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LOCHNER'S FEMINIST LEGACY

David E. Bernstein*

CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS. By Julie Novkov. Ann Arbor: University of Michigan Press. 2001. Pp. xii, 320. \$44.50.

Professor Julie Novkov's *Constituting Workers, Protecting Women*¹ examines the so-called *Lochner* era of American constitutional jurisprudence through the lens of the struggle over the constitutionality of "protective" labor legislation, such as maximum hours and minimum wage laws. Many of these laws applied only to women, and Novkov argues that the debate over the constitutionality of protective laws for women — laws that some women's rights advocates saw as discriminatory legislation against women — ultimately had important implications for the constitutionality of protective labor legislation more generally.

Liberal defined, the *Lochner* era² lasted from the *Slaughter-House Cases* in 1873 — in which four Supreme Court Justices advocated strong constitutional protection for occupational liberty³ — through the triumph of the New Deal in the late 1930s. In preparing her book, Novkov apparently unearthed and read every reported federal and state case on protective labor legislation during the relevant time period.⁴ Having tabulated these cases, Novkov finds that both federal and state courts were much more likely to uphold women's protective legislation than to uphold general protective labor legislation. In fact, decisions affirming the constitutionality of women's protective legislation often paved the way for later sex-neutral legislation.

Novkov usefully divides the *Lochner* era into four distinct periods. As discussed below, Novkov's analysis of these periods is not fully

* Professor, George Mason University School of Law. J.D. 1991, Yale; B.A. 1988, Brandeis. — Ed. Sandra Van Burkleeo, Daniel Ernst, Richard Friedman, and Nancy Woloch provided helpful comments on this Review, and George Mason's Law and Economics Center provided financial support.

1. Assistant Professor of Political Science, University of Oregon.

2. Named after *Lochner v. New York*, 198 U.S. 45 (1905).

3. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

4. Unfortunately, Novkov neither provides an appendix listing the cases she considered, nor provides an explanation of what criteria a case needed to meet to be considered protective legislation.

persuasive. The four periods she delineates, however, do track major shifts in Supreme Court doctrine regarding the government's power to regulate labor (and to regulate the economy more generally), and will be used to frame this Review. Part I of this Review discusses Supreme Court jurisprudence regarding protective labor legislation from 1873-1897. Novkov refers to this period as the "era of *generalized balancing*," in which "the tension between liberty and police power emerged as the central focus of claims grounded in due process" (p. 32).

Part II of this Review discusses what Novkov calls the "era of *specific balancing*," which lasted from 1898-1910. According to Novkov, this period saw a significant increase in legislation regulating labor contracts, including legislation that applied only to women workers (p. 33). Novkov asserts that courts began to focus on the types of labor legislatures sought to regulate, distinguishing between the prototypical male laborer in an "ordinary" occupation on the one hand, and classes of laborers considered legitimately in need of government assistance on the other. In 1908, in *Muller v. Oregon*,⁵ the Supreme Court affirmed the constitutionality of maximum hours laws for women.

In the ensuing period of "*laborer-centered analysis*" between 1911 and 1923, discussed in Part III of this Review, courts focused on "the justifications that could be used to show that protective labor legislation for women was legitimate" (p. 33). During this era, the Supreme Court was inclined to uphold protective legislation. Advocates of protective laws for women gradually shifted their argument from women's natural disabilities to more general "laborer-centered" arguments that necessitous workers of any sex were not truly free. The constitutionality of maximum hours laws for male factory workers was established during this period.

Finally, Part IV of this Review discusses the period from 1923 through 1937, which Novkov refers to as an era of "*gendered rebalancing*" (p. 34). The focus of efforts to enact protective legislation shifted once again to laws that applied exclusively to women, especially minimum wage laws. The era began with the Supreme Court overturning a minimum wage law for women in *Adkins v. Children's Hospital*,⁶ on the grounds that women have the same right to liberty of contract as men. It ended with the Court upholding a similar law in *West Coast Hotel v. Parrish*.⁷ In *West Coast Hotel*, the Court adopted the argument that allowing women workers with unequal bargaining power to negotiate contracts for themselves for less than a living wage cannot be considered liberty at all.

5. 208 U.S. 412 (1908).

6. 261 U.S. 525 (1923).

7. 300 U.S. 379 (1937).

As discussed in this Review, throughout *Constituting Workers, Protecting Women*, Novkov provides an interesting and generally well-researched narrative regarding the debate over the constitutionality and wisdom of protective labor legislation for women. She sometimes shows great scholarly care, rejecting some hoary and popular myths about the *Lochner* era. Novkov notes, for example, that *Lochner* itself was something of an aberration in its time, one of the very few cases invalidating protective labor legislation before the 1920s.

