Labor and Labor: The Sexism and Legacy of *Muller v. Oregon*

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In the seminal 1905 case *Lochner v. New York*, the Supreme Court struck down a New York law limiting bakers' working hours. The Court ruled that the Due Process Clause of the Fourteenth Amendment protects a right to freedom of contract, and the law limiting bakers' hours violated that right. Two years later, a practically identical case arising out of Oregon came before the Court, but this time concerning laundry workers. The Supreme Court upheld Oregon's regulation and found it did not violate the laundry workers' right to contract. The only difference between the two cases: the bakers were men and the laundry workers were women. Part I of this Essay reviews the decision in *Lochner v. New York*. Part II evaluates the *Muller v. Oregon* case, its background, the Brandeis Brief, and the decision. Finally, in Part III, this essay looks at the lasting implications of the *Muller v. Oregon* decision.

I. Lochner v. New York

In 1895, New York passed the New York Bakeshop Act, which made it a crime for employers to require bakers to work more than 10 hours a day and 60 hours a week.[12] In 1899, Joseph Lochner, who owned a bakery in Utica, New York, allowed an employee to work for more than 60 hours in one week.[3] Joseph Lochner was charged with violating the New York Bakeshop Act.[4]

The Supreme Court held that the New York Bakeshop Act "necessarily interferes with the right of contract between the employer and employees"[5] because it limited the number of hours employees could work without regard for the desires of the employers or the employees. More broadly, the court held that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[6] The court reasoned that the Due Process Clause of the Fourteenth Amendment prevents states from depriving any person of life, liberty, or property without due process of law, and that includes the liberty to buy and sell labor without the interference of the state.[7]

The Court specifically addressed the state's argument that the regulation limiting bakers' hours was a reasonable exercise of police powers. Police powers allow a state to pass laws and regulations that are to protect the health, safety, and welfare of the population.[8] The Court stated "[t]here 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. Nor can a law limiting such hours be justified [as] a health law to safeguard the public health, or the health of the individuals following that occupation."[9] The Court further explained that laws " limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences

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1 Alex McBride, *Lochner v. New York*, THIRTEEN PBS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_lochner.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 198 U.S. 45, 53 (1905).

6 *Id.*

7 *Id.*

8 Berman v. Parker, 348 U.S. 26, 32 (1954)

9 *Lochner,* 198 U.S. at 45.

with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power." The Court did leave open the possibility that there were some circumstances, in especially hazardous careers, where the state's interest in the public health may justify encroachment on the individual right to contract, but held that this was not such a case.

Lochner v. New York ushered in an era in which the Court regularly struck down regulations meant to empower and protect laborers, from declaring minimum wages to forbidding yellow dog contracts, all under the doctrine of economic substantive due process.[10] During this period, the Court required a close causal connection between law regulating economic activity and the problem that the law was designed to resolve. However, as discussed in the next section of this Essay, the standard for men and women under this regime was radically different.

II. Muller v. Oregon

a. Background

In 1903, Oregon passed a law preventing women "employed in any mechanical establishment, or factory, or laundry" from working more than 10 hours a day.[11] Originally, the growing labor movement had been advocating for an eight-hour day for all laborers, but switched to the "more modest" proposal of only limiting the hours of women to 10 hours a day at the last minute.[12] The reason for the change was that limitations to women's work days had been upheld by the Nebraska and Washington Supreme Courts.[13] The Oregon law applied to very few workers; less than 10% of laborers in Oregon in 1903 were women.[14] This was equivalent to about 3,500 laborers, of which only 20% were covered by the law.[15] Commercial laundry workers were usually women, and they were responsible for running large machinery that could be dangerous and required them to be on their feet all day.[16]

On September 4th, 1905, Labor Day, Emma Gotcher, a laundry worker and labor activist, was forced to work more than 10 hours, violating the 1903 law.[17] Oregon filed charges against the owner of the laundry, Curt Muller, two weeks later.[18] Muller challenged the law as unconstitutional.[19] Muller's lawyer argued the law violated the Supreme Court's decision in *Lochner v. New York*. Muller also argued that the regulation discriminated against women as a class because it did not apply equally to non-female workers.[20] The lower state court upheld the law.[21]

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10 *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915).

