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*.[1] 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."[2] 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"?[3] In

The National Consumers League, led by ardent social reformer Florence Kelley, wanted to ensure that Oregon would have the best possible representation.[11] 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

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."[22] 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.

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."[28]

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."[29] "[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?"[30]

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."[31]

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.[32] 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."[33]

28. *Id*. at 113.

29. Brief for Plainti02 TD0.0784 Tp6x(o)4.84r.66.2(TJ 1131e.c0.220.0lace . . . in s oTc0.3272951.1(r)]TJ/TT Pl3 aft)6. 11e

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. [40] Laws of this genre were adopted or maintained in the shadow of *Lochner*'s barrier to worker protective laws. Twelve years after

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becoming better citizens and more intelligent voters.[46] (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."[47]

Had *Lochner* received a silent burial? Not yet, the *nin*

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

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.[66] 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.[67] 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.[68]

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.[69] 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."[70] 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."[71]

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

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.

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

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."[80] 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

"prohibit[ing] or limit[ing] the employment of females . . . ha[d]

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.[98]

The Supreme Court, however, disagreed and determined that GE's exclusion of pregnancy from disability benefits "is not a gender-based discrimination at all."[99] 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.[100] Pregnant workers, the Act provided, "shall be treated the same for all employment-related purposes, including . . . benefit programs, as other persons not

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).

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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.[120] 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 . . ..
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> . . ..
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> . . .. 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.[121]

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."[122]

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.[123]

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

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

121. *Id.* at 736–37.

122. *Id.* at 738.

123. 208 U.S. at 422.