U.S. Supreme Court decision in *Muller v. Oregon* produced a burst of approbation. Headlines trumpeted the unique position in which the Court had placed women: "Supreme Court Holds Woman Above Man in Law," the *Washington Post* declared. Influential liberal magazines such as *The Outlook* described the decision as "A Victory for Posterity." The leading women's groups celebrated—particularly the National Consumers' League, which had helped prepare the decisive brief in the case. Its members were ecstatic because the Court's ruling had explicitly affirmed what everyone knew to be common sense: Gender distinctions justified treating women differently before the law.

The *Muller* case was a simple one, involving an Oregon statute that limited the number of hours women (but not men) could work operating certain types of mechanical equipment. In its ruling, the Court sustained the law, thereby affirming the constitutionality of legislation that placed women in a separate legal category—or class—from men. The *Muller* decision proved to be so important that the precedent it set prevailed for more than half a century. During that time, the legislative agenda *Muller* fostered shaped the daily lives of men, women, and children throughout the country.



EXCESSIVE AND DEBILITATING work, of course, was not an issue that threatened women alone. Around 1900, ten- and twelve-hour workdays—and sixty- or even seventy-hour workweeks—were not uncommon for both men and women; and because the pace of industrialization had accelerated during the late nineteenth century, working conditions everywhere had become nearly intolerable. Most unskilled laborers found themselves confined to unsanitary and often dangerous workplaces,

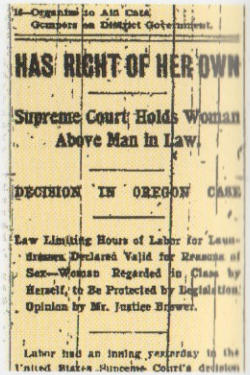
AT LEFT: *By 1900, nearly six million women earned their livings in factories, retail stores, and other people's households (as domestic workers). This 1908 photograph shows the interior of a factory employing women to make shoes.*

ABOVE: *The NWTUL, founded in 1903, was one of the*

control over the process of production and the pace of their work. Women, disproportionately unskilled, were especially vulnerable. Because single women were thought to be only temporary members of the labor force and married women merely secondary wage earners, women were generally denied the job training that prepared men for good jobs. Most apprenticeships, for example, were closed to females, and employers tended to hire them to fill only the lowest-paid and most exploitative jobs.

The results were everywhere evident. Department store saleswomen stood on their feet for long hours; female garment and textile workers were crowded into unventilated, lint-infused workplaces where they contracted tuberculosis and spread smallpox at alarming rates; female factory workers were forced to operate unguarded machinery that endangered their weary fingers and sometimes, if they weren't careful, pulled them in by their long hair. The below-subsistence wages they were paid produced visible malnutrition and, according to some social critics, drove more than a few women into prostitution.

During the years just prior to the *Muller* decision, the particular vulnerability of women workers forced its way into public consciousness. By this time, young women had already been part of the industrial labor force for several generations, having worked in the earliest U.S. textile and paper mills as well as at shoe binding and in the garment industry. However, when nineteenth-century industrialization moved jobs such as washing laundry out of the home and into small factories, women of all ages supplied the labor. By 1900, women made up a noticeable 20 percent of the nation's industrial workforce, and most young women now spent several years in the labor force before marrying and having children.



HAS RIGHT OF HER OWN

Supreme Court Holds Woman Above Man in Law.

DECISION IN OREGON CASE

Law Limiting Hours of Labor for Laundresses Declared Valid for Reasons of Sex—Woman Regarded in Class by Herself, to Be Protected by Legislation. Opinion by Mr. Justice Brewer.

Labor had an inning yesterday in the United States Supreme Court's decision

***The* Washington Post** *printed this front-page story on February 25, 1908. The article ran below the masthead but above the fold.*

Although the employment of young women wasn't considered too disturbing, the plight of married women and the mothers of young children was. By the turn of the twentieth century, it had become clear that, increasingly, married women and young mothers had no economic choice but to work outside the home, often under arduous conditions. (African-American women had long worked at difficult jobs outside the home in great numbers, but white social activists and their friends in organized labor didn't take much notice until large numbers of white married women began to join them.) In 1900, 6 percent of white married women in the United States earned wages outside the home; a decade later, that figure had nearly doubled. The surge was obvious to everyone and produced a great deal of anxiety that women would become overworked and too sickly to sustain a normal family life. Women's wage work thus seemed a threat not only to their own health but also to that of society.