On the other hand, Novkov seems overly enamored with applying the concept of “nodes of conflict” to the controversy over protective laws for women. She defines nodes of conflict as “a point at which the public, attorneys, and the courts are all in communication” (p. 20). This Reviewer did not find the nodes of conflict concept especially enlightening, and suspects that it distracted Novkov from taking a more nuanced approach to the history of the controversy over protective labor laws. In particular, as discussed in Part V of this Review, Novkov ignores relevant economic issues, overemphasizes the role of legal argument in explaining constitutional development, and overstates the relative importance of the debate over protective laws for women to the more general debate over constitutional limits on the government’s regulatory power.

I. THE ERA OF GENERALIZED BALANCING, 1873-1898

Novkov appropriately begins her study of the constitutional conflict over protective labor legislation for women with an analysis of two cases decided by the Supreme Court in 1873 — the *Slaughter-House Cases*⁸ and *Bradwell v. Illinois*.⁹ In *Slaughter-House*, four dissenting Justices vigorously argued that the Fourteenth Amendment’s Privileges or Immunities Clause protected the right to earn a living from infringement by government-established monopoly. The right articulated in the *Slaughter-House* dissents eventually evolved into the right to pursue an occupation free from unreasonable government interference enforced by the *Lochner* Court.

In *Bradwell*, by contrast, three of the four dissenting *Slaughter-House* Justices concurred in the Court’s ruling that Illinois could prohibit women from practicing law. They reasoned that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”¹⁰ The contrast between the

8. 83 U.S. (16 Wall.) 36 (1873).

9. 83 U.S. (16 Wall.) 130 (1873).

10. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

Slaughter-House dissents and the *Bradwell* concurrence shows that what Novkov calls the "gendered" nature of liberty of contract doctrine under the Fourteenth Amendment was already established in the 1870s.

Because the *Slaughter-House* majority eviscerated the Privileges or Immunities Clause, attorneys challenging economic regulations turned to the Fourteenth Amendment's Equal Protection and Due Process Clauses. By the 1890s, state courts were regularly issuing decisions invalidating various protective laws as "class legislation" under the Equal Protection Clause or as violations of liberty of contract under the Due Process Clause.¹¹ The U.S. Supreme Court, however, interpreted the prohibition on class legislation narrowly¹² and had not yet adopted the liberty of contract doctrine.

With regard to protective legislation limited to women workers, most of the litigation during this era involved laws that banned women from serving alcohol.¹³ Only two of the cases during this era involved sex-based protective laws for women in industry, a category which was soon to be the focal point of a great deal of litigation. In 1876, the Massachusetts Supreme Court upheld a maximum hours law for women because the statute "merely provides that in an employment, which the Legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten-hours a day or sixty-hours a week."¹⁴

The other sex-based protective-law case, *Ritchie v. People*,¹⁵ involved an Illinois law limiting women to an eight-hour work day. Novkov does not discuss the history of this law, but other historians have done so. A broad coalition of women's reform groups had lobbied for the law.¹⁶ These groups believed that women were unable to compete on equal terms with men in the workplace and therefore needed legislative intervention on their behalf to protect them from overwork. In contrast, almost all of the women workers who appeared

11. Novkov focuses her attention on courts' reliance on liberty of contract under the Due Process Clause. P. 51. For a discussion of the relationship between the equal protection and due process decisions, see David E. Bernstein, *Lochner Era Revisionism, Revisited: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. (forthcoming 2003).

12. See *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

13. Courts routinely upheld these laws as part of the states' police power to regulate alcohol consumption. Pp. 48-49.

14. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, 384 (1876). For a discussion of the origins of this law, see Renee D. Toback, *Protective Labor Legislation for Women: The Massachusetts Ten-Hour Law* (2000) (unpublished Ph.D. dissertation, University of Massachusetts) (on file with author).

15. 40 N.E. 454, 455 (Ill. 1895).

16. Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois, 1869-1895*, 84 MICH. L. REV. 1518, 1520 (1986).

at trial testified that they preferred to work longer hours to get higher pay.¹⁷

When a challenge to the law reached the state supreme court in 1895, Illinois argued that women's biological differences from men, combined with their unique role in bearing offspring, justified the exercise of the state police power on women's behalf.¹⁸ In response, Ritchie's attorney contended that women had full citizenship rights and that the law deprived women of their right to make a living.¹⁹ The brief quoted libertarian treatise author Christopher Tiedeman for the proposition that "the constitutional guaranty of the liberty of contract applies to women, married or single, as well as men."²⁰

The Illinois Supreme Court sided with Ritchie. Novkov asserts that *Ritchie* "did not take much notice of the female workers affected by the statute at issue in the case" (p. 61), "ignore[d] gender" (p. 101), and did not "refer to gender specifically" (p. 124). This reading of *Ritchie* is inexplicable. While it's true that the Illinois Supreme Court "saw no need to reason differently about police power simply because the workers involved . . . happened to be female" (p. 71), the court did not ignore the sex of the workers regulated by the hours law.

To the contrary, *Ritchie* contains rousing feminist language, albeit language reflecting a libertarian classical liberal and individualist feminism,²¹ rather than the "social feminism"²² of the reformers who supported maximum hours laws. While the court acknowledged that the state had the power to protect workers who might injure themselves or others, it denied that the state could create a blanket distinction between male and female workers:

[W]oman is entitled to the same rights, under the constitution, to make contracts with reference to her labor as are secured thereby to men. . . . The law accords to her, as to every other citizen, the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. Before the law, her right to a

17. Nancy S. Erickson, *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228, 241 (1989).

18. See Lori Ann Kran, *Gendered Law: A Discourse Analysis of Labor Legislation, 1890-1930*, at 50-51 (1993) (unpublished Ph.D. dissertation, University of Massachusetts) (on file with the Harvard University Law Library).

19. *Id.* at 52-53.

20. *Id.* at 53 (quoting CHRISTOPHER G. TIEDMAN, *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY* 336 (2d ed. 1900)).

21. See generally JOAN KENNEDY TAYLOR, *RECLAIMING THE MAINSTREAM: INDIVIDUALIST FEMINISM REDISCOVERED* (1992) (presenting a modern restatement); Mark G. Yudoff, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366 (1990) (book review) (discussing the relationship between classical liberalism and women's rights).

22. See Sybil Lipschultz, *Social Feminism and Legal Discourse*, 2 YALE J.L. & FEMINISM 131 (1989).

choice of vocations cannot be said to be denied or abridged on account of sex.²³

Ritchie outraged reformers. Consider, for example, the reaction of Florence Kelley. Kelley was the primary author of, and most important lobbyist for, Illinois's maximum hours law, and had been charged as Chief Illinois Factory Inspector with enforcing it.²⁴ She exclaimed that "the measure passed to guarantee the Negro freedom from oppression [the Fourteenth Amendment] has become an insuperable obstacle to the protection of women and children."²⁵ Kelley apparently assumed that the legal statuses of women and children were necessarily the same, when in fact women's rights as citizens were gaining legal and judicial recognition.²⁶ In contrast to Kelley's reaction, a writer who supported *Ritchie* stated "that women are citizens, capable of making their own contracts, particularly in states where they have the right of suffrage, such legislation restricting their hours of labor is unconstitutional . . . as class legislation of the worst sort . . ." ²⁷ Thus, contrary to Novkov's understanding of this period, contrasting views regarding women's rights and abilities were already playing a large role in the debate over the constitutionality of protective legislation.

II. THE ERA OF SPECIFIC BALANCING, 1898-1910

1898 was a crucial year for protective labor legislation. In *Holden v. Hardy*, the Supreme Court upheld a Utah law mandating a maximum eight-hour day for underground miners, despite arguments that the law was class legislation and infringed upon liberty of contract.²⁸ Justice Brown, writing for a seven-vote majority, found that the statute was an "exercise of a reasonable discretion" by the legislature, and not class legislation.²⁹ The Court also held that the law's infringement on liberty of contract was justified in order to redress inequalities in bargaining power between workers and their employers.³⁰ In short,

23. *People v. Ritchie*, 40 N.E. 454, 458 (Ill. 1895).

24. See Erickson, *supra* note 17, at 236; Kran, *supra* note 18, at 49-50.

25. JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER: FLORENCE KELLEY'S LIFE STORY* 144 (1953). For other negative commentary on *Ritchie*, see ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS*, § 313, at 298 (1904), and Comment, 4 *YALE L.J.* 200, 201 (1895). For more on Kelley, see KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK* (1995).

26. Throughout this period, none of the opinions invalidating the regulation of women's labor stated or implied that states could not regulate child labor. Indeed, the author of this Review is unaware of any case in which state regulation of child labor was invalidated.

27. F.J. STIMSON, *HANDBOOK TO THE LABOR LAW OF THE UNITED STATES* 64-65 (1896).

28. *Holden v. Hardy*, 169 U.S. 366, 398 (1898).

