

## ***MULLER V. OREGON: ONE HUNDRED YEARS LATER\****

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This year marks the 100th anniversary of the Supreme Court's decision in *Muller v. Oregon*.<sup>1</sup> In that historic case, the Supreme Court upheld the constitutionality of a 1903 Oregon statute prohibiting employment of women in industrial jobs for more than ten hours per day. Still celebrated as the occasion for the initiation of the Brandeis brief, *Muller* was characterized by equal rights advocates in the 1970's as a "roadblock to the full equality of women."<sup>2</sup> Was the decision right for its time although anachronistic today? How would we now appraise judicial recognition of women as a vulnerable class in need of special legislation "to secure a real equality of right"?<sup>3</sup> In these remarks, I invite your consideration of those questions.

I will begin with an account of *Muller v. Oregon*, including the brief filed in the case by Louis Dembitz Brandeis. Next, I will describe how legislation framed to protect women gave way to legislation designed to protect all workers. Finally, I will take up the advent of legislation facilitating engagement by women and men in both paid work and family life.

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1. 208 U.S. 412 (1908).

2. Pauli Murray, *The Rights of Women*, in *The RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 521, 525 (Norman Dorsen ed., 1971); see also Brief of American Civil Liberties Union as *Amicus Curiae* at 37 n.46, 37–39, *Frontiero v. Laird*, 411 U.S. 677 (1973) (No. 71-1694) [hereinafter *Frontiero Amicus Brief*] (quoting Murray and criticizing *Muller*); Joint Reply Brief of Appellants and American Civil Liberties Union as *Amicus Curiae* at 10, *Frontiero*, 411 U.S. 677 (No. 71-1694) [hereinafter *Frontiero Joint Reply Brief*] (noting that *Muller* "has become a major roadblock to women seeking equal opportunities for remuneration and promotions in blue-collar employment"); Brief for Appellant at 41–45, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) [hereinafter *Reed Appellant Brief*] (criticizing *Muller*).

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

*MULLER AND THE BRANDEIS BRIEF*

In 1903, at the urging of the Oregon Federation of Labor, which had formed the preceding year, Oregon adopted a law prescribing a ten-hour work day for women “employed in any mechanical establishment, or factory, or laundry.”<sup>4</sup> The Federation first sought an eight-hour day for all workers. When that proposal encountered resistance, its proponents settled on a law limiting the hours some women could engage in paid labor, a law similar to one earlier enacted in the State of Washington and upheld by that State’s Supreme Court.<sup>5</sup> The hope was that a law covering women would serve as an “opening wedge,” leading, in time, to coverage of all workers.<sup>6</sup> As later described by Brandeis’ daughter Elizabeth, the strategy was to “fight the battle behind the women’s petticoats.”<sup>7</sup>

Portland laundry owner Curt Muller was prosecuted for violating the law. He had allowed his overseer to require Emma Gotcher to work more than ten hours on September 4, 1905, the day the State had designated as Labor Day to encourage employers to give their workers a holiday.<sup>8</sup> The timing, and Gotcher’s active role in the Shirt, Waist, and Laundry Workers Union, suggest that Muller and fellow members of the Laundry-Owners Association sought to create a test case.<sup>9</sup> After the State prevailed in the Oregon courts, Muller asked the U.S. Supreme Court to hear the case and invalidate the 1903 statute.

He had cause to be hopeful. In 1905, the Court had ruled, 5-4, in *Lochner v. New York*,<sup>10</sup> that New York’s law limiting the hours bakers could work to ten per day, 60 per week, interfered with the right of bakery owners and bakers to contract freely, a liberty the Court lodged in the Fourteenth Amendment’s Due Process Clause.

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4. 1903 Or. Laws 148, § 1.

5. See *State v. Buchanan*, 70 P. 52 (Wash. 1902) (upholding Washington law limiting women’s working hours). The hours laws adopted in Washington, Oregon, and most other states around the turn of the century were of limited scope. Oregon’s law, for example, did not cover women engaged in agricultural, domestic, or office work. See ELIZABETH BRANDEIS, *HISTORY OF LABOR IN THE UNITED STATES, 1896–1932*, at 457–74 (1935) (describing the contours of state hours laws).

6. ALICE KESSLER-HARRIS, *OUT TO WORK* 184 (1982).

7. BRANDEIS, *supra* note 5, at 462.

8. See *Muller*, 208 U.S. at 417.

9. Elaine Zahnd Johnson, *Protective Legislation and Women’s Work: Oregon’s Ten-Hour Law and the Muller v. Oregon Case, 1900–1913*, at 238–39 (June 1982) (unpublished Ph.D. dissertation, University of Oregon).

10. 198 U.S. 45 (1905).

The National Consumers League, led by ardent social reformer Florence Kelley, wanted to ensure that Oregon would have the best possible representation.<sup>11</sup> Kelley's first choice was Brandeis, but the League, while she was out of town, had set up an appointment for her with New York bar leader Joseph H. Choate. To Kelley's relief, Choate refused to take the case. He told Kelley that he saw no reason why "a big husky Irishwoman should [not] work more than ten hours a day in a laundry if she and her employer so desired."<sup>12</sup> Kelley then went to Boston to see Brandeis, accompanied by Josephine Goldmark, who was Brandeis' sister-in-law and Kelley's associate in the League.

