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# *Muller v Oregon:* Reassessing Protective Legislation

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**Abstract:** Although the Progressive Era has drawn the attention of countless scholars, few historians have deeply investigated one of the most important Supreme Court cases of the era, *Muller v. Oregon* (1908). It was not until the failure of the Equal Rights Amendment (ERA) in 1972 that scholars seriously considered the case. The failure of the ERA brought a surge of scholarship from the field of history, law, sociology, psychology, and communications. This historiography examines the reemergence of interest in *Muller v. Oregon* in the years following the ERA's failure. In addition to examining the increasing interest of scholars, this historiography also considers the method in which secondary school educators should teach the *Muller* case. Should *Muller* be taught as a triumph of progressivism or as a setback for women's rights? This historiography considers the important changes *Muller* brought to the Supreme Court's decision-making process as well as the damaging legacy left in its wake. As the United States appears to move toward revoking

protective legislation for a woman's reproductive rights, *Muller v. Oregon*, deserves to be studied by students and scholars alike.

**Keywords:** *Muller v. Oregon*; feminism; progressivism; women's workplace legislation.

## Introduction

Progressive reformers celebrated the 1908 Supreme Court decision in the *Muller v. Oregon* case as a victory for both labor and women. However, as women have gained more equal footing in the workforce in the decades since the ruling, the ruling has come under scrutiny. A wide variety of academics, including historians, lawyers, sociologists, psychologists, and communications experts, have debated the *Muller v. Oregon* case. The variations in interpretations and legacy associated with *Muller* no doubt impacts the methods in which history students learn about the landmark Supreme Court case. Although progressives initially celebrated the *Muller v. Oregon* decision, it did not receive much academic attention until the emergence of second-wave feminism in the 1970s. The failure of the Equal Rights Amendment to ratify led historians and educators to reconsider the *Muller* case as a blow to women's rights rather than a victory for workplace justice.

The interdisciplinary interest in *Muller v. Oregon* has resulted in a significant variation in writing themes and methods. There are those who defend the Supreme Court decision from a legal standpoint in which gender is a secondary and largely irrelevant component. The *Muller* case also entered sociological jurisprudence into the Supreme Court for the first time,

which has been noted by many scholars. One of the more recurring concentrations of academics includes a focus on the rhetoric and verbiage of the famous “Brandeis brief” and the majority opinion delivered by Justice Brewer. In addition to the rhetoric of the case, the legacy of limiting women’s working hours and conditions continues to haunt the legal, historical, and sociological approaches to understanding women’s working rights. While one of the most vocal supporters of the ruling in *Muller* was Florence Kelley, a female progressive reformer, the precedent set through the protective legislation also resulted in the fracturing of the women’s movements during the early twentieth century.

### ***Muller v. Oregon***

Did an Oregon law that limited the hours women were allowed to work in certain manufacturing plants and laundries violate the Fourteenth Amendment? The Supreme Court was tasked with answering this question when it heard *Muller v. Oregon*. In 1903, Oregon passed legislation limiting the number of hours women were allowed to work in factories and laundries to no more than ten hours per day. Prior to the passing of Oregon’s law, progressive reformer Florence Kelley had drafted a similar law in 1893 that would have limited women’s working hours to no more than eight hours per day in Illinois, but this law was struck down by the Supreme Court in the 1895 *Ritchie v. Illinois* case. In 1905, the Supreme Court struck down a similar law in the *Lochner v. New York* case. *Lochner v. New York* determined that the state of

New York could not limit bakers, a male-dominated profession, to a ten-hour workday because it violated their “freedom of contract,” a freedom guaranteed in the due process clause of the Fourteenth Amendment.

After these defeats, Kelley focused on passing legislation that sought to protect women as a separate class of citizen who needed their hours limited, for their own benefit. When fined for violating Oregon’s 1903 law, laundry owner Curt Muller challenged the constitutionality of the law. In Muller’s eyes, the law violated the Fourteenth Amendment because it violated women’s freedom of contract. The 1905 ruling in *Lochner v. New York* established the precedent Muller needed to challenge Oregon’s law, allowing Muller to argue that women, “equally with men, are endowed with fundamental and inalienable rights of liberty and property” and that “difference in sex alone does not justify the destruction or impairment of these rights.”<sup>1</sup> Muller’s assertion that women were indeed entire citizens and deserved to be treated as such may be viewed today as a feminist argument, but his motivation was less altruistic; Muller likely wished to continue exploiting poor immigrant labor. Regardless of Muller’s real intent, his argument was simple – women should have the same rights as men, as previously decided in the *Lochner* case.

After the loss in *Ritchie v. Illinois*, Florence Kelley, committed to labor reform, partnered with fellow reformer Josephine Goldmark and her brother-in-law Louis Brandies to appeal to the Supreme Court that women belonged to a separate and more delicate class of citizens, who needed protective legislation.

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<sup>1</sup> *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

They argued, like Oregon's law, that women needed protective legislation to protect their health and more specifically, their reproductive organs. Through the famous "Brandeis brief," Brandeis utilized a sociological approach to argue why it was not only constitutional, but necessary, for the government to limit women's working hours. The "Brandeis brief," paired with the Court's preconceived notions on women, resulted in the unanimous decision to uphold Oregon's law. The Court drew a distinction between *Muller* and *Lochner* on the basis of the "difference between the sexes."<sup>2</sup> Justice Brewer, delivering the majority opinion, declared that women are "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."<sup>3</sup> Progressive reformers celebrated the Court's ruling as a victory for labor, and while there was criticism in the immediate aftermath, it was not until the failed ratification of the ERA in the 1980s that historians and activists alike have reflected on the *Muller* ruling as an anti-woman ruling that had lasting effects for working women.