29. *Id.*

30. *Id.* at 397.

Holden established the government's power to intervene on behalf of necessitous workers.

Although state courts were not bound by *Holden* in interpreting their states' constitutions, the opinion was very influential. State courts in Nebraska,³¹ Pennsylvania,³² and Washington³³ upheld maximum hours laws for women on the authority of *Holden*. The Nebraska Supreme Court, for example, reasoned that because so few occupations were open to women, there was great competition for the available jobs. This led to opportunities for employers to exploit women workers and justified legal intervention on their behalf.³⁴ Moreover, women had always been considered "wards of the state."³⁵

Meanwhile, post-*Holden* U.S. Supreme Court decisions upheld general protective labor legislation, such as laws regulating employment on public works projects and laws requiring mining companies to pay their workers in cash and not scrip.³⁶

Just when the constitutionality of most protective labor legislation seemed unassailable, in 1905 the Supreme Court decided the infamous case of *Lochner v. New York*.³⁷ In *Lochner*, the Supreme Court invalidated a maximum hours law for bakers as a violation of liberty of contract. Novkov properly understands *Lochner* as a somewhat anomalous case, rather than as a central case from which to begin an analysis of the period (p. 87). The *Lochner* opinion essentially ignored the anti-class legislation arguments made in *Lochner's* brief,³⁸ and instead focused on liberty of contract. The Court held that the states' police power did not encompass regulations that protected males working in ordinary occupations. Ordinary occupations were those that posed no special health risks to the workers themselves or to the public at large (pp. 108-110).

In *People v. Williams*, the New York Court of Appeals, relying on *Lochner*, invalidated a law that prohibited women from working at night. The court rejected the constitutionality of special regulations for women workers, propounding instead a "radical vision of equality" (p. 101). The court stated,

31. *Wenham v. State*, 91 N.W. 421 (Neb. 1902).

32. *Commonwealth v. Beatty*, 15 Pa. Super. 5, 8-9 (1900).

33. *State v. Buchanan*, 70 P. 52 (Wash. 1902).

34. *Wenham*, 91 N.W. at 425.

35. *Id.* at 424-25.

36. *E.g.*, *Atkin v. Kansas*, 191 U.S. 207 (1903) (upholding a law regulating employment on public works projects); *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23 (1901) (upholding a law requiring mining companies to pay their workers in cash); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901) (same).

37. 198 U.S. 45 (1905).

38. See David E. Bernstein, *The Story of Lochner v. New York*, in CONSTITUTIONAL LAW STORIES (Michael Dorf ed., forthcoming 2003).

[A]n adult [woman] is not to be regarded as a ward of the state, or in any other light than the man is regarded, when the question relates to the business pursuit or calling. . . . She is entitled to enjoy, unmolested, her liberty of person and her freedom to work for whom she pleases, where she pleases, and as long as she pleases [S]he is not to be made the special object of the exercise of the paternal power of the state³⁹

Meanwhile, the Oregon Supreme Court upheld a ten-hour day and sixty-hour week law for women.⁴⁰ Reformers marshaled their forces to defend this opinion. After *Ritchie*, local reform organizations had banded together in 1898 (not 1899, as Novkov states) to form the National Consumers' League as an umbrella organization to lobby for the improvement of industrial standards for workers, especially women workers.⁴¹ Florence Kelley was soon appointed general secretary and became a national force in reformist circles.⁴² Her efforts were supported by the newly formed National Women's Trade Union League, which tried to organize women workers and also lobbied for protective labor legislation (pp. 80-81). These organizations supported protective legislation for women both because they thought women workers were easily exploited⁴³ and as a step toward greater legal protections for all workers.⁴⁴

The reformists knew that the ultimate outcome of the Oregon case was crucial to their cause. The Consumers' League hired famed attorney Louis Brandeis to write a Supreme Court brief defending Oregon's maximum hours law. Brandeis apparently decided that a frontal attack on *Lochner* was too risky, even though one member of the five-vote majority in that case, Justice Henry Brown, had retired and been replaced by the more liberal William Moody.⁴⁵ Instead, Brandeis resolved to show that women workers were more like the

39. *People v. Williams*, 81 N.E. 778, 780 (N.Y. 1907); see also *Burcher v. People*, 14 Colo. 495 (1907) (overturning a law setting eight hours as the legal limit for women and children working in laundries).

40. *State v. Muller*, 85 P. 855 (Or. 1906). See generally BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 97-99 (2d ed. 1996).