11 1903 Or. Laws 148, § 1

12 NANCY WOLOCH, A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S-1990S, 56-57 (2015).

13 *Id.*

14 *Id.* at 57

15 *Id.*

16 *Id.* at 56

17 *Id* at 58

18 *Id.*

19 *Id.* at 59

20 *Id.*

21 *Id.*

Muller appealed to the Oregon Supreme Court, and both sides raised the issue of gender.[22] Muller directly attacked the sex classification, stating "it is time we…cease[ ] to classify women, in general, with children, criminals, and idiots, they are citizens, and their privileges and immunities may not thus be abridged by legislative majority."[23] Muller once again lost; the Oregon Supreme Court upheld the law. Muller once again appealed, this time to the U.S. Supreme Court.

b. The Brandeis Brief

When the case was appealed to the U.S. Supreme Court, the National Consumer League stepped in on behalf of the state of Oregon and brought in up-and-coming lawyer Louis D. Brandeis as the lead advocate. Brandeis was part of the movement of lawyers fighting against formalism.[24] He believed judges should not view laws in a vacuum but instead pay attention to the facts, conditions, and policies that gave rise to them.[25] Brandeis's brief in *Muller v. Oregon* has gone on to become renowned for its reliance on the theory of judicial interpretation known as "sociological jurisprudence," and is usually referred to as "The Brandeis Brief."[26]

Of the 113 pages in the Brandeis Brief, only two contain traditional legal arguments.[27] The other pages of the brief were dedicated to facts, scientific reports, opinions of academics, doctors, scientists, and substantial citations to foreign materials.[28] The Brief argued that it was detrimental to women's health and their ability to fulfill their role in society as mothers to work more than ten hours a day, based on their specific role in society and their physical bodies.[29] This thought, at the time, was seen as pioneering progressive lawyering, though it is now recognized to promote the views of scientists who believed women were inferior to men and treated all women as mothers or potential mothers.[30] The Supreme Court, however, would side with Brandeis, the man who would one day become a justice himself.[31]

c. The Decision

The Supreme Court agreed with Brandeis and held that the Oregon law did not violate women's right to contract.[32] Justice Brewer wrote for a unanimous court, and the entire opinion spans only ten pages. The Court began by acknowledging their decision in *Lochner*, but went on to state that this case is distinguishable because the freedom to contract "is not absolute" and "a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract."[33] The language of the opinion is stark. The entire decision is based on two ideas. First, the Court stresses that women are fragile and need additional protection to

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 61.
[25] *Id*
[26] *Id.*
[27] *Id.* at 64
[28] *Id.*
[29] *Id.* at 64-65
[30] *Id.* at 69.
[31] Muller v. Oregon, 208 U.S. 412, 423 (1908).
[32] *Id.*
[33] *Id.* at 421.

prevent exploitation.[34] Second, that women's ability to become pregnant means their working hours are within the realm of conduct that can be regulated by police powers.[35]

First, the opinion asserts that women are like children in their need for protection by the state and that women have always been reliant on men, both because of societal factors and their nature.[36] The court stated:

> history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet, even with that and the consequent increase of capacity for business affairs, it is still true that, in the struggle for subsistence, she is not an equal competitor with her brother.[37]

This one section conveys an immense amount about the Court's view of women's value and capabilities. The underlying nod to coverture, or the legal doctrine under which women did not have independent legal identities or rights apart from their husbands, is clear in the assumption that women have always been dependent on men and have a status similar to that of minors.[38] Though the Court started with some brush-clearing, recognizing that women have some legal status and property rights, they quickly undermined this point by comparing women's reliance on men to that of children two pages later.

Furthermore, the Court saw no irony in stating that a woman is an "equal competitor with her brother" while simultaneously upholding a law that actually makes women less competitive in the marketplace because their hours are limited, whereas men's are not. There is some speculation from critics that this is the underlying motivation of the *Muller* decision: to give men a more competitive edge in the marketplace by decreasing the value of female laborers.[39] *Muller* was used to justify laws that banned women from factory work, pushing them out of safer jobs and making them less competitive in the labor market. Ella Sherwin, a labor organizer, lost her job at a printing factory after New York passed a protectionist law banning women from working in factories at night.[40] She wrote in the New York World in 1919 "[w]elfare legislation, if persisted in, will protect women to the vanishing point. Whatever its intent, it can have but one outcome. It will drain women out of all highly paid and highly organized trades, because the law will prevent them from doing the same work that men do and the unions will prohibit them from working for a lower wage than the men." These laws, supposedly meant to protect women, put them at an economic disadvantage and pushed them out of better-paying jobs.[41]

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[34] *Id.* at 421-422

[35] *Id.*

[36] *Id.*

[37] *Id.* at 421-422.