### **In Defense of the Court's Decision**

Historians and legal scholars have increasingly criticized the 1908 Supreme Court decision in *Muller v. Oregon* in recent years. While radical feminists like Alice Paul were critical of *Muller* in the immediate

aftermath of the ruling, it was not until the women's rights movement of the 1960s and 1970s that it received consistent scrutiny. Historians and legal scholars both place *Muller* in context with other progressive Court cases. Perspectives differ, but only slightly. Historians tend to write about *Muller* in line with other Court cases as a means of telling the history of progressive movement, whereas legal scholars tend to write about *Muller* in line with other progressive Court cases as a means for explaining precedent. The failure of the ERA has not changed the perspectives in which historians nor legal scholars write about the case, as few were writing about *Muller* before the ERA's failure. The ERA's failure sparked a renewed interest in the *Muller* case as critics searched for a moment in history to begin the story of the unfair treatment of women in employment and highlight the necessity of the ERA. Despite the criticisms that have arisen, there are historians and legal scholars who defend the Court's decision in *Muller*. Ann Allen, Ronald Collins, Jennifer Freisen, and Melvin Urofsky argue that the necessity of protective legislation in the early twentieth century outweighed the anti-women implications of the ruling in *Muller*.<sup>4</sup>

The Supreme Court frequently decides court cases based on political lines, influences, and the conditions of their time rather than the sole constitutionality of a case. Further influencing the Court's perspective is the ongoing debate between a

<sup>2</sup> "*Muller v. Oregon*," Oyez, <https://www.oyez.org/cases/1900-1940/208us41>

<sup>3</sup> *Muller v. Oregon*, 208 U.S. 412, 422 (1908)

<sup>4</sup> Ann Allen, "Women's Labor Laws and the Judiciary: Reaction to Progressive Philosophy," *Proceedings of the South Carolina Historical Association*, (May 1985), 75-85; Ronald K.L. Collins and Jennifer Friesen, "Looking Back on *Muller v. Oregon*," *American Bar Association Journal* 69, no. 3 (1983): 294-8; Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook: Supreme Court Historical Society* (1983): 53-72.

strict and limiting reading of the US Constitution and more contextual interpretations of law and society. According to some historians and legal scholars, the Supreme Court's ruling in *Muller v. Oregon* does not deserve the criticism that it receives for being anti-woman because it ruled along the more popular reformist lines of the early twentieth century and thus reflects a Court that played a more active role in improving society.

At the time of the *Muller* case, progressives saw labor reform as both an individual reform, but also as a means of promoting gender equality. For some progressives, namely radical feminists like Alice Paul, the insinuation that women required protective legislation was more harmful than helpful. While there were women actively fighting for women's suffrage, for many progressive reformists, labor reform was the bigger issue, evidenced by the multiple court cases surrounding labor legislation, like *Lochner v. New York* (1905). In their 1983 article, "Looking Back on *Muller v. Oregon*," First Amendment scholar Ronald Collins and labor lawyer Jennifer Friesen provide an explanation as to how the Supreme Court came to their decision and how progressive leaders of the time overwhelmingly regarded it as a victory. "Looking Back on *Muller v. Oregon*" was published in the American Bar Association journal just one year after the failure of the Equal Rights Amendment, although the authors do not directly address the immediate context of the failure of the ERA, likely due to the legal and stoic nature of the publication source. Collins and Friesen

note that "protective laws were part of a growing labor and social reform movement" and the Supreme Court made many rulings related to protective legislation.<sup>5</sup> Collins and Friesen do not make a specific argument within their piece, but instead provide an easy-to-follow explanation of the Court's rationale for their ruling. Where other historians who defend the Supreme Court note the political influence progressive reformers had during the early twentieth-century, Collins and Friesen simply write the history of the court case. The importance of including the political context of the era cannot be overstated.

Historians largely agree that the 1980s was a decade defined by a more conservative political outlook; both federal and state governments pulled back on labor regulations even as the ERA failed ratification, limiting women's ability to be constitutional equals to men. The political context of the decade in which each defender of the Supreme Court's ruling writes is important. In her 1985 article "Women's Labor Laws and the Judiciary: Reaction to Progressive Philosophy," historian Ann Allen writes a political history discussing the powers of the judiciary in relation to the political ideology of the early twentieth century. Allen cites multiple labor court cases, such as *Ritchie v. Illinois* (1895), *Holden v. Hardy* (1898), and *Lochner v. New York* (1905) in order to put *Muller* in a broader context of the progressive goal of protective legislation. Allen compellingly argues that "progressive philosophy was, indeed, influential in the judicial process of determining the constitutionality of protective work laws for women."<sup>6</sup> By placing *Muller*

<sup>5</sup> Ronald K.L. Collins and Jennifer Friesen, "Looking Back on *Muller v. Oregon*," *American Bar Association Journal* 69, no. 3 (1983): 295.

<sup>6</sup> Ann Allen, "Women's Labor Laws and the Judiciary: Reaction to Progressive Philosophy," *Proceedings of the South Carolina Historical Association*, (May 1985), 83.

in line with other examples when the Supreme Court ruled on labor legislation, regardless of the gender of those impacted, Allen makes the *Muller* case one that should be viewed in line with labor reform and not for its implications for working women. The Supreme Court's willingness to be influenced by partisan politics emphasizes that its ruling, while sexist in rhetoric by contemporary standards, was more about appeasing progressive labor reformers than it was the women's movement.