41. P. 80; GOLDMARK, *supra* note 25, at 56-57; SKLAR, *supra* note 25, at 309; NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 28 (1996).

42. GOLDMARK, *supra* note 25, at 59.

43. Well-known reformer Mary Van Kleeck, for example, wrote:

[W]e are interested in the protection of women workers by wage legislation at this time, not particularly because they are women, but because they are underpaid workers and underpayment is a social menace whether the worker be a man or woman, but it happens that the condition pressed most heavily upon women at this time, and it seems to me that we should regard those conditions as unique to women.

Quoted in VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE* 93 (1994).

44. Elizabeth Faulkner Baker, *At the Crossroads in the Legal Protection of Women in Industry*, 143 ANNALS AM. ACAD. POL. & SOC. SCI. 265, 267 (1929).

45. WOLOCH, *supra* note 41, at 28.

necessitous miners of *Holden*, in need of state protection, than like the sturdy bakers of *Lochner*.

As Novkov points out, the *Lochner* Court had found that baking “was not unhealthy *either* in common understanding, or in scientific fact” (p. 108; emphasis added). The scientific facts were provided to the Court in an appendix to *Lochner*’s brief, which contained a compilation of medical, scientific, and statistical data.⁴⁶ Justice Peckham clearly relied on this appendix in writing *Lochner*, as much of his dicta about the relative safety of baking tracks information contained in the appendix, and he explicitly stated that his opinion was informed by “looking through statistics regarding all trades and occupations.”⁴⁷

Brandeis, then, knew that his job was to appeal both to “common knowledge” about the health effects of long hours on women and also to present statistical and other evidence in support of restricting women’s work hours. He prepared a brief that contained an unusually concise legal argument that focused on distinguishing *Lochner*. The rest of the brief consisted of hundreds of pages of documents supporting the view that women’s work hours should be limited. The brief attempted to support “four matters of general knowledge”: (1) women are physically weaker than men; (2) a woman’s ill health could damage her reproductive capacity; (3) damage to a woman’s health could affect the health of her future offspring; and (4) excess hours of labor for women are harmful to family life.⁴⁸ In short, the brief “treats all women as mothers or potential mothers; it either conflates the needs of families and society with those of women or prefers the former to the latter; and it depicts women as weak and defective.”⁴⁹

The evidence in Brandeis’s brief was anecdotal and unscientific. It consisted of a “hodgepodge”⁵⁰ of reports of factory or health inspectors, testimony before legislative investigating committees by witnesses such as physicians or social workers, statutes, and quotes from medical text in journals, along with similar sources. Ironically, just about the only relevant authority not cited in the brief were women workers themselves, whose views were apparently considered superfluous.⁵¹

46. See Brief for Plaintiff in Error at 50-61, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292), in 14 LANDMARK BRIEF AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (Philip B. Kunland & Gerhhad Casper eds., 1975). For a discussion, see Bernstein, *supra* note 38.

47. *Lochner*, 198 U.S. at 59.

48. This summary is adapted from Erickson, *supra* note 17, at 247. See also pp. 117-20.

49. WOLOCH, *supra* note 41, at 32.

50. OWEN M. FISS, THE TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910, at 175 (1993).

51. The only women workers whose views appeared in the brief were bookbinders and printers studied in the 1870s. WOLOCH, *supra* note 41, at 32.

Laundry owner Kurt Muller's brief, by contrast, contained a strongly worded appeal for women's equal right to freedom of contract.⁵² Muller's brief, relying on the Illinois and New York opinions invalidating protective laws for women, demonstrated the fact that "arguments for freedom of contract and sexual equality were natural allies; they were branches of the same tree, individualism,"⁵³ or, more precisely, classical liberalism. On a more pragmatic level, the "specter of protective laws now forced employers and their lawyers to develop an affinity for sexually egalitarian ideals."⁵⁴

The Supreme Court, however, was not yet ready to treat women as fully equal citizens entitled to the same degree of liberty of contract as men. The Court upheld the law in an opinion by Justice Brewer. Brewer was famously libertarian; his most memorable opinion stated: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."⁵⁵ He, along with Justice Rufus Peckham, consistently dissented in the Court's decisions upholding general protective legislation.⁵⁶

Protective laws for *women*, however, were another matter, and Brewer wrote the opinion upholding the Oregon maximum hours law. Brewer wrote that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," especially "when the burdens of motherhood are upon her."⁵⁷ Prolonged work hours had "injurious effects" on women's bodies and as "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength... of the race."⁵⁸ While women's legal rights had been extended, "there is that in her disposition and habits of life which