[38] Catherine Allgor, *Coverture: The Word You Probably Don't Know But Should*, NAT'L WOMEN'S HISTORY MUSEUM (Sept. 4, 2012), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should.

[39] WOLOCH *supra*, note 12 at ; Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (Fall 1986); JILL ELAINE HASDAY, WE THE MEN 15 (2025); R.B. Tiven, *"We Were Put Out of Good Jobs": Women Night Workers in New York and the Origins of the Women's Equal Opportunity League*, INT'L LAB. WORKING-CLASS HIST. 2024; Anne O'Hagan, *"Protecting" Women out of Their Jobs*, 5 Touchstone 400, (1919).

[40] Tiven, *supra* note 39, at 8.

[41] *Id.*

The Court's second justification concerned women's ability to get pregnant. The Court stated that "as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[42] By stating that women's physical wellbeing is a matter of the "public interest" the Court allows women's bodies to be regulated under the police powers doctrine. Police powers, embedded in the Tenth Amendment, allow the state governments to regulate highways, slaughterhouses, buildings, railroads, and now women's bodies when it is in the interest of the "public good."[43] The use of the word "object" is especially striking in this sentence. Police powers are most commonly used to justify the regulation of resources like land, factories, and transportation. In *Muller*, the Court views women's bodies as "object[s] of the public interest."

The Court concluded by stating "that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the wellbeing of the race -- justify legislation to protect her from the greed, as well as the passion, of man."[44] The language referring to the "wellbeing" and "health" "of the race" throughout the decision is no mistake. Twenty years later, Louis Brandeis, now a Supreme Court justice, would vote in favor of allowing the State of Virginia to sterilize Carrie Buck without her consent because "her welfare and that of society will be promoted by her sterilization."[45] The philosophy of the eugenics movement is a clear undercurrent in the *Muller v. Oregon* opinion, seen in the decision's emphasis on women as mothers and the necessity to protect the "wellbeing of the *race*."[46] The *Muller* decision was in part justified because of the belief that women could not work long hours and give birth to the healthiest offspring, and therefore, it was in the interest of society that their hours be limited.[47]

Thomas C. Leonard, professor of the history of economics at Princeton, described *Muller* as "justified on the grounds of protecting the integrity of the home and the race by preventing female wage labor."[48] Society and the court alike viewed "[m]otherhood [as] women's true vocation, and the race were what justified labor legislation. A working woman was depicted not as a worker in need of protection from long hours but as a mother who should be encouraged to leave the labor force."[49]

The *Muller v. Oregon* decision relied on a theory of sexual difference that sees women as inferior to men and a belief that all women are just mothers in waiting. It brought women's bodies into the public interest and allowed sexist societal standards to justify limiting women's work hours simply because they have the capacity to reproduce. These holdings have never been formally overruled.

III. The Lasting Implications of *Muller v. Oregon*

Muller v. Oregon is certainly less talked about in law school classrooms than *Lochner*, its doctrinal counterpart. To the extent that it is discussed, it is usually highlighted as a win for the burgeoning

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42 *Muller,* 208 U.S. at 422.

43 *Police Powers*, LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/police_powers, (last visited Feb. 24, 2025).

44 *Muller,* 208 U.S. at 422.

45 Buck v. Bell, 274 U.S. 200, 207 (1927)

46 *Muller,* 208 U.S. at 422 (emphasis added).

47 Brief for Petitioner at 47-50, Muller v. Oregon, 208 U.S. 412 (1908).

48 Thomas C. Leonard, *Protecting Family and Race The Progressive Case for Regulating Women's Work*, 64 AM. J. ECON. AND SOCIO. 754, 774 (2005).