The defenders of the Court's ruling in *Muller* are more focused on the immediate implications *Muller* had in the moment rather than the lasting implications that occurred as a result of the ruling. Where many historians and other scholars criticize the implications for gender working roles in the decades following the ruling and claim that the Supreme Court was anti-reform, historian Melvin Urofsky disagrees. One year after the ERA failed, Urofsky published "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," in which he argues "in-sofar as the Supreme Court decided issues of protective legislation in the Progressive Era, one would have to conclude that far from being the enemy of reform, the Court was as progressive as most reformers could desire."<sup>7</sup> Utilizing the same court cases as Allen, Urofsky goes on to cite fifteen more cases that all support his and Allen's claim that the Court ruled in favor with Progressives more often than not. According to Urofsky, the rulings in almost all of the cited court cases "aimed at redressing the

perceived imbalance between the lords of industry and their ill-used workers."<sup>8</sup> Urofsky's legal history semi-effectively negates the importance that gender plays in progressive reforms, and that ultimately, the ruling was just and acceptable by Progressive reformers. The defense of the Supreme Court's ruling in *Muller v. Oregon* relies on the reader's ability and willingness to separate gender from a case whose majority opinion rested on the notion that women were weaker than men and needed special protections.

The four scholars discussed above provide a sample of the very few scholars who separate the *Muller* ruling on lines of labor rather than gender. While it is not necessary to review the *Muller* case through a lens where gender and labor are inextricably linked, separating the two creates a different understanding of the case. The ruling in *Muller* tied gender and labor together, as protective legislation existed because of gender, not in spite of it. By removing gender as a defining factor in the Court's ruling one can defend the Court's decision. Other scholars, however, disagree with the arguments made by Collins, Friesen, Allen, and Urofsky based on the fact that gender had been inextricably tied to many pieces of protective legislation in the early twentieth century. The defense of *Muller v. Oregon* is rooted in the consistency of writing its histories using almost exclusively rulings in other Supreme Court cases, which limits the scope of research. Yet, as each scholar defending the ruling noted, the Supreme Court's decisions were ultimately dictated by the progressive politics of the era, but by not

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<sup>7</sup> Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook: Supreme Court Historical Society* (1983): 55.

<sup>8</sup> Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," 53.

drawing from the larger historical context these scholars present an incomplete history of *Muller v. Oregon*.

### **Sociological Jurisprudence**

Progressive reformers of the early twentieth century remained divided on what should be the ultimate focus of their efforts. Despite the inability to agree on what should be the focus of the movement, a broader progressive ideology increasingly influenced the way in which Supreme Court justices understood society, governance, and law via a gradual acceptance of what contemporary legal scholar Roscoe Pound defined as sociological jurisprudence. This legal philosophy is central when discussing the legacy of *Muller v. Oregon* because it was the core ideology of the “Brandeis brief,” which allegedly swayed the Court’s decision. Legal historian, Kermit Hall, discusses sociological jurisprudence extensively in his renowned book, *The Magic Mirror: Law in American History*. Hall explains that sociological jurisprudence represented a new way of thinking about law and legislative decisions. Justices and judges no longer ruled exclusively based upon precedent, but also considered “the social and economic consequences of their decisions” and that lawyers should also take on the “role of gathering and presenting evidence that would help a judge in reaching a determination about those consequences.”<sup>9</sup> The legal approach of sociological jurisprudence also calls on judges to “seek enlightenment from disciplines outside law, including political and social sciences.”<sup>10</sup> The

Brandeis brief contained pages of “evidence” from doctors and states that had similar laws to Oregon, urging the judges to consider the physical ramifications their ruling would have on working women. Through the introduction of sociological jurisprudence, it is easier to understand why the Supreme Court ruled so differently in *Muller* than they did in the *Lochner v. New York* case, which were similar in many ways, other than the glaring difference that one impacted men and the other impacted women. Sociological jurisprudence emerged as a result of Progressives calling for a more equitable society and was the legal attempt of bringing humanity into decision making.

The importance of the Brandeis brief is not limited to the effects it had for working women and in the short and long term, it also is significant because it fundamentally changed how cases were argued to the Supreme Court. Prior to the Brandeis brief, cases argued in front of the Supreme Court relied on legal precedent in supporting their argument. The “Brandeis brief” introduced a new method of arguing court cases – the field of sociology was now relevant. In her 1994 article “The Science of Protection: Gender-Based Legal Arguments for the Ten-Hour Work Day” social historian Susan Englander compellingly argues that “the emergence of sociological jurisprudence... institutionalized scientific method as a means of legal procedure and social reform.”<sup>11</sup> Had the Supreme Court’s decision been solely based on legal precedent, *Muller* would have been ruled upon in the same way

<sup>9</sup> Kermit L. Hall, *The Magic Mirror: Law in American History* (Oxford: Oxford University Press, 1989), 224.

<sup>10</sup> Kermit L. Hall, James W Ely, Joel B Grossman, and William M Wiecek, eds. *The Oxford Companion to the Supreme Court*, New York: Oxford University Press, 1992, 803.

<sup>11</sup> Susan Englander, “The Science of Protection: Gender-Based Legal Arguments for the Ten-Hour Work Day,” *UCLA Historical Journal* 14, (January 1994): 45.

that *Lochner* had been, because the precedent was established that workers had a right to “freedom of contract.” Englander relied heavily on secondary source material, like Alfred Chandler’s *The Visible Hand* and Nancy Erickson’s “*Muller v. Oregon* Reconsidered” to construct her argument. Despite limited use of primary sources and court cases, Englander’s claim about the importance of the Brandeis brief for its establishment of sociological jurisprudence holds up as it is supported by many other scholars. Englander also reiterates the importance of the Brandeis brief’s establishment of women as a “distinct legal category” that required special protections, and states that “the Court’s decision in the *Muller* case set a precedent which remained in effect until the late 1960s.”<sup>12</sup> Other historians disagree with the effect ending in the 1960s but agree with the argument that *Muller* and the Brandeis brief had lasting impacts on working class women.