Brandeis has previously consulted with Kelley and Goldmark on issues of concern to the League. At the time he was asked to take on *Muller*, he was hardly new to pro bono representation. Then age 51, Brandeis was often called "the people's attorney," descriptive of his activity in the social and economic reform movements of his day.<sup>13</sup> Indeed, he was instrumental in creating the pro bono tradition in the United States. A brilliant advocate with an awesome knowledge of the law, Brandeis spent at least half of his working hours on public causes and reimbursed his Boston law firm for the time he devoted to nonpaying matters. From the wealth he gained in a wide-ranging, highly successful commercial practice, he made large donations to good causes. At home, he lived frugally. A friend recounted that, whenever he went to the Brandeis house for dinner, he ate before and afterward.<sup>14</sup>

Brandeis said yes to the League's invitation on one condition. He wanted to represent Oregon as special counsel and to present oral argument on the State's behalf. Kelley and Goldmark made that

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11. The National Consumers' League was a Progressive Era organization founded in 1899 that advocated for better working conditions, particularly for women, by attempting to change consumer behavior. Companies that satisfied the League's labor standards could display the League's label, and the League issued "white lists" which recommended to consumers stores that treated their employees well. The League was also involved in the effort to enact protective legislation in Oregon and elsewhere. The Oregon chapter of the League enlisted Kelley's aid in defending the state's law in the courts. For discussions of the League, see, for example, BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 98 (2d ed. 1996); PHILIP S. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT* 122 (1982).

12. PHILIPPA STRUM, LOUIS D. BRANDEIS: *JUSTICE FOR THE PEOPLE* 116 (1984).

13. Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 *BRANDEIS L.J.* 229, 232 (2002).

14. *Id.*

happen.<sup>15</sup> Brandeis then superintended a brief unlike any the Court had seen. It was to be loaded with facts and spare on formal legal argument. Its success would depend on the Court's willingness to take judicial notice of a vast array of information outside the formal record of the case.<sup>16</sup>

Josephine Goldmark, aided by her sister Pauline Goldmark (secretary of the New York City Consumers League) and several researchers, scoured the Columbia University and New York Public Libraries in search of the materials Brandeis wanted—facts and figures on dangers to health, safety, and morals from excessive hours, and corresponding benefits from shortened hours, with heavy emphasis on women in the labor force.<sup>17</sup> Data was to be extracted from reports of factory inspectors, physicians, trade unions, economists, and social workers. Within a month, Goldmark's team compiled information that would ultimately fill 98 of the 113 pages in Brandeis' brief.<sup>18</sup>

To show that Oregon was no outlier, Brandeis first set out the statutes of the 20 States that had restricted women's on-the-job hours. He also listed similar hours laws in force in Europe.<sup>19</sup> Only two pages of his brief presented formal legal analysis. His basic contention, for which he cited *Lochner*: The due process right to contract for one's labor is subject to reasonable restraints to protect health, safety, morals, and the general welfare.<sup>20</sup>

Bakers, most of whom were men, were "in no sense wards of the state," the Court had noted in *Lochner*.<sup>21</sup> Women, Brandeis urged, were more susceptible than their male counterparts to the maladies of industrialization, and their unique vulnerabilities warranted the State's

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15. JOSEPHINE GOLDMARK, IMPATIENT CRUSADER 154–55 (1953).

16. *See id.* at 157–58.

17. *Id.* at 156.

18. Brandeis' association with women prominent in reform efforts converted him from opponent to proponent of women's suffrage. In 1884, at age 28, he counseled a committee of the Massachusetts legislature against extending the franchise to women. Voting, he then thought, was an obligation that should rest on men alone. *See STRUM, supra* note 12, at 54. By 1912, experience working with and for women had convinced him that "much that is required to be done to improve social and industrial conditions can be done only with women's aid." Typical of his emphasis on the obligations as well as the rights of citizens, he added: "We cannot relieve [women] from the duty of taking part in public affairs." *Id.* at 130.

19. Brief for Defendant in Error at 1–8, 11–17, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107) [hereinafter "Brandeis Brief"].

20. *Id.* at 9–10.

21. 198 U.S. at 57.

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sheltering arm. The brief's pattern: After a line or two of introduction, Brandeis quoted long passages from the sources Goldmark supplied.

Some of the excerpts from medical experts, it should be acknowledged, look dubious to the modern eye. One source, for example, reported that, "in the blood of women, so also in their muscles, there is more water than in those of men."<sup>22</sup> Less fanciful, Brandeis emphasized the effect of overworking women on the general welfare: "Infant mortality rises, while the children of married working-women, who survive, are injured by the inevitable neglect. The overwork of future mothers thus directly attacks the welfare of the nation."<sup>23</sup>

One section of the brief addressed the special hazards of laundries. A British epidemiological study showed a higher prevalence of disease among laundry workers than among other women.<sup>24</sup> Another British report commented that "the prevalence of the drink habit among [laundrywomen] . . . is not difficult to account for: the heat of an atmosphere often laden with particles of soda, ammonia, and other chemicals has a remarkably thirst-inducing effect."<sup>25</sup>

On the benefit side, Brandeis stressed that shorter hours allowed women to attend to their family and household responsibilities. According to one source:

[F]ree time is not resting time, as it is for a man. . . . For the working-girl on her return from the factory, there is a variety of work waiting. She has her room to keep clean and in order, her laundry work to do, clothes to repair and clean, and, besides this, she should be learning to keep house if her future household is not to be disorderly and a failure.<sup>26</sup>

To allay the concern that shorter hours were bad for business, the brief excerpted studies showing that hours laws improved productivity.<sup>27</sup>

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22. Brandeis Brief, *supra* note 19, at 21 (quoting HAVELOCK ELLIS, *MAN AND WOMAN* 155 (1894)).

23. *Id.* at 47.

24. *Id.* at 106–07 (quoting Report of the British Chief Inspector of Factories and Workshops (1900)).

25. *Id.* at 46 (quoting THOMAS OLIVER, *DANGEROUS TRADES* 672 (1902)).

26. *Id.* at 58 (quoting Imperial Home Office, *The Working Hours of Female Factory Hands* 111 (1905)).

27. *Id.* at 65–77.