MANY SKILLED LABORERS RESPONDED to deteriorating conditions at work by organizing unions. They wanted to ameliorate the most dangerous working conditions, reduce the number of working hours, and earn enough pay to support their families—but few men and even fewer women obtained these benefits. Although most states permitted the organization of trade unions, no worker had the guaranteed right to join one, and employers were free to fire any worker who did. State laws also severely restricted the kinds of activities in which organized workers could engage. Strikes, for example, were not legal if they deprived employers of property (which was their point); with the implicit support of courts and state governments, most employers routinely hired thugs to brutalize any workers who dared to strike. Twice during the 1890s, organized workers suffered spectacular and well-publicized defeats—in 1892, when Andrew Carnegie used eight thousand state militia to break up a strike at his Homestead, Pennsylvania, steel mills; and in 1894, when Pres. Grover Cleveland used federal troops to end the Pullman strike, which had shut down rail traffic into and out of Chicago. These incidents reminded everyone, especially workers, of the power that employers had to resist collective action.

In the case of the Pullman strike, most of the violence was precipitated by a federal court injunction requiring the strikers to return to work, and this was often so: Court injunctions typically gave employers the legal cover they needed to use violence to break a strike. Nearly all of these injunctions relied on the prevailing interpretation of the Fourteenth Amendment's due process clause—which had become, in the hands of the late-nineteenth-century Supreme Court, an effective weapon that employers could use to prevent unions from obstructing their businesses. Another legal principle cherished by late-nineteenth-century employers was the "freedom of contract" doctrine that had been found in the Fourteenth Amendment's

***State militiamen** enter Homestead, Pennsylvania, after the governor's declaration of martial law.*

OVERLEAF:

***Lewis W. Hine** took this photograph,* Little Spinner Girl in Globe Cotton Mill, Atlanta, Georgia, *in early January 1909. At the time, Hine was working as an investigator for the National Child Labor Committee, an advocacy group funded by Progressives. Now and then resorting to subterfuge to gain access to the worst sweatshops, Hine produced a collection of photographs that educated the public of his generation and now constitute a remarkable visual record of the working class at the turn of the twentieth century.*

privileges and immunities clause—which, according to a number of court decisions, guaranteed "the fundamental right of the citizen to control his or her own time and faculties." Prior to *Muller,* state and federal courts ruled consistently that states could not regulate work hours or working conditions because doing so would infringe on the individual's constitutional right to negotiate his or her own contract free from government interference.

To escape such damaging court rulings, the American Federation of Labor, then the largest and most respected U.S. trade union coalition, adopted a new strategy that it called voluntarism. The idea was to control wages and employment conditions through the economic leverage of organized working people. Instead of asking for legislative or judicial relief, labor emphasized such new and old tactics as union labels, boycotts of unfair employers, and strikes.

Whatever its merits for men, voluntarism made female industrial workers decidedly unattractive candidates for organization because they had so little economic power. Unskilled or at best semiskilled, they were easily replaced and thus in a poor position to negotiate. When they had no choice but to accept low pay and acquiesce to employers' demands for extra work, male coworkers accused women of dragging down all wages. In addition, male trade unionists believed like everyone else that most women were just passing through the workforce. If men helped women to organize at all, they did so reluctantly.

ALTHOUGH MOST TRADE UNIONS continued to discount legislative solutions during the early years of the twentieth century, independent advocates agitating on behalf of the working poor did pursue legal remedies, especially for women and children. They specifically hoped to extend to other states advances already made in Massachusetts, where an 1874 law limiting the number of hours women and children could work had successfully withstood state supreme court review. This had encouraged a dozen other states to look for loopholes in the freedom-of-contract doctrine and pass laws regulating working hours and conditions for both men and women. The results of these efforts, though, were mixed: The laws were generally weak, and although some were upheld, many were struck down by state courts, which held them to be violations of workers' and employers' freedom of contract. In 1893, when Illinois tried to establish an eight-hour workday for women, the state's high court rejected the effort decisively. Still, many ambiguities concerning the application of freedom-of-contract law remained until 1898, when the U.S. Supreme Court entered the fray.