The Brandeis brief officially entered sociological jurisprudence into the Supreme Court as a legitimate legal option. Political Scientist Judith Baer argues that the ruling in *Muller* also entered women as a separate class of people into the high Court, creating a new precedent in which future women’s rights cases would be decided. Baer’s expertise falls in public law and feminist jurisprudence, and her 1991 article, “Women’s Rights and the Limits of Constitutional Doctrine” showcases her expertise perfectly. Baer cited 92 Supreme Court cases in her article, the oldest dating back to 1880 and the most contemporary ones being from 1990, one year before her article’s publication. Baer argues, using these 92 cases, that

*Muller* introduced a new form of case to the Supreme Court, cases that focus on sexual equality. While many political scientists and legal scholars have argued that this shift in the Court’s focus was a good thing, Baer claims that “the conclusion is inescapable: so far, men have been the primary beneficiaries of the new doctrine of sexual equality.”<sup>13</sup> *Muller*’s impact on women resulted in decades of Court rulings where women continued to come up short, and Baer states that women did not begin to see any “wins” in the Court until the 1970s, where women won sexual discrimination cases more often than men. While many scholars’ interests in *Muller* renewed in light of the ERA’s failure, there was also another resurgence in interest in *Muller* during the 1990s, when sexual harassment cases continued to come to light. Baer’s article makes it clear that *Muller* effectively cast women as existing in a separate legal category. This separation and distinction continued well into the late twentieth century.

The Brandeis brief entered sociological jurisprudence into the arena of legal arguments and forever changed how the Court would rule in cases. The legacy of this legal practice has been felt for decades following the 1908 ruling in *Muller*. While the importance of the Brandeis brief begins with its introduction of sociological jurisprudence into legal practice, this is not where it ends. The verbiage and rhetoric of the case laid the foundation for decades worth of women being considered a separate and lesser class of citizens, both in the eyes of society and in the eyes of the law.

<sup>12</sup> Englander, “The Science of Protection,” 33.

<sup>13</sup> Judith A. Baer, “Women’s Rights and the Limits of Constitutional Doctrine,” *The Western Political Quarterly* 44, no. 4 (1991): 828.



### **The Rhetoric of *Muller v. Oregon***

Progressive politics influenced the Supreme Court's rulings in several cases throughout the early twentieth century, and while the legal precedent existed for sex-based discrimination, a new precedent emerged as a result of the *Muller* case. Josephine Goldmark recruited her brother-in-law, Louis Brandeis, to help argue the progressives' side to the Supreme Court. Brandeis brought a new form of legal argument to the Court by using a sociological approach to show how the Oregon law impacted American citizens. To support their claim that women workers needed their hours limited on the basis of reproductive and physical health, Brandeis and Goldmark compiled statistics from both medical journals as well as sociological journals to produce 113 pages that "proved" women needed their working hours limited. The Brandeis brief's significance comes from the fact that it was the first of its kind to be submitted to the Supreme Court. This was the first time that a case argument relied on extra-legal data to prove its claim. While historians and legal scholars debate whether or not the brief truly swayed the Supreme Court's decision, the citation of non-legal data (sociological jurisprudence) soon became common practice. Historians, lawyers, psychologists, and communication studies scholars debate the importance of the Brandeis brief in relation to the Court's ruling in *Muller*, but collectively agree that the implications of the brief's rhetoric on contemporary working women and the Court cannot be ignored.

The rhetoric of the Brandeis brief places

women in a class of citizenship that requires coddling and special protections that men do not require. Many historians look at the importance of the Brandeis brief in relation to its affect on how the Supreme Court decided cases, and the jurisprudence that it establishes. Those who have written about the brief focus almost exclusively on the implications it had for the Court's ruling in *Muller* and how it categorizes women, but few have mentioned, or even noticed, the grammatical errors that exist in its concluding paragraph. In his 2005 article "Revenge of the Triple Negative: A Note on the Brandeis brief in *Muller v. Oregon*," legal historian Clyde Spillenger approaches the case from an English grammar-forward method. Spillenger argues that the final paragraph of the Brandeis brief is grammatically flawed and actually negates its entire purpose for the brief. Brandeis' final paragraph, which is a run-on sentence, includes a triple negative in which Brandeis inadvertently argues that the state of Oregon's law limiting the hours of laundresses was unnecessary; "the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation of women's work."<sup>14</sup> Spillenger goes further to state that "it is hard to believe that a reputable law firm today would allow such a brief in a major U.S. Supreme Court case to leave the office printer without first ensuring the final paragraph has been subdued and domesticated."<sup>15</sup> The grammatical errors of the concluding paragraph of Brandeis' brief are no doubt interesting and worth noting, but Spillenger fails to recognize any of the effects the brief had on

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<sup>14</sup> Clyde Spillenger, "Revenge of the Triple Negative: a Note on the Brandeis Brief in *Muller v. Oregon*," *Constitutional Commentary* 22, no. 1 (2005): 7.

<sup>15</sup> Spillenger, "Revenge of the Triple Negative: a Note on the Brandeis Brief in *Muller v. Oregon*," 7.

the Court's ruling in *Muller*. Justice Brewer's majority opinion succinctly summarizes the main point of the Brandeis brief and ultimately deserves more of the attention paid by historians and other related scholars.

While many scholars agree with the assertion that the Brandeis brief was a turning point in the Court's proceedings, not all scholars are convinced that it was instrumental in the Court's overall ruling in *Muller*. As has been previously established, *Muller v. Oregon* was not the first time the Supreme Court heard cases related to women's working conditions, and it certainly was not the last time. In her 1989 article "*Muller v. Oregon* Reconsidered," legal scholar Nancy Erickson utilizes numerous court cases, both preceding and following *Muller* to argue that the Supreme Court would have reached the same decision, with or without the Brandeis brief. Erickson was active during the women's movement of the 1970s, and her activism paralleled the goals of progressives during the early twentieth century, with a focus on women's rights and child welfare. Erickson's focus on women's rights undeniably shapes her perception that the Supreme Court would have upheld its sex-based discrimination without the Brandeis brief because it had already done so for years prior.<sup>16</sup> Erickson is highly critical of the "science" presented in the Brandeis brief, so much so that she argues that "it seems unlikely that any brief, no matter how persuasive, could change the minds of all four if some of them had not been inclined in that direction already."<sup>17</sup> Erickson's background in

women's rights paired with her extensive citation of related court cases like the *Slaughter-House Cases* (1873), *Commonwealth v. Hamilton Manufacturing Company* (1876), *Commonwealth v. Beaty* (1900), and *State v. Buchanan* (1902) results in a semi-compelling argument that the Brandeis brief did not sway any justices in their decision in *Muller*. The issue with Erickson's argument lies in the fact that the *Muller* decision cited the Brandeis brief extensively. The justices of the Court may have already agreed with the argument being made in the brief, but the Brandeis brief itself provided the Court with the rationale it needed to rule in favor of the Oregon law. Despite Erickson remaining unconvinced that the Brandeis brief mattered to the case, many other scholars highlight the importance of its verbiage and rhetoric as being a defining approach in future women's rights cases.