In conclusion, the brief urged that, in light of decades of experience at home and abroad, “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.”<sup>28</sup>

The brief for Curt Muller scarcely anticipated the voluminous documentation the State, through Brandeis, would present. But it struck one chord that might resonate with today’s readers. Most of the disadvantages facing women in the labor market derive from society, not biology, Muller argued. Women enter the labor market “hampered and handicapped by centuries of tutelage . . . . Social customs narrow the field of [their] endeavor.”<sup>29</sup> “[O]stensibly,” Oregon’s law was “framed in [women’s] interests.” But was it “intended perhaps to limit and restrict [their] employment”? “[W]hether intended so or not,” did it in fact give a boost to “[women’s] competitor[s] among men?”<sup>30</sup>

The Supreme Court heard argument in the *Muller* case only five days after receiving the voluminous Brandeis brief. There is no transcript of the argument. But according to Josephine Goldmark, Brandeis spent long hours in preparation. He “submerg[ed] himself . . . in the source material,” then carefully determined what to include and what to exclude, where to place emphasis, and the order of presentation. His courtroom performance “had all the spontaneity of a great address because he had so mastered the details that they fell into place . . . in a consummate whole.”<sup>31</sup>

Less than six weeks after oral argument, the Supreme Court unanimously upheld Oregon’s law. Justice Brewer, who was a member of the 5-4 majority in *Lochner*, authored the relatively short opinion. Brewer took the unusual step of acknowledging the “copious collection” of statutes and reports, domestic and foreign, in Brandeis’ brief.<sup>32</sup> In a long footnote, Brewer described the contents of the brief. He conceded that the legislation and expert opinions Brandeis set out “may not be, technically speaking, authorities.”<sup>33</sup>

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28. *Id.* at 113.

29. Brief for Plaintiff in Error at 31, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

30. *Id.*

31. STRUM, *supra* note 12, at 122.

32. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

33. *Id.* at 420.

Nevertheless, he found them corroborative of “a widespread belief that women’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”<sup>34</sup>

Brewer did not simply echo Brandeis’ brief; he put his own gloss on the materials the brief contained. Brandeis’ brief purported to present “scientific” facts. Brewer, by contrast, saw the data as confirming eternal, decidedly unscientific truths about men and women. According to Brewer, “history discloses the fact that woman has always been dependent upon man.”<sup>35</sup> “[I]n the struggle for subsistence she is not an equal competitor with her brother.” Even if “all restrictions on [her] political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection.”<sup>36</sup> Brewer then stated, somewhat inconsistently perhaps, that “[woman’s] physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.”<sup>37</sup>

Did the Justices rule in Oregon’s favor in *Muller* because they were impressed by the extraordinary quality of the Brandeis brief? Or did they hold for Oregon because the Brandeis brief seemed to confirm their preconceptions about the relationship between the sexes, the physical superiority of men, women’s inherent vulnerability, and society’s interest in “the well-being of wom[e]n” as actual or potential mothers as a matter vital “to preserve the strength and vigor of the race”?<sup>38</sup> Had the reports excerpted in the Brandeis brief been inconsistent with the prevailing wisdom about women’s confined place in man’s world, the Court may well have viewed the material with a more skeptical eye.<sup>39</sup>

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34. *Id.*

35. *Id.* at 421–22.

36. *Id.* at 422.

37. *Id.*

38. *Id.* at 421.

39. The Brandeis brief in *Muller* and follow-on cases aimed to persuade the Court to uphold legislation challenged as unconstitutional. The mode of argument Brandeis, Goldmark, and Kelley developed, however, has influenced challengers as well as defenders of legislation. In the 1970s, for example, Brandeis-style briefs were filed in cases challenging legislation that differentiated on the basis of sex. The endeavor was to explain that, as the economy and

THE DEMISE OF WOMEN-ONLY PROTECTIVE OR RESTRICTIVE LABOR  
LEGISLATION

In *Muller's* wake, states enacted a raft of women-only protective legislation: maximum hours and minimum wage laws, health and safety regulations, laws barring women from night work, mandating break time for them, limiting the loads they could carry, and excluding them from certain occupations altogether.<sup>40</sup> Laws of this genre were adopted or maintained in the shadow of *Lochner's* barrier to worker protective laws. Twelve years after *Lochner*, however, the Court began a slow and unsteady retreat from that decision's laissez-faire, due process/liberty to contract underpinning.

*Bunting v. Oregon*, decided in 1917, was the first signal that *Lochner* might not have staying power.<sup>41</sup> In 1913, going beyond the 1903 statute involved in *Muller*, Oregon enacted a law limiting the workday to ten hours for all "persons" employed in mills, factories, and manufacturing establishments.<sup>42</sup> The law contained an exception for overtime—up to three hours per day at a pay rate of time and half.<sup>43</sup> Oregon prosecuted a flour mill owner, Franklin Bunting, for violating the law by employing a male worker for a 13-hour day with no overtime pay. The State prevailed in the Oregon courts, and the National Consumers League again enlisted the Brandeis-Goldmark team to present the State's case in the U.S. Supreme Court.

In 1916, while preparation in *Bunting* was well underway, Brandeis was appointed to the Court. Felix Frankfurter, then a professor at Harvard Law School, took up the reins as Oregon's counsel.<sup>44</sup> The brief filed in *Bunting* was enormous, running nearly 1000 pages.<sup>45</sup> It documented, exhaustively, the ill effects of long hours on men and women alike. It also emphasized, *inter alia*, a theme only lightly played in the *Muller* brief: with shorter hours, workers could further their education. They could go to libraries, attend public lectures, and enroll in night school classes, thereby

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society evolved, laws premised on women's subordinate status could not survive equal protection measurement. See, for example, the *Frontiero* and *Reed* briefs cited, *supra*, note 2.

40. See Brandeis, *supra* note 5, at 459; ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 32 (2001); DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT 95 (2004).

41. 243 U.S. 426 (1917).