***Miners** were the focus of much important labor activity at the turn of the twentieth century. Four years after* Holden v. Hardy, *150,000 anthracite coal miners in Pennsylvania went on strike for higher pay, shorter hours, and recognition of their union. The often violent protest continued from May until December, when winter cold, dwindling coal supplies, and pressure from Pres. Theodore Roosevelt forced mine management to accept a settlement largely favoring labor.*

That year, in its landmark *Holden v. Hardy* decision, the Court upheld a Utah law limiting the workday of miners on the grounds that their health was at stake. Thereafter, some states began seeking health-related rationales to justify laws protecting workers whose overtired or diseased bodies could put their own or the public's health and safety at risk. The states of Nebraska, Pennsylvania, and Washington specifically applied the Court's new interpretation to women, passing regulations that limited the number of hours women could work on the grounds that the government had a legitimate interest in protecting women's more fragile health because of their singular ability to reproduce. Each of these laws was later upheld in state supreme court.

Meanwhile, the U.S. Supreme Court set another important precedent regarding freedom of contract in 1905, when it decisively limited the use of the health rationale for men. In *Lochner v. New York,* the Court overturned a New York State law limiting the number of hours bakers (who were predominantly men) could work. By a seven-to-two majority, the Court declared the New York law unconstitutional because it interfered with the rights of bakery owner Joseph Lochner and his employees to contract freely *without serving any larger public purpose.* The deciding factor, the Court said, was that the law protected "neither the safety, [nor] the morals, nor the welfare of the public."

This freedom-of-contract roadblock affirmed the labor movement's decision not to pursue legislative action, at least where working men were

concerned. But other reform-minded men and women increasingly pursued the legal logic of sex differentiation, arguing (as had Nebraska, Pennsylvania, and Washington) that exceptions to freedom-of-contract law should be made for women because wage work threatened their health; the health of future generations; and the safety, morality, and welfare of the American family. Demanding even more laws to protect women from the most difficult working conditions, these activists organized themselves first locally and then nationally through such groups as the General Federation of Women's Clubs; the National Women's Trade Union League; and, most powerfully, the National Consumers' League.

IN FEBRUARY 1903, THE OREGON LEGISLATURE passed one such law prohibiting employers from hiring women to work more than ten hours a day operating mechanical equipment in certain commercial businesses (including steam laundries). A year and a half later, Curt Muller, the prosperous owner of a small chain of Portland laundries, told Emma Gotcher that she could not leave before meeting her quota for the day. Faced with the choice of working overtime or possibly losing her job, Gotcher finished her work and then complained to the office of the Oregon labor commissioner. Two weeks later, the county court cited Muller for criminal misconduct.

Instead of paying the fine and letting the case drop, Muller decided to fight the judgment. He didn't like any law that hampered his flexibility as an employer, and a consortium of laundry owners who felt the same way was willing to fund and otherwise back his appeal. To handle the litigation, Muller retained distinguished Portland lawyer and former Southern Pacific Railroad counsel William D. Fenton, who opposed the judgment on constitutional grounds. He argued, not surprisingly, that Oregon's 1903 law improperly interfered with his client's right to contract freely with his employees. That Gotcher was a woman, Fenton insisted in his brief, made no difference because women were "entitled to the same rights, under the Constitution, to make contracts with reference to [their] labor as are secured thereby to men." The general right of any person "to pursue any lawful calling" was not one that could be abridged by the state. Yet, Fenton continued, this was precisely what Oregon had done in the name of protecting women's health, thereby sacrificing a woman's right to her own labor "in an attempt to conserve the public health and welfare."

The county trial judge had sympathized with Muller—but because Muller had, after all, admitted to violating the law, the judge had found him guilty. Fenton's appeal to the Oregon Supreme Court failed to overturn that judgment, but it did clarify the issues involved. Rooting its June 1906 decision in *Holden v. Hardy,* the state supreme court reasoned that because the health of the workers was at stake, the regulation of women's hours was legal. Once again Muller appealed, this time to the U.S. Supreme Court.

onal Women's Trade Union League held its second convention in Chicago. That winter, the tant role in the New York City shirtwaist strike that built up the garment workers' unions.

SEEING A TEST CASE IN THE MAKING, the Oregon Consumers' League contacted its parent organization, the National Consumers' League—whose executive secretary, Florence Kelley, was an early and eager advocate of protective labor legislation. Kelley had been an architect of Illinois's unsuccessful 1893 eight-hour law, and now she saw the opportunity to establish a beneficial precedent, settling the issue once and for all.