For those who disagree with the assertion that the Brandeis brief was the convincing factor in the Court's ruling in *Muller*, they do not discredit the role sociological jurisprudence had on the Court in decades to come, but rather focus on the preexisting conceptions of womanhood as influences for the Court. Justice Brewer's majority opinion placed women in an entirely separate class of people based upon their physical capabilities and how work would impact their reproductive abilities. In their 1991 article "Social and Social Scientific Perspectives in Judicial Interpretations of the Constitution," psychologist Alan Tomkins and lawyer Kevin Oursland explore the idea

<sup>16</sup> Nancy S. Erickson, "*Muller v. Oregon* Reconsidered: The Origins of Sex-Based Doctrine of Liberty of Contract," *Labor History* 30, no. 2 (1989): 229.

<sup>17</sup> Erickson, "*Muller v. Oregon* Reconsidered," 249.

<sup>18</sup> Alan J. Tomkins, and Kevin Oursland, "Social and Scientific Perspectives in Judicial Interpretations of the Constitution," *Law & Human Behavior (Springer Science & Business Media B.V.)* 15, no. 2 (1991): 101.

that “social perspectives have long been a part of the Court’s decision making when it has confronted different social issues.”<sup>18</sup> Tomkins and Oursland’s multidisciplinary approach utilizes a plethora of Court cases, both preceding and following the Court’s ruling in *Muller* to argue that the Court has relied on social perspectives of race and gender for a long time. Tomkins and Oursland also extensively cite Roscoe Pound’s writings where he called on the Court to recognize a new form of legal argument, sociological jurisprudence. While Tomkins and Oursland support their claim that the Court had always ruled in line with social perspectives, they also acknowledge the importance the Brandeis brief did have in the *Muller* ruling. The Court ruled in favor of the right to contract in the *Lochner* case because it was socially accepted for men to work as many hours as they wanted. Brandeis had to compile scientific evidence that women were incapable of having this same freedom.<sup>19</sup> According to Tomkins and Oursland, the Brandeis brief, while not necessarily central in swaying the Court’s decision, did mark a change in which certain classes of people would be represented as being scientifically different in the eyes of the Court.

As Tomkins and Oursland explained how the Brandeis brief laid the foundation of women being regarded as a separate class of citizen, in the eyes of the law, other scholars go further and assert that the Brandeis brief is also responsible for the lasting impacts of these discussions. Throughout the early

twentieth century, the socially accepted norm was that men’s place was in public where a woman’s place was in private, meaning the home. As more women entered the workforce, society had to come to terms with women entering the public sphere. Communication studies professor Katie Gibson argues in her 2007 article, “Judicial Rhetoric and Women’s ‘Place’: The United States Supreme Court’s Darwinian Defense of Separate Spheres” that the “Supreme Court employed a Darwinian framework to justify its decision in *Muller v. Oregon*.”<sup>20</sup> While Gibson does not cite many primary sources, such as court cases, she utilizes a wide array of secondary sources to analyze and discuss the rhetoric found in the Brandeis brief. Gibson notes that Justice Brewer focuses much of his opinion on describing women being physically inferior to men, and thus needed to have their working hours limited. While this was a commonly held social perspective, as defined by Tomkins and Oursland, Gibson goes further to say that the *Muller* case specifically set women back in what they could accomplish. The lasting legacy of *Muller* is explained by the Court’s “emphasis of women’s difference from man” and how the ruling of the Court “advanced the principle that sex was a valid basis for enacting special legislation, resulting in the legal treatment of women as a separate class of workers for six decades.”<sup>21</sup> Though Gibson’s article was written in 2007, she asserts that the legacy of *Muller* impacted working women until the late 1960s. The late 1960s saw a reemergence of the women’s movement as

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<sup>19</sup> Tomkins and Oursland, “Social and Scientific Perspectives in Judicial Interpretations of the Constitution,” 115.

<sup>20</sup> Katie L. Gibson, “Judicial Rhetoric and Women’s ‘Place’: The United States Supreme Court’s Darwinian Defense of Separate Spheres,” *Western Journal of Communication* 71, no. 2 (2007): 160.

<sup>21</sup> Gibson, “Judicial Rhetoric and Women’s ‘Place,’” 166.

second wave feminism gained traction in wake of Betty Friedan's *Feminine Mystique* of 1963. Second wave feminism sought to revive the ERA and fought fiercely for its passing. While Gibson's piece falls outside the scope of those initially interested in revisiting *Muller* in the wake of the ERA's failure, it still falls in line with the timeline of influence that *Muller* had. Many scholars agree with Gibson's assertion that the impacts of *Muller* were felt until the late 1960s, following the passing of Title VII, but others argue that the rhetoric of the Brandeis brief and majority opinion in *Muller* lasted well into the 1980s.