49 *Id.*

labor movement and an opening from which progressives lawyered for greater worker protections during the New Deal era.[50] However, we are often quick to overlook the deeply sexist reasoning of the case and its immensely damaging construction of women's bodies and role in the world. The ghost of *Muller* has been felt for generations, be it through fetal protection laws, poll taxes that targeted women, women's exclusion from conscription, citizenship laws, abortion bans, or pregnancy discrimination.[51] For example, there are a variety of types of fetal protection laws, including those that punish women and others for harm to the fetus while in utero. After Title VII was passed in 1964, preventing employment discrimination on the basis of sex, many employers passed fetal protection policies.[52] These companies argued that these jobs were too dangerous for anyone who is or even had the possibility of becoming pregnant because the work would be a risk to the fetus or potential fetus. Therefore, they required women to show proof that they were sterile in order to even be considered for the job.[53] These policies clearly mirror the logic of the decision in *Muller v. Oregon* over 100 years later, as they argued that women were unfit for specific careers simply because they had the capacity to get pregnant. In *United Automobile Workers v. Johnson Controls, Inc.*, the Supreme Court held that these policies violated Title VII and the Pregnant Workers Discrimination Act and that the capacity to get pregnant was not a Bona Fide Occupational Qualification.[54]

Even though these fetal protection policies that limited women in the workplace were struck down, *Muller*'s lasting impact was clear. Research shows that women of reproductive age are discriminated against in the hiring and promotion processes because of the possibility that they may one day have children, regardless of what their personal plans are regarding pregnancy.[55] Most women are still viewed as "potential mothers" in the workplace.[56] Women's ability to labor (give birth to children) continues to harm them in their access to the labor market, 117 years after *Muller*.

Beyond *Muller*'s reasoning regarding women's roles and their access to the labor market, the legitimation of the "mothers of the race" argument held women's reproductive capacity to be an "object of the public interest."[57] It is not difficult to trace a line from the arguments in *Muller* to *Buck v. Bell* to *Planned Parenthood v. Casey,* wherein Justice O'Connor, writing for the majority stated, "Abortion is a unique act. It is an act fraught with consequences for others… for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted."[58] When Justice O'Connor spoke of the "unique" position of abortion in society, she was implicitly calling back to *Muller* and its holding that women's bodies are

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[50] JILL ELAINE HASDAY, *supra* note 39, at 6, 13-18. For example in Feldman & Sullivan's Constitutional Law textbook there is a fulsome discussion of *Lochner v. New York,* and six pages excerpted from the case, while *Muller v. Oregon* receives only a passing mention in the notes for *Lochner*. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 511-525 (21st ed. 2022).

[51] JILL ELAINE HASDAY, *supra* note 39, at 115 - 146; Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV 359 (2009); Breedlove v. Suttles, 302 U.S. 277 (1937); Nguyen v. INS, 533 U.S. 53 (2001).

[52] Becker *supra*, note 51 at 1219.

[53] United Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[54] *Id.*

[55] Sascha Becker, Ana Fernandes, and Doris Weichselbaumer, *Discrimination in hiring based on potential and realized fertility: Evidence from a large-scale field experiment*, 59 LABOUR ECON. 139 (2019); Lauren T. Katz, *Tearing Down The Maternal Wall In The Legal Profession: a Perspective Inspired By Difference Feminism*, 22 GEO. J. GENDER AND L. 213, 230-236 (2020).

[56] Becker, Fernandes, and Weichselbaumer *supra*, note 55.

[57] Muller v. Oregon, 208 U.S. 412, 422 (1908).

[58] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992).

part of the public interest and that women's choice regarding their own bodies are inherently a concern of the public welfare. Even while Justice O'Connor's opinion supposedly rejected the belief that a woman's ultimate destiny is to be a mother, the specter of *Muller* and its holding that women's bodies and reproductive choices are an object of the public interest still looms.

In failing to truly do battle with *Muller,* advocates for women's autonomy overlook a major assumption in American jurisprudence: that women's bodies and reproductive lives are "object[s] of the public interest" and subject to regulation under police powers.[59] Women's bodies and reproductive capacities have repeatedly been subjected to regulation under police powers,[60] whereas in nearly identical cases, men's have not.[61] It is worth revisiting the cases and assumptions that construct this doctrine.

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[59] *Muller,* 208 U.S. at 422.

[60] *See Muller,* 208 U.S. at 422-423; Buck v. Bell, 274 U.S. 200 (1927).

[61] *See Lochner*, 198 U.S. 45 (1905); Skinner v. Oklahoma, 316 U.S. 535 (1942).