By the time Kelley got involved, Fenton had already submitted to the Supreme Court a detailed brief, based on precedent, defending his client's freedom to contract. Oregon's attorney general knew he needed help, so he encouraged Kelley to approach Joseph Choate, a distinguished lawyer friend of his. Rebuffed, Kelley immediately turned to the lawyer she most trusted—someone who could argue persuasively that the public interest in preserving women's health overrode whatever private rights inhered in freedom of contract. That person was Louis Brandeis, brother-in-law of Josephine Goldmark, director of legislation and law for the National Consumers' League.

FLORENCE KELLEY

1859 – 1932

After her graduation from Cornell in 1882, Florence Kelley continued studying social problems at the University of Zürich, where she became a socialist and translated into English Friedrich Engels's 1887 study The Condition of the Working Class in England in 1844. *Returning to America, she began working in 1891 at Chicago's Hull House settlement, where she later met William English Walling. In 1899, Kelley became secretary of the National Consumers' League and moved to New York City, where she took up residence at Lillian Wald's Henry Street Settlement. In 1909, she joined the biracial civil rights group, led initially by Walling, that founded the NAACP.*

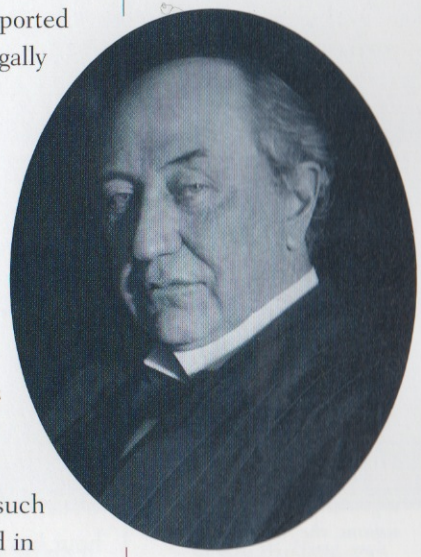
In 1907, Brandeis was a distinguished professor of law at Harvard with a reputation for defending progressive legislation, particularly laws that regulated transportation monopolies and insurance companies. When Kelley and Goldmark came to call, he quickly agreed to participate in the case on two conditions: He wanted Oregon's attorney general to remain the attorney of record, and he insisted on having the facts necessary to make the argument that long hours threatened women's health. The thesis that Kelley, Goldmark, and Brandeis subsequently developed asserted that the maternal destiny and physical constitution of women—along with their greater vulnerability to fatigue as a result of their dual roles as paid and unpaid workers—gave the state reasonable cause to limit their liberties and deprive them of due process. Goldmark and a team of ten young social scientists conducted research that produced hundreds of pages of supporting material. Using this data, Goldmark and Brandeis wrote the 113-page argument that has since come down to us as the Brandeis Brief.

Drawing on the Court's *Lochner* rationale, the Brandeis Brief acknowledged that, for the Oregon law to be constitutional, the state had to demonstrate the existence of a public interest substantial enough to override the parties' freedom of contract. The brief then laid out an authoritative basis for arguing that such an interest did exist where women workers were concerned. To prove the special dangers that long hours of work posed to women (because of their physical constitutions and the negative impact of overwork on childbirth), Goldmark and Brandeis cited dozens of medical authorities and social science experts from the United States and abroad. The Supreme Court was impressed. Unanimously, it upheld the Oregon law.

UNEXPECTEDLY, THE MAJORITY decision was written by Associate Justice David J. Brewer, one of the Court's more conservative members. Previously, Brewer had voted often to uphold the rights of employers and corporations, so many expected him to embrace Fenton's freedom-of-contract appeal. But Brewer also believed strongly in a woman's special place, and liberty, he acknowledged, especially in the case of women, wasn't absolute. Therefore, citing the painstakingly assembled data in the Brandeis Brief, he concurred that a "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," adding that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." Noting as well the family's need for the services of women, Brewer sharply distinguished *Muller* from other cases that involved legislation protecting men. "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor," he wrote. Finally, he insisted that woman—who "has always been dependent on man"—"is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."