The 1980s brought many changes for working women, including the highest percentage of American women entering the workforce. These high numbers of women entering work also brought a new diversity in the kind of work women did. However, with this diversity, came continued limitations based on gender and women's reproductive organs continued to be the reasoning for these limitations. In her 1986 article "From *Muller v. Oregon* to Fetal Vulnerability Policies," legal historian Mary Becker constructs a comparative legal study in which she compares the early twentieth-century perceptions of womanhood to contemporary fetal vulnerability policies. Citing Title VII, *Muller v. Oregon*, *Lochner v. New York*, and *Bunting v. Oregon*, Becker argues that "like sex-specific protectionist legislation, sex-specific fetal vulnerability policies have been adopted without firm empirical evidence," and that while Title VII has limited protective legislation from being enforced, it continues to uphold employer policies of fetal vulnerability as a just reasoning for

limiting women's work.<sup>22</sup> Through her utilization of *Muller* and other protectionist legislation allowed by the Supreme Court, Becker compellingly argues that *Muller* allowed for future discrimination of women in the workplace to occur if it meant protecting a hypothetical fetus that she may carry one day. Becker's article was published four years after the ERA's failure and places the rhetoric of *Muller* at fault for decades worth of sex-based employment discrimination.

The rhetoric of the Brandeis brief and Justice Brewer's majority opinion in *Muller v. Oregon* laid the foundation for decades worth of sex-based discrimination for women to overcome. Brandeis' data and Brewer's opinion place women in a class in which they are viewed on the basis of motherhood and the future children they may bear. Historians, lawyers, communication studies scholars, and psychologists all agree that *Muller* had damaging and lasting effects on women because of the verbiage found in the evidence and ruling of the case. The Court placed women in a separate class of people that it would take decades for them to emerge from, and even then, constitutionally women are not viewed as equals. The rhetoric of *Muller* created lasting impacts on women throughout the United States.

### **The Legacy of *Muller v. Oregon***

A renewed interest in *Muller* emerged as the ERA failed and women across the United States faced the reality that they were not constitutional equals with men. The legacy of *Muller* lasted for decades following its ruling and continues to impact the women of the 1970s

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<sup>22</sup> Mary E. Becker, "From *Muller v. Oregon* to Fetal Vulnerability Policies," *The University of Chicago Law Review* 53, no. 4 (1986): 1225-1235.

through 1980s, and in many ways continues to impact working women today. Some scholars review *Muller* on the basis of legal precedent and validity, others on the verbiage and rhetoric of the case itself, and others have focused their writings on the immediate impacts on the Court's ruling. In light of the ERA's failure, the writings with the most diverse areas of scholarship focus on the hurtful legacy of *Muller v. Oregon* on the "modern" woman and how this legacy can be blamed for the failure of the ERA. The decades following the Court's ruling in *Muller* saw women's employment opportunities drastically limited on the basis of sex. Sociologists, psychologists, legal scholars, historians, and political scientists have all written about the hurtful legacy of *Muller* through the lens of their scholarship. The diversity of scholars highlights the significant harm many feel *Muller* has had for women. The 1960s through the 1980s have seen an increase in gender-focused legislation and court cases in which women are still relegated as a separate class.

The 1970s appear to be the widely accepted decade in which the effects of *Muller* begin to fade, but not disappear entirely. Despite the legal effects of *Muller* fading in light of the passage of Title XII, and more women winning sexual discrimination cases than men per year, women still found themselves cast in a separate class to men. In her 1979 article, "Protection of Women Workers and the Courts: A Legal Case History," Ann Hill argues that "the courts, in their decisions on protective legislation, have legitimated rather than challenged the second-class position of women in the

American labor force."<sup>23</sup> Hill's article comes before the ERA's failure to ratify, but in the wake of *Cleveland Board of Education v. LaFleur* (1974), in which the court ruled that the Cleveland School Boards violated women's Fourteenth Amendment rights to freedom of contract. Sixty-six years after the *Muller* ruling, women regained the right to work on their own terms. But as Hill points out, the impact of *Muller* did not immediately end with the Court's ruling in *Cleveland*. The Court left the door open for less restrictive maternity leave policies that would ultimately continue to hurt women.<sup>24</sup> So, while the immediate employment impacts of *Muller* seemingly began to end in the 1970s, the impacts it had on women in relation to their reproductive rights continued to last. As discussed in Becker's article, the impact of *Muller* on women's ability to work, and be mothers, continued into the 1980s.

As second-wave feminism spread throughout the United States during the 1960s and 1970s, women became increasingly disenchanted with being relegated to the home all day. The 1970s and 1980s saw a surge of women entering the workforce for the very first time, hoping to shed the notion that a woman could only be a wife and mother. Much that has been written about the *Muller* ruling has been written by lawyers and historians, but this does not mean those are the only interested parties. In her 1981 article, "Protective Labor Legislation and the Cult of Domesticity," sociologist Ava Baron compellingly argues that "the impact of *Muller* is still alive in the law"<sup>25</sup> and the only way to right this wrong is through the passage of the Equal

<sup>23</sup> Ann Corrine Hill, "Protection of Women Workers and the Courts: A Legal Case History," *Feminist Studies* 5, no. 2 (1979): 248.

<sup>24</sup> Hill, "Protection of Women Workers and the Courts," 267.

<sup>25</sup> Ava Baron, "Protective Labor Legislation and the Cult of Domesticity," *Journal of Family Issues* 2, no. 1 (1981): 27.

Rights Amendment. Baron argues this point through her utilization of Ruth Bader Ginsburg's arguments before the Supreme Court, the California Commission on the Status of Women, and other court cases in which women have been placed in a class of their own.

The California Commission on the Status of Women material displays the impact of the ERA if it were to pass. Ginsburg's career was marked by her dedication to undoing the effects of gender-based legislation, for which the *Muller* case set the precedent Baron's piece, published one year before the ERA failed, highlights the lasting effects of *Muller* and the need for women to be equal in the eyes of the law. "The *Muller* decision established the precedent that justified the differential application of the 17th Amendment to male and female workers."<sup>26</sup> This differential treatment experienced by women, created by *Muller*, is a driving force for scholars to study the implications of the Court's ruling.