42. See *id.* at 433–34.

43. See *id.*

44. See generally JUDITH BAER, THE CHAINS OF PROTECTION 89 (1978).

45. See Brief for Defendant in Error, *Bunting*, 243 U.S. 426 (No. 238).

becoming better citizens and more intelligent voters.<sup>46</sup> (Little surprise this theme was muted in the *Muller* brief, for women, however intelligent, could not vote in national elections until ratification of the Nineteenth Amendment in 1920.)

The Court's opinion in *Bunting* was as spare as the brief was elaborate. Without so much as a citation to *Lochner*, the Court upheld Oregon's worker-protective hours-of-work statute. Quoting from the Oregon Supreme Court's opinion, the U.S. Supreme Court concluded: "In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislation is unreasonable or arbitrary as to hours of labor."<sup>47</sup>

Had *Lochner* received a silent burial? Not yet, the *Bunting* opinion indicated, for the Court left open the question whether minimum wage legislation could be sustained. Oregon's law, the Court said, regulated hours, not wages.<sup>48</sup> (The overtime provision, as the Court described it, was in the nature of a penalty for violating the hours restriction.)<sup>49</sup> When wage regulation was squarely contested, the Court seesawed.<sup>50</sup>

First, in 1923, in *Adkins v. Children's Hospital*, the Court struck down the District of Columbia's minimum wage law for women.<sup>51</sup> The Brandeis-style brief in *Adkins*, superintended by Felix Frankfurter, emphasized the evils of inadequate wages for women and catalogued the positive effects of minimum wage laws in other countries.<sup>52</sup> Describing the hefty brief as "interesting but only mildly persuasive," the Court distinguished *Bunting* on the ground that wages, unlike hours, go to the very heart of a labor contract.<sup>53</sup> *Muller*

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46. See *id.* at 532, 550–51.

47. *Bunting*, 243 U.S. at 438.

48. See *id.* at 438–39.

49. See *id.* at 439.

50. Frankfurter and Goldmark also submitted a Brandeis-style brief in *Stettler v. O'Hara*, 243 U.S. 629 (1917), a challenge to Oregon's minimum wage law for women. Justice Brandeis had worked on the brief before his appointment to the bench and did not participate in the Court's decision. The Court ultimately split 4–4 and therefore wrote no opinion. That even division left in place the Oregon Supreme Court's decision upholding the law. Had Brandeis participated in the decision, the wage issue finally decided in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), discussed *infra*, might have been decided 20 years earlier.

51. 261 U.S. 525, 562 (1923).

52. Brief for Appellants at 214–542, *Adkins*, 261 U.S. 525 (No. 795).

53. *Adkins*, 261 U.S. at 554, 560.

had upheld special legislation “to secure [to women] a real equality of right.”<sup>54</sup> Times had changed, the *Adkins* majority observed. “[T]he ancient inequality of the sexes, other than physical,” the Court said, had come “almost, if not quite, to the vanishing point.”<sup>55</sup>

Thirteen years later, in *West Coast Hotel Co. v. Parrish*, the Court reconsidered *Adkins*.<sup>56</sup> The State of Washington statute at issue in *West Coast Hotel* was virtually identical to the District of Columbia law struck down in *Adkins*. Writing for the Court in *West Coast Hotel*, Chief Justice Hughes upheld Washington’s law and expressly overruled *Adkins*.<sup>57</sup> Prime among the reasons Hughes gave: Women received “the least pay” and were “ready victims of those who would take advantage of their necessitous circumstances.”<sup>58</sup> Supervening economic circumstances, *i.e.*, the Great Depression, also figured in the decision. The Court took judicial notice of the “unparalleled demands for relief” from public treasuries and observed that “[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers.”<sup>59</sup> While the exploitation of women was a dominant theme in *West Coast Hotel*, the Court also spoke more inclusively of the imbalance of bargaining power between employers and workers, and read liberty sheltered by due process to mean, not liberty unlimited, but “liberty in a social organization which requires the protection of law against the evils which menace the [people’s] health, safety, morals and welfare.”<sup>60</sup>

With *West Coast Hotel* as the Court’s latest return, Secretary of Labor Frances Perkins decided the time was right to introduce the bill that became the Fair Labor Standards Act of 1938, which prescribed a national minimum wage for workers of both sexes and required overtime pay for work in excess of eight hours per day.<sup>61</sup> In a 1941 decision, *United States v. Darby*, the Court unanimously upheld the

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54. *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

55. *Adkins*, 261 U.S. at 553.

56. 300 U.S. 379, 390 (1937).

57. *See id.* at 400.

58. *Id.* at 398.

59. *Id.* at 399.

60. *Id.* at 391.

61. *See* KESSLER-HARRIS, *supra* note 40, at 101. The original FLSA was a modest measure: it set a minimum wage of 25 cents per hour, so low that relatively few workers stood to benefit. It also excluded numerous categories of workers from coverage; the statute applied to only 20% of all workers and only 14% of working women. *See id.* at 105–06. Through repeated amendments, Congress has since expanded the statute’s coverage significantly. *See generally* THE FAIR LABOR STANDARDS ACT 16–35 (Ellen C. Kearns ed., 1999).