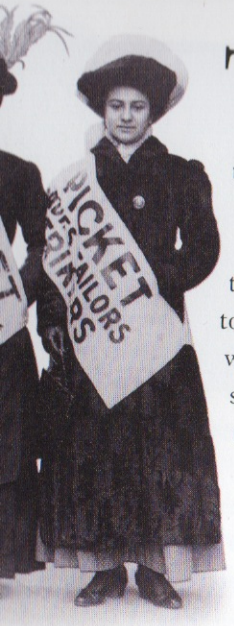
The group of nine justices *that decided* Muller v. Oregon *was known as the Fuller Court after Chief Justice Melville Fuller.*

With the Court's decision, advocates of protective labor legislation for women won a great victory, but it came at some cost. Carefully refusing to sustain laws ameliorating the conditions faced by all workers, the Court invoked the police power of the state only to protect a traditional view of women and family life. In so doing, it transformed women into wards of the state—who, like children, had a special need for protection because of their weakness. As the *New York Herald* reported on February 25, 1908, the day after the decision came down, "legally she is in a class by herself." The tone of such coverage made it clear that much of the public found the outcome not only appropriate but also desirable. A leading reform magazine greeted the decision with a declaration that although the Court had nominally addressed "a constitutional question, it is really a vast social question that the Court has answered."



David J. Brewer, *appointed to the Court by Pres. Benjamin Harrison in 1889, generally joined conservative justices in resisting the trend toward greater power and responsibility for the federal government. Yet, writing the majority opinion for* In Re Debs *(1895), he upheld the constitutionality of federal court injunctions then being used against labor strikes.*

The labor movement joined in the general expression of satisfaction, but its leaders had more pressing concerns. Just three weeks earlier, the Supreme Court had resolved the famous Danbury Hatters' Case (formally *Loewe v. Lawlor*) by declaring that unions, already barred from organizing boycotts against the clients of their employers, could be assessed triple damages for such actions, as could the individual union members who participated in them. Unions responded to this decision, which threatened their very existence, by organizing public protest meetings designed to renew the commitment to voluntarism. American Federation of Labor leaders were busy with this work on February 24, the day that the *Muller* decision came down. The AFL leadership, therefore, embraced the *Muller* judgment because it was consistent with their views of women and of family life and because it finally resolved the troublesome issue of women workers. The women reformers who had backed the *Muller* case generally mistrusted male trade unionists, but even they welcomed the AFL's tacit support for new labor legislation regulating the working hours of women.



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THE MAJORITY OF WOMEN ACTIVISTS cheered *Muller* because, at the turn of the twentieth century, they shared the common assumption that men should be the primary breadwinners in the family; and, like male unionists, they applauded the decision's acknowledgment of women's maternal roles. Women activists also accepted the Court's rationale that women had weaker constitutions; less physical strength; and bodies that were more susceptible to fatigue, toxins, and muscular damage. The few men and women who were worried by the Court's vision of women as dependent and sickly remained in the shadows, along with those who feared that the decision would further diminish the labor movement by dividing it along gender lines.

Some of these fears were calmed by the suggestion that labor legislation for women might serve as an "entering wedge" for protective legislation benefiting all workers, but the sexually divisive rationale behind *Muller* prevented that from happening. Between 1908 and 1917, nineteen states and the District of Columbia passed laws limiting the number of hours women could work and otherwise restricting their labor. Much of this new legislation was justified on the basis of *Muller,* and the court cases that sustained these new laws all turned on versions of the Brandeis Brief (which the National Consumers' League had assiduously circulated). But where Brandeis and Goldmark had attempted to persuade the Court that social science data could allow it to become more generally involved in resolving social issues, their successors narrowed the focus of the litigation, emphasizing (and sometimes exaggerating) the role of sex differences in order to ensure success. Even Brandeis and Goldmark focused their approach. After *Muller,* Goldmark expanded her research into the effects of fatigue on women; and in 1909, she and Brandeis used this new data to persuade the Illinois Supreme Court (in the case of *Ritchie and Company v. Wayman*) to sustain a ten-hour law for women. As the Supreme Court had in *Muller,* the Illinois court cited sex distinctions as the grounds for its decision, with Judge John Hand declaring that "women's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life." Other decisions followed, all of which relied heavily on the construction of women as a separate class before the law.