*Muller's* legacy lasted for decades following the Court's ruling, and ultimately continued to hurt women for the duration of the twentieth century. While there have been no articles written about *Muller's* hurtful legacy in the twenty-first century, it would not be surprising if historians and legal scholars found a renewed interest in the wake of the Supreme Court's overturning of *Roe v. Wade* (1973). *Muller* defined women as a separate class of people based upon their reproductive organs and potential to be a mother. The failure of the ERA reaffirmed that the United States views women as a separate class of citizens, and sexual harassment and assault cases, like Anita Hill's, has brought renewed interest in a case based upon working

hours. While the twenty-first century has not brought a renewed interest in *Muller*, the immediate effects on the women's movement in the twentieth century were felt.

### **Fracturing the Women's Movement**

The Court's ruling in *Muller v. Oregon* had lasting effects on working women for decades, but also had implications for women in the short-term. Many progressives regarded the Court's ruling in *Muller* as a victory for labor because it shortened the workday and was a step towards better working conditions. While many progressives celebrated the effects of *Muller*, others immediately began to criticize the implications it would have for women, particularly poor women of foreign descent. *Muller* benefited women in middle-class circles who did not have to worry about finances and working hours nearly as much as impoverished immigrant women. The progressive movements conflicts on who should be the beneficiaries of reform ultimately impacted poor, immigrant women negatively. The early twentieth century saw an influx in immigration to the United States, which necessitated men and women working long hours to support their families in the ever-expanding cities.

The early support of *Muller* reflects the political climate of the early twentieth century while the delayed criticism reflects the social upheaval during the second half of the twentieth century. The failure of the Equal Rights Amendment in 1982 renewed interest in *Muller*, but in the eyes of a few legal historians, this is not the only connection between *Muller* and the ERA. Three years after the ratification of the Nineteenth

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<sup>26</sup> Baron, "Protective Labor Legislation and the Cult of Domesticity," 31.

Amendment, the Equal Rights Amendment was proposed in Congress. The initial proposal of the ERA resulted in many women, who considered themselves progressives, to begin questioning whether *Muller* was actually a good thing for women. Two legal scholars point to the 1920s as when the women's movement began to fracture, evidently as a result of the increasing criticisms over the Court's decision in *Muller*.

As many progressives focused on bringing more cases like *Muller* to the Supreme Court as a means to advance labor rights, another branch focused their efforts and energy on the passage of the Nineteenth Amendment. The focus and priorities of the progressive movement were never clearly defined, and no clearer can a divide be seen than during the first two decades of the twentieth century. Many progressives felt that workers' rights and fixing the capitalist system was the most important aim of the movement, while others argued that until all citizens had an equal voice, the country would never truly be equal. In her 2011 article, "Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today" lawyer Marcia McCormick writes the history of women in the progressive movement and in the workplace. McCormick's article is better described as a paper as she does not make a coherent argument throughout it, and it more serves the purpose of laying the foundation for explaining the first- and second-women's movements. Through her utilization of federal laws pertaining to women's rights, McCormick writes a history that highlights the fact that every legislation

passed with the intent of advancing women's rights has fallen short in some way or another; "the gendered nature of the tragedy and its place in the development of laws protecting women as women, rather than as beneficiaries of laws protecting all workers, has not been fully explored."<sup>27</sup> Laws, and Court rulings, like the one in *Muller*, were designed as a means of assisting women, but in reality they have done more harm than good. McCormick also points to the passage of the Nineteenth Amendment as a marker for the history of when the first women's movement began to fracture. With the ratification of the Nineteenth Amendment, women were now freely able to represent their own interests in law and did not have to rely on cases like *Muller* to advance their interests. McCormick points to the fact that as women gained political autonomy, criticisms of *Muller* began to emerge in earnest. The progressive movement's division of priority once again emerged and ultimately resulted in the women's movement dividing its efforts and ultimately itself.

In addition to the Nineteenth Amendment renewing criticism over the ruling in *Muller*, so too did the ERA. As women gained political equality, they also sought constitutional equality through the passage of the initial ERA. The failure of the ERA in 1982 brought forth a decade of women continuing to be both exploited at work as well as excluded. 1991 brought to light yet another reality that has plagued women since the beginning of their employment – sexual harassment and assault. Historian Joan Zimmerman published her article "The Jurisprudence of Equality" the same year as the Anita Hill accusations against Supreme Court

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<sup>27</sup> Marcia L. McCormick, "Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today," *New York University Journal of Legislation & Public Policy* 14, no. 3 (2011): 647.

justice nominee Clarence Thomas came to surface. Zimmerman's publication, like those who came before her, showcases the renewed interest in the legacy of *Muller v. Oregon* in response to injustices committed against women in the workplace. Zimmerman argued that "the jurisprudential divisions that helped polarize the women's movement may also illuminate other struggles for reform in the Progressive Era."<sup>28</sup> Zimmerman utilizes drafts of the ERA, letters written by reformer Florence Kelley, and the publications of Kelley to explain how the categorization of women in the workplace not only hurt working women, but also laid the foundation for the fracturing of the women's movement. Zimmerman showcases that reformers like Kelley did not necessarily want to focus on protective legislation for women alone, but that those reformers understood that in order to pass protective legislation for all, they had to first convince the Court that it was necessary for women. Many progressive women understood that they were viewed as the weaker sex and to ultimately accomplish long term goals, they would have to sacrifice their own rights for longer, but others refused to be held back any longer. The divisions that emerged with the passage of the Nineteenth Amendment and proposal of the ERA forever fractured the first women's movement.

The fracturing of the women's movement of the early twentieth century was inevitable. As more women joined the movement, more ideas manifested. There were those who thought women workers rights was the preeminent issue to address while others viewed the issue of suffrage to be more important.