FLSA.<sup>62</sup> Wages and hours were appropriate subjects for Commerce Clause legislation, the Court ruled.<sup>63</sup> Further, the law was in line with the scaled-back due process doctrine the Court had advanced in *West Coast Hotel*.<sup>64</sup> Citing *Bunting*, the Court added that “the statute is not objectionable because applied alike to both men and women.”<sup>65</sup>

Although the *Lochner* impediment to worker-protective laws had been removed, States retained labor laws applicable only to women for decades after the *Darby* decision.<sup>66</sup> Prominent social reformers and partisans of working women continued to believe that women needed special protection against exploitation, including shields against long hours and night work.<sup>67</sup> Other feminists considered women-only protective laws dangerous—measures that contributed to the confinement of women to a subordinate place in the paid labor force. As feminist lawyer Blanche Crozier quipped in 1933: If night work by women was “against nature,” starvation was even more so.<sup>68</sup>

The disagreement within the Women’s Movement on special protection for women played out in debates over the virtue of an Equal Rights Amendment. Commencing in 1923, and continuing until Congress approved the Amendment in 1972, the National Woman’s Party introduced one or another version of the ERA in every Congress.<sup>69</sup> As originally composed, the text of the Amendment read: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”<sup>70</sup> Feminist leaders in the labor movement countered with a text designed to preserve protective statutes. They introduced annually between 1947 and 1954 a Women’s Status Bill that would proscribe only “unfair discrimination based on sex.”<sup>71</sup>

At this point, a personal note about *Muller* and women-only protective legislation may be in order. As a law student in the late

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62. United States v. *Darby*, 312 U.S. 100, 125–26 (1941).

63. *See id.* at 121–22.

64. *See id.* at 125.

65. *Id.*

66. *See generally* BABCOCK ET AL., *supra* note 11, at 127–28.

67. *See* NANCY COTT, *THE GROUNDING OF MODERN FEMINISM* 120–21 (1987).

68. Blanche Crozier, *Regulations of Conditions of Employment of Women, A Critique of Muller v. Oregon*, 13 B. U. L. REV. 276, 284 (1933).

69. *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 G.W. L. REV. 232, 236 (1965); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 PA. L. REV. 297, 308 n.24 (2001).

70. COTT, *supra* note 67, at 125.

71. COBBLE, *supra* note 40, at 63.

1950's, I learned in my Constitutional Law class that *Muller* marked a first break from the Court's refusal to uphold social and economic legislation attacked as invading the liberty to contract once thought to be secured by the Due Process Clauses. It was a decision to applaud, we were taught.

Just over a decade later, briefing gender discrimination cases in or headed for the U.S. Supreme Court, I assessed *Muller* differently. The decision, I recognized, was responsive to "turn of the [20th] century conditions when women labored long into the night in sweat shop operations."<sup>72</sup> But, I observed, "[a]s the work day [for industrial workers, male and female] shortened from twelve hours to eight, and the work week from six days to five," laws limiting only women's work were in many instances "'protecting' [women] from better-paying jobs and opportunities for promotion."<sup>73</sup> However well intended, such laws could have a perverse effect—they could operate to protect men's jobs from women's competition. (That same point was made by Curt Muller's lawyer, but it carried less weight in 1908, when unregulated work weeks, with no overtime pay, could run 72 hours or more.)

In briefs and commentary, I included *Muller* in a trilogy of cases that "b[ore] particularly close examination for the support they appear[ed] to give [to] . . . perpetuation of the treatment of women as less than full persons within the meaning of the Constitution."<sup>74</sup> The other decisions in the trilogy were *Goesaert v. Cleary*, which, in 1948, upheld a Michigan statute prohibiting women from working as bartenders (unless the woman's husband or father owned the tavern)<sup>75</sup>; and *Hoyt v. Florida*, which, in 1961, upheld a state statute excluding women from the obligation to serve on juries.<sup>76</sup>

Eventually, Title VII of the Civil Rights Act of 1964 trumped *Muller*-style protective legislation. At first, however, the efficacy of Title VII's ban on job market sex discrimination was anyone's guess. Sex had been added to the list of categories shielded against

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72. *Frontiero Amicus Brief*, *supra* note 2, at 37.

73. *Id.* at 38–39.

74. *Reed Appellant Brief*, *supra* note 2, at 41; *see also Frontiero Amicus Brief*, *supra* note 2, at 37–42; *Frontiero Joint Reply Brief*, *supra* note 2, at 10; Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 454–57 (1978).

75. *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948).

76. *Hoyt v. Florida*, 368 U.S. 57, 69 (1961).

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employment discrimination by a last minute floor amendment.<sup>77</sup> There was no accompanying legislative history.<sup>78</sup> The *New York Times* forecast “chaos,” lamenting that positions from the milkman and foreman to the Playboy bunny and Rockettes were imperiled.<sup>79</sup>

The provision most puzzled over was the so-called BFOQ defense, which applies to sex-based classifications. That prescription allowed employers to make sex-based employment decisions upon showing that sex is a “bona fide occupational qualification necessary to the normal operation of th[e] particular business or enterprise.”<sup>80</sup> Many feminists feared that expansive interpretation of the BFOQ defense could severely undermine the antidiscrimination thrust of the statute. In contrast, labor advocates, still seeking to preserve special protection for women, worried that a narrow reading of the BFOQ provision would kill legislation they had long championed.

Did state women-only protective laws give rise to a BFOQ? If an employer refused to hire a woman because state law prohibited her from lifting required loads, did that law make maleness a BFOQ? The Equal Employment Opportunity Commission, charged with the enforcement of Title VII, debated the issue in the statute’s early years without coming to a firm conclusion. The National Organization for Women, launched in 1966, urged the EEOC to take a firm stand against laws protecting women rather than workers.<sup>81</sup> Labor Secretary Esther Peterson, a long-time advocate of protective laws, recognized that change was in the wind: “I do not think the [Labor] Department should stay in dead center on the desirability of State protective labor legislation,” she commented. “We may well be standing with Lot’s wife.”<sup>82</sup>

In 1969, the EEOC took definitive action. In revised Guidelines on Discrimination Because of Sex, it declared that state laws

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77. The “sex” amendment was introduced—to laughter—by Howard Smith, a Virginia representative who chaired the House Rules Committee and was a known opponent of the civil rights legislation. By many accounts, sex was included only in jest and as a means of obstructing the bill’s passage. See generally KESSLER-HARRIS, *supra* note 40, at 239–41. Others have posited that the amendment was “not as thoughtless, or as devious,” as the popular history indicates, but rather reflects that the National Woman’s Party and its allies had gained support in Congress. Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1991).