Of course, this rationale did little to protect men in the workplace. In 1916, Oregon passed a law requiring employers to pay overtime to any man or woman working in excess of ten hours a day. (The law effectively applied only to men, because women were already forbidden to work such long hours.) Defending the law before the Court, Harvard law professor Felix Frankfurter tried to apply the principles contained in the Brandeis Brief to men, but he was not persuasive. In its 1917 *Bunting v. Oregon* decision, the Court ignored the law's implicit regulation of men's hours and permitted the overtime pay on other grounds.

WHATEVER ITS GOOD INTENTIONS (we can certainly give credit for those) and whatever immediate benefits women workers received (reduced hours and safer workplaces were two), the strategy of isolating women as a legal class soon began to impact them well beyond the workplace and in ways that were not always positive. In 1915, for example, a New York court (in the case of *People v. Schweinler)* sustained a law that prohibited women from working at night—much to the dissatisfaction of women printers, who protested that the law threatened their livelihoods and deprived them of the extra wages they could earn at night.

Emboldened by the new case law, other state legislatures began denying women the opportunity to hold jobs that might expose them to close and possibly salacious contact with men. These were often jobs that required contact with strangers, such as delivering telegrams, operating elevators, and collecting tickets on streetcars. Encouraged by unions, some state lawmakers even enacted seemingly arbitrary restrictions on women's work around machinery or with heavy objects, thereby excluding women from wide ranges of industrial work. As these legal restrictions replaced weaker customary restraints on women, the sexual division of labor affirmed by *Muller* was exacerbated, and growing numbers of women were crowded into a restricted universe of permissible jobs.

Nor did the courts see fit to compensate women for limiting their workplace choices—for instance, by offering them wage protection. In 1916, the Supreme Court—unpersuaded by Felix Frankfurter's argument that women's health could not be sustained without adequate income—barely upheld in *Stettler v. O'Hara* Oregon's meager attempt to provide women with a minimum wage. And six years later, the Court

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women working as bartenders. Writing for the majority, Felix
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nvoked the argument his mentor Louis Brandeis had made that
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ing that major changes had taken place in women's lives during
forty years since *Muller*—but forgetting the degree to which
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women" (just as Brandeis had requested) and asserting that
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the same conclusion when in 1960 it decided to exclude women
all-male university. Sex was a reasonable basis for classification,
s agreed, in part because it had already been applied so widely
beyond employment and labor law.

For nearly sixty years—until Title VII of the Civil Rights Act of 1964 initiated a reconsideration of women's legal status—court decisions affirmed and legitimized the popular wisdom of 1908. They altered the relationship of working women to the state and in doing so renegotiated the terms of their citizenship. These rulings also played a decisive role in perpetuating and reinforcing the sexual division of labor, contributing to the wage gap between men and women and significantly enhancing gender divisions within the family. Arguably, too, they affirmed male prejudices against working women and changed the course of the labor movement by providing male leaders with a basis for excluding female workers. By offering a persuasive rationale for excluding women from the Fourteenth Amendment's equal protection clause, the *Muller v. Oregon* decision canonized the belief, prevalent in 1908, that women and men could reasonably be treated differently before the law.

This African-American woman *was photographed at work in a laundry in 1909 or soon thereafter. While the rhetoric of sisterhood was an important part of the early-twentieth-century women's movement, the well-educated and often well-to-do white women who led the movement for protective laws rarely reached out to understand and accommodate the needs of people of color.*

AND YET WE CAN DRAW more benign conclusions as well. For instance, the *Muller* decision empowered a generation of women to organize on behalf of progressive labor legislation. Groups such the National Consumers' League recruited and trained women in every state and many local communities—women such as NCL lobbyist Frances Perkins, who went on to play central roles in shaping and enacting the revolutionary welfare legislation of the 1930s. And even as *Muller*'s negative impact became more obvious, it fueled organizational engagement among women who recognized and opposed the decision's stigmatization of women as weak. This struggle to discard the burdensome legacy of *Muller* informed the women's liberation movement of the 1960s, many of whose leaders saw that achieving sex equality demanded first and foremost the reversal of the sex-difference jurisprudence that still limited a woman's ability to work at the occupation of her choice.

By 1971, the *Muller* decision had run its course. That year in *Phillips v. Martin Marietta,* the Supreme Court—taking into account dramatic changes in women's workforce participation, their demands for equality before the law, and changes in family structure and responsibility—grudgingly agreed that gender probably no longer constituted an appropriate legal classification. The burden of *Muller v. Oregon* was finally lifted.