*Muller v. Oregon* was the perfect case to cause divisions among women. Many women in the women's movement belonged to the middle and upper class and were fortunate enough to not need to work for a living. Those who struggled were forced to work. The women's movement was divided long before *Muller* was ruled on, but its ruling made the glaring economic differences clear within the women's movement. Those with means could not understand how so many women were willing to accept second-class citizenship for a day longer where working women could not understand why those with means were so selfish to the workers' cause. The reemergence of the women's movement via second-wave feminism during the 1960s and 1970s both highlights the lasting class divisions that existed among women and also serves as an explanation for the renewal in interest in *Muller* after the ERA fails for the last time.

### **Teaching *Muller v. Oregon***

While historians, communication specialists, and law professionals have many different things to say about the *Muller v. Oregon* case, education professionals have published minimal resources on the subject. Author Nancy Woloch has published a book entitled *Muller v. Oregon: A Brief History with Documents*, that provides teachers with the resources necessary to teach the case to students, but there are few online resources for teachers that offer insights and lesson plans on teaching high school level students the *Muller v. Oregon* case. The online resources focus on reading and analyzing the rhetoric of Justice Brewer's majority opinion and

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<sup>28</sup> Joan G. Zimmerman, "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital*, 1905-1923," *The Journal of American History* 78, no. 1 (1991): 193.



pay next to no attention to the Brandeis brief.<sup>29</sup> None of the available lessons suggest discussion questions about whether *Muller* was a progressive victory or an anti-woman ruling. The lack of history educators discussing how to effectively teach this court case is shocking considering the plethora of opinions found when discussing the case in a purely legal and historical context. Despite the lack of published scholarly work, and the minimal lessons available online, the method in which history teachers teach *Muller* going forward is immeasurably important.

When taken in conjunction, the available literature highlights the need to teach *Muller v. Oregon* both as a progressive victory and as an example of women being harmed based on the perception of their fragile nature. American history, like much of the world's history, places women in a category of their own in which men must protect and care for them, because they are incapable of advocating for themselves. *Muller* exemplifies both the harmful implications of protective legislation on the basis of sex but also the growing voice of women in the twentieth century. Florence Kelley and Josephine Goldmark spearheaded the case and rhetoric surrounding it in order to accomplish their political goals. While *Muller* was harmful for women in the long run, and must be taught as such, it would be reckless to omit the fact that women reformers led this fight.

*Muller* is often taught as a standalone case, and it should not be. For students to grasp the full picture of sex and progressive reforms, *Muller* must be taught alongside other successful and failed protective

legislation Court cases. *Lochner v. New York* should be included in the lesson as it lays the foundation for Curt Muller's argument. Without *Lochner*, *Muller* appears to be the first case in which limiting work hours of certain careers emerged, and it minimizes the role that sex played in the Court's decision. It is undeniable that *Muller* is an important Court case, but it cannot and should not be relegated to only being taught as a women's case. In its time, *Muller* was a labor victory that was criticized. The many nuances surrounding this case and the Court's decision makes *Muller* the perfect topic for teaching students how to critically evaluate history.

### ***Muller's Place in the 21st Century***

Women being relegated as a second-class of citizens on the basis of sex is a reality that is still seen in 2022. States throughout the United States are enacting laws that limit women's ability to make decisions about their reproductive health in the wake of the *Dobbs v. Jackson* decision in the summer of 2022, which overturned the precedent of *Roe v. Wade*. Until the Equal Rights Amendment failed in 1982, many historians and other scholars ignored the important legacy of *Muller v. Oregon* and failed to discuss the lasting implications the Court's ruling had for working women throughout the United States. Beginning with Betty Friedan's *The Feminine Mystique* in 1963, women throughout the United States began to question the status quo and the notion that they were a separate, secondary class of citizen when compared to men. The 1960s and 1970s brought a reemergence of the women's movement that fractured in the early twentieth century, partially

<sup>29</sup> David Brewer, "Muller v. Oregon," Teaching American History, July 8, 2022, <https://teachingamericanhistory.org/document/muller-v-oregon/>; "Muller v. Oregon 1908," Muller v. Oregon, 1908, <https://history.hanover.edu/courses/excerpts/229muller.html>.

because of the implications *Muller* had for women. It is undeniable that *Muller* had devastating lasting impacts for working women, but the literature available also makes it clear that *Muller* was not unique in regard to sex-based work discrimination. The significance of *Muller*, according to many academics, is that it officially put into writing that it was constitutional to categorize women as an inherently different and separate class that needed special protections. *Muller* may have been one case in a long line of sex-based discrimination rulings, but the precedent that *Muller* established is irrefutable. The failure of the Equal Rights Amendment, in many ways, highlights the fact that despite all the progress made in the decades following the Court's ruling in *Muller v. Oregon*, women are still considered secondary citizens who do not deserve equal protection under the law. The renewal of interest among academics is unsurprising and will likely continue in the decades to follow as states throughout the United States pass laws revoking women's autonomy and rights. *Muller v. Oregon* was not the starting place for women being treated differently, and the reevaluation of its legacy should not end anytime soon.

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## Notes

1. For information related to the discussion of Lesson Plans and the way educators approach teaching the *Muller v Oregon* case, online lesson sharing websites were explored. Below you will find examples of websites explored. Through my research, educators have not professionally published their thoughts and recommendations on how to teach *Muller v Oregon*, but rather deflect to the standard of reading the court case and analyzing it.
  - a. <https://history.hanover.edu/courses/excerpts/229muller.html>
  - b. <https://teachingamericanhistory.org/document/muller-v-oregon/>
  - c. <https://study.com/academy/lesson/muller-v-oregon-summary-case-brief.html#:~:text=Lesson%20Summary,-One%20of%20the&text=Oregon%2C%20a%20laundry%20owner%20argued,the%20working%20hours%20of%20women>
  - d. <https://www.womenshistory.org/resources/lesson-plan/landmark-supreme-court-cases>