78. See, e.g., *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986).

79. *De-Sexing the Job Market*, N. Y. TIMES, Aug. 21, 1965, at 20.

80. 42 U.S.C. § 2000e-2(e).

81. See COBBLE, *supra* note 40, at 186.

82. KESSLER-HARRIS, *supra* note 40, at 262–63.

“prohibit[ing] or limit[ing] the employment of females . . . ha[d] ceased to be relevant to our technology or to the expanding role of the female worker in our economy.”<sup>83</sup> Such laws, the Commission stated, were in conflict with Title VII and did not fit within the EEOC’s narrowed interpretation of the BFOQ exception. Federal courts reached the same conclusion in response to women’s complaints that their States’ purportedly protective laws denied them valuable jobs.

*Rosenfeld v. Southern Pacific Co.* is typical of cases that yielded a narrow reading of the BFOQ.<sup>84</sup> Leah Rosenfeld was denied employment as an agent-telegrapher for a railroad company because that job category was reserved for men. Responding to her Title VII complaint, the railroad urged that maleness was a BFOQ for the position for two reasons: First, women were not suited to the arduous nature of the work; second, California laws regulating hours women could work and weight loads they could bear precluded Rosenfeld’s employment. In 1971, the Ninth Circuit ruled in Rosenfeld’s favor. According deference to the EEOC’s Guidelines, the court rejected the railroad’s BFOQ defenses. Generic characterization of women as the “weaker sex,” the court explained, was not a legitimate basis for an employment decision.<sup>85</sup> And California’s labor laws, the court determined, were at odds with Title VII’s general objectives and could not be invoked to block women workers from gaining jobs they wanted and were able to perform.<sup>86</sup>

Influenced by the EEOC’s position and court decisions holding that Title VII superseded women-only protective laws, state legislatures in large numbers repealed or modified such laws, and state attorneys general in nearly half of the States advised that *Muller*-style laws did not apply to employers covered by Title VII.<sup>87</sup> The hope of the proponents of Oregon’s 1903 law, one might conclude, had been realized. The “opening wedge” strategy paved the way for laws that protected workers without limiting women’s opportunities.

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83. 29 C.F.R. § 1604.1 (Aug. 19, 1969).

84. 444 F.2d 1219 (9th Cir. 1971).

85. *Id.* at 1224.

86. *Id.* at 1226.

87. See BABCOCK ET AL., *supra* note 11, at 488.

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THE NEWER- STYLE PROTECTION: LEGISLATION ON CHILDBIRTH,  
CHILDREARING, AND THE POTENTIAL FOR A BALANCED WORK AND  
FAMILY LIFE

Even after Title VII spelled the end of labor legislation applicable to women only, a pregnant problem remained. To what extent could employers treat women differently because of their *childbearing* capacity and the primary responsibility cast on women for *childrearing*?

In the very first Title VII sex discrimination case to reach the Supreme Court for decision on the merits, *Phillips v. Martin Marietta Corp.*,<sup>88</sup> the Court addressed a child-rearing issue: Could an employer refuse to accept applications from women with pre-school-age children while employing, without reservation, men with pre-school-age children? The Court's answer in 1971 was wobbly. The employer's practice, on its face, conflicted with Title VII's ban on sex discrimination, the Justices recognized. But the majority hedged. If the employer could prove that "conflicting family obligations" were "demonstrably more relevant to job performance for a woman than for a man," the Court said, then arguably the employer might have a valid BFOQ defense.<sup>89</sup>

Justice Marshall, concurring in the judgment, chided his brethren for suggesting that the BFOQ defense might excuse Martin Marietta's practice. Title VII, he wrote, allowed no room for discrimination based on "ancient canards about the proper role of women."<sup>90</sup> Marshall's position eventually prevailed, first in lower courts, ultimately in the Supreme Court. Just as the BFOQ defense could not be used to shield women-only protective or restrictive labor legislation, so it could not be used to perpetuate the notion that women with young children belong at home and are unfit for gainful employment.

Parenthood is not unique to women, but pregnancy is a condition no man can experience. The Court dealt with the plight of pregnant women ready, willing, and able to work, yet denied the opportunity to do so, in *Cleveland Bd. of Ed. v. LaFleur*.<sup>91</sup> Decided in 1974, *LaFleur* and a companion case involved pregnant public school

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88. 400 U.S. 542 (1971).

89. *Id.* at 544.

90. *Id.* at 545 (Marshall, J., concurring).

91. 414 U.S. 632 (1974).

teachers forced to leave work well in advance of childbirth. The teachers contested their school boards' policies as state action impermissible under the Fourteenth Amendment. The Court took up a similar issue in *Turner v. Department of Employment Security of Utah*.<sup>92</sup> Decided summarily in 1975, *Turner* concerned a Utah law that made pregnant women categorically ineligible for unemployment benefits from the end of the second trimester until six weeks after childbirth. The ban was absolute; it operated without regard to the woman's actual ability to and availability for work. Complainants prevailed in both cases. But the Court ruled in their favor not on the basis of their equal protection pleas. Instead, the Court held they were denied due process because they were irrebuttably deemed unfit to work, even if, in truth, they were ready, willing, and able to undertake gainful employment.<sup>93</sup>

Six months after ruling in favor of pregnant teachers still fit for work, the Court resolved a case involving women seeking disability benefits when their pregnancies in fact rendered them unable to work. That case, *Geduldig v. Aiello*,<sup>94</sup> concerned exclusion of pregnant women from California's temporary disability plan for public sector employees. As in *LaFleur* and *Turner*, *Aiello* was framed, not under Title VII, but as a Fourteenth Amendment case. This time, the Court did not shy away from an equal protection ruling. California's plan, the Court held, was not unfairly discriminatory, for "nonpregnant persons"—a class that includes members of both sexes—were treated alike.<sup>95</sup>

The same reasoning held sway in a Title VII case decided in 1976, *General Electric Co. v. Gilbert*.<sup>96</sup> The Court there dealt with a GE plan that paid workers part of their wages for up to three weeks of absences due to any disabling condition save one—disability caused by pregnancy. The Equal Employment Opportunity Commission had wrestled with the issue and, in 1972, issued Guidelines declaring that practices classifying employees based on pregnancy-related conditions were "prima facie violations of Title VII."<sup>97</sup> Pregnancy-related disabilities, the Commission advised, qualify for any and all

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92. 432 U.S. 44, 46 (1975).