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the District of Columbia's effort to set a minimum wage for women. In *Adkins v. Children's Hospital,* the majority conceded the need to protect women's physical well-being but saw no reason to intervene in the wage bargain. "The physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly be taken into account," Associate Justice George Sutherland wrote for the majority. But if women were to be guaranteed a minimum wage for their labor, that would restrict the liberty of an employer to pay as much or as little as he wished. His freedom of contract would thus be violated.

AS THE YEARS PASSED, even as the Supreme Court slowly backed away from freedom-of-contract law, the principle that women constituted a special legal class endured. When a Massachusetts court affirmed the exclusion of women from juries in 1931, it drew on Brewer's argument in *Muller.* There was no difference, the Massachusetts court held, between denying women the right to make certain kinds of labor contracts and denying them the right to serve on juries. Such a law "violates no rights or privileges secured to women by the Fourteenth Amendment," Associate Justice John M. Harlan asserted with regard to a similar case, *Hoyt v. Florida,* reviewed by the Supreme Court in 1961.

In 1948, acting in *Goesaert v. Cleary,* the Court sustained Michigan's ban on women working as bartenders. Writing for the majority, Felix Frankfurter (whom Franklin Roosevelt had appointed to the Court in 1939) invoked the argument his mentor Louis Brandeis had made that it was proper for women to be treated as a separate class. Acknowledging that major changes had taken place in women's lives during the forty years since *Muller*—but forgetting the degree to which Brandeis himself had relied on the Court's perception of the social good—Frankfurter insisted that "the Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." When in 1956 Oregon denied women the right to wrestle publicly (and thus professionally), the Supreme Court upheld the law on the same grounds, taking "judicial notice of the physical differences between men and women" (just as Brandeis had requested) and asserting that "there should be at least one island on the sea of life reserved for man and that would be impregnable to the assault of woman." The state of Texas came to the same conclusion when in 1960 it decided to exclude women from an all-male university. Sex was a reasonable basis for classification, the courts agreed, in part because it had already been applied so widely in cases beyond employment and labor law.

For nearly sixty years—until Title VII of the Civil Rights Act of 1964 initiated a reconsideration of women's legal status—court decisions affirmed and legitimized the popular wisdom of 1908. They altered the relationship of working women to the state and in doing so renegotiated the terms of their citizenship. These rulings also played a decisive role in perpetuating and reinforcing the sexual division of labor, contributing to the wage gap between men and women and significantly enhancing gender divisions within the family. Arguably, too, they affirmed male prejudices against working women and changed the course of the labor movement by providing male leaders with a basis for excluding female workers. By offering a persuasive rationale for excluding women from the Fourteenth Amendment's equal protection clause, the *Muller v. Oregon* decision canonized the belief, prevalent in 1908, that women and men could reasonably be treated differently before the law.

***This African-American woman** was photographed at work in a laundry in 1909 or soon thereafter. While the rhetoric of sisterhood was an important part of the early-twentieth-century women's movement, the well-educated and often well-to-do white women who led the movement for protective laws rarely reached out to understand and accommodate the needs of people of color.*

AND YET WE CAN DRAW more benign conclusions as well. For instance, the *Muller* decision empowered a generation of women to organize on behalf of progressive labor legislation. Groups such the National Consumers' League recruited and trained women in every state and many local communities—women such as NCL lobbyist Frances Perkins, who went on to play central roles in shaping and enacting the revolutionary welfare legislation of the 1930s. And even as *Muller*'s negative impact became more obvious, it fueled organizational engagement among women who recognized and opposed the decision's stigmatization of women as weak. This struggle to discard the burdensome legacy of *Muller* informed the women's liberation movement of the 1960s, many of whose leaders saw that achieving sex equality demanded first and foremost the reversal of the sex-difference jurisprudence that still limited a woman's ability to work at the occupation of her choice.

By 1971, the *Muller* decision had run its course. That year in *Phillips v. Martin Marietta,* the Supreme Court—taking into account dramatic changes in women's workforce participation, their demands for equality before the law, and changes in family structure and responsibility—grudgingly agreed that gender probably no longer constituted an appropriate legal classification. The burden of *Muller v. Oregon* was finally lifted.

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