93. *LaFleur*, 414 U.S. at 645; *Turner*, 432 U.S. at 46.

94. 417 U.S. 484 (1974).

95. *Id.* at 497 n.20.

96. 429 U.S. 125 (1976).

97. 37 Fed. Reg. 6819, 6837 (April 5, 1972) (codified at 29 C.F.R. § 1604.10).

benefits, *e.g.*, sick leave and insurance, provided for other temporarily disabling conditions. By the mid-1970s, every federal appellate court presented with the issue agreed with the EEOC's position.<sup>98</sup>

The Supreme Court, however, disagreed and determined that GE's exclusion of pregnancy from disability benefits "is not a gender-based discrimination at all."<sup>99</sup> Title VII protection for women in the workplace, in the Court's view, did not encompass disability stemming from the physical condition that most conspicuously differentiates women from men.

I have a suspicion about the Court's diverse rulings in *LaFleur* and *Turner* on the one hand, and *Aiello* and *Gilbert* on the other. The pregnant woman ready, willing, and able to work met a reality check. She sought, and was prepared to take on, a day's work for a day's pay. But the woman who sought benefits for a disability caused by pregnancy may have sparked doubt in the Justices' minds: Was she really a member of the labor force, or was she a drop out who, post-childbirth, would retire from the paid labor force to devote herself to the care of her home and family?

Almost immediately after the Supreme Court rejected the Title VII challenge to GE's disability plan, action shifted to a different forum. A coalition that eventually encompassed over 200 organizations—including women's equality advocates, labor unions, civil rights proponents, pro-life as well as pro-choice groups—formed under the umbrella of the Campaign to End Discrimination Against Pregnant Workers. Less than two years after the coalition was launched, the Campaign achieved its goal: Congress passed the Pregnancy Discrimination Act, a measure notable for its simplicity. Congress declared in the PDA that pregnancy-based classifications were indeed sex-based for Title VII purposes.<sup>100</sup> Pregnant workers, the Act provided, "shall be treated the same for all employment-related purposes, including . . . benefit programs, as other persons not

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98. See *Communications Workers v. Am. Tel. & Tel.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), *judgment vacated on other grounds*, 424 U.S. 737 (1976); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *aff'd in part, vacated in part, and remanded*, 434 U.S. 136 (1977); *Holthaus v. Compton & Sons, Inc.* 514 F.2d 651 (8th Cir. 1975); *Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208 (9th Cir. 1975); *Hutchinson v. Lake Oswego Sch. Dist.*, 519 F.2d 961 (9th Cir. 1975); *Farkas v. South Western City Sch. Dist.*, 506 F.2d 1400 (6th Cir. 1974).

99. *Gilbert*, 429 U.S. at 144.

100. 42 U.S.C. § 2000e(k).

so affected but similar in their ability or inability to work.”<sup>101</sup> Congress thus displayed an understanding that perhaps eluded the Court in *Aiello* and *Gilbert*: “The assumption that women will become pregnant and leave the labor force,” a House Report stated, “is at the root of the discriminatory practices [they encounter].”<sup>102</sup>

How did the Court respond to the PDA? Three decisions tell that story. First, in a case resolved in 1983, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,<sup>103</sup> the Court ruled that the PDA could work to the benefit of male employees. Prior to enactment of the PDA, the Newport News Company’s group health insurance plan gave employees and their spouses comprehensive hospitalization and medical expense coverage save for childbirth, for which only reduced coverage was available. Once the PDA came into force, Newport News raised the childbirth coverage for female employees to the general level but continued to provide only reduced childbirth coverage for male workers’ wives. That distinction, the Court ruled, ran afoul of Title VII’s “original prohibition against discrimination on the basis of an employee’s sex.”<sup>104</sup> Under the PDA, the employer could not treat childbirth disadvantageously, but under Title VII’s basic ban on discrimination “because of sex,” male workers had to be given a health insurance package no less generous than the insurance accorded female workers.

Third of the pathmarking post-PDA decisions (I will take up the second out of chronological order) was the Court’s 1991 ruling in *Automobile Workers v. Johnson Controls, Inc.*<sup>105</sup> The employer in that case followed a policy common in industries involving toxic substances: Women “capable of bearing children” were excluded from hazardous jobs based on a purported concern for the well-being of the fetus the woman might conceive.<sup>106</sup> In accord with that policy, Johnson Controls excluded all fertile women—but not fertile men—from jobs exposing workers to lead toxins. Briefs attacking the policy warned against a revival of *Muller*’s placement of women in a special class because of their “physical structure” and “maternal

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101. *Id.*

102. H.R. REP. NO. 948, 95th Cong., 2d Sess. 3 (1978).

103. 462 U.S. 669 (1983).

104. *Id.* at 685.

105. 499 U.S. 187 (1991).

106. *Id.* at 199.

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functions.”<sup>107</sup> The Court grasped the point: “Concern for a woman’s existing or potential offspring,” the Court wrote, “historically has been the excuse for denying women equal employment opportunities. Congress in the PDA prohibited discrimination on the basis of a woman’s ability to become pregnant. We do no more than hold that the PDA means what it says.”<sup>108</sup>

Unlike *Newport News* and *Johnson Controls*, a case decided in 1987 divided members of the PDA coalition. Titled *California Federal Savings & Loan Association v. Guerra*<sup>109</sup> (and commonly called *Cal Fed*), the case posed this question: Does Title VII, as amended by the PDA, permit *preferential* treatment for pregnant workers? California had adopted a law under which women returning to work after pregnancy leave were afforded job security unavailable to other temporarily disabled workers, *i.e.*, a superior right to reinstatement in the woman’s former post or a similar job.<sup>110</sup> Some feminists urged that under the PDA, California’s enhanced job security could not be confined to women seeking reinstatement after childbirth leave. Protective legislation for women only, they stressed, “has historically reinforced sex-role stereotypes and reduced women’s employment opportunities.”<sup>111</sup> Feminists on the other side emphasized the uniqueness of pregnancy. As a distinguished scholar explained:

Men do not experience a conflict between their right to engage in reproductive conduct and their right to be free of discrimination based on sex at work. Women, however, have experienced such a conflict and will continue to do so unless pregnant workers are safeguarded from the loss of employment opportunities during pregnancy.<sup>112</sup>

The Court essentially agreed with that view. States, the Court ruled, *may* require employers to grant special job protections to pregnant workers, for “Congress intended the PDA to be a floor

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107. See, e.g., Brief of *Amici Curiae* Ass’n of the Bar of the City of New York et al. in Support of Pet’rs at 7, 15, *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (No. 89-1215).

108. *Johnson Controls*, 499 U.S. at 211.

109. 479 U.S. 272 (1986).

110. Cal. Gov’t Code Ann. § 12945(b)(2) (West 1980).

111. Brief of *Amici Curiae* American Civil Liberties Union et al. in Support of Neither Party at 11, *Cal. Fed. Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *ACLU Amicus Brief*].

112. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 27–28 (1985).

beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”<sup>113</sup> The Court cautioned, however, that the “special treatment” permissible under the PDA was “unlike the protective legislation prevalent earlier in [the 20th] century.”<sup>114</sup> Thus “a State could not mandate special treatment of pregnant workers based on stereotype or generalizations about their needs and abilities.”<sup>115</sup>

Seeds of a rapprochement were planted in briefs filed in *Cal Fed* by the ACLU and NOW. The job security California provided for pregnant workers, the briefs maintained, should not be taken away from them, but should be extended to all workers on return from leave.<sup>116</sup> Such a sweeping extension would be a tall order for a court to decree, but it was well within Congress’ ken. Moreover, favorable treatment for women returning after childbirth was merely permissive under the *Cal Fed* decision, and was of small comfort to a woman whose sick child, husband, or parent required her temporary absence from paid employment.

A second coalition formed during the *Cal Fed* litigation, a campaign seeking more durable protection for people with family care responsibilities. The result of the new campaign: Congress, in 1993, passed the Family and Medical Leave Act.<sup>117</sup> The FMLA requires employers of 50 or more employees to provide up to 12 weeks of unpaid, but job-protected leave to employees, male or female, who are parents of newborns or newly adopted children, or who need to attend to their own serious health condition or that of a family member.<sup>118</sup> In lieu of protecting women only, the FMLA protects families; its stated purposes, “to promote the goal of equal employment opportunity for women and men,” and “to balance the demands of the workplace with the needs of families.”<sup>119</sup>

The Justice who, in 1976, announced in *Gilbert* that Congress had not made disadvantageous treatment of pregnant workers “gender-based discrimination at all,” responded in 2003 to a clear signal from the Legislature. The FMLA, Chief Justice Rehnquist

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113. *Id.* at 285.

114. *Id.* at 290.

115. *Id.* at 285 n.17.

116. Brief of *Amici Curiae* of Nat’l Org. for Women et al. in Support of Neither Party at 4, 20, *Guerra*, 479 U.S. 272 (No. 85-494); see also ACLU *Amicus* Brief, *supra* note 111, at 48.

117. 29 U.S.C. § 2612 (2000).

118. *Id.* § 2612(a)(1).

119. *Id.* § 2601(b).

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wrote for the Court in *Nevada Department of Human Resources v. Hibbs*, was a proper exercise of Congress' authority to enforce the Equal Protection Clause.<sup>120</sup> Reminiscent of the *Muller* brief's compilation of turn of the 20th century medical, social, and economic reports, reams of information, laid out in congressional findings, also in briefs filed with the Court in *Hibbs*, showed the need for the FMLA's approach to the reduction of workplace gender discrimination. As phrased by the Chief Justice:

Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination . . .

. . . .

. . . Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.<sup>121</sup>

The FMLA, the Court concluded, was a fitting prophylactic, appropriately binding public as well as private employers, for it homes in on "the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest."<sup>122</sup>

#### CONCLUDING NOTE

The Court stated in *Muller*:

Though limitations upon [women's] personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life that will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.<sup>123</sup>

Having grown up in years when women, by law or custom, were protected from a range of occupations, including lawyering, and from serving on juries, I am instinctively suspicious of women-only protective legislation. Family-friendly legislation, I believe, is the sounder strategy. The FMLA and state analogs move in that direction. In time, I expect, their scope will be expanded. Devising

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120. 538 U.S. 721, 738 (2003).

121. *Id.* at 736–37.

122. *Id.* at 738.

123. 208 U.S. at 422.

means to facilitate a balanced work and personal life, however, is First Branch work; such arrangements are beyond the province of the judiciary to shape and decree. Future developments in this area, I anticipate, may be influenced by the growing numbers of women seated in state and federal legislative chambers, in top-level executive posts, in courts responsible for interpreting and applying legislation, on law faculties, and in law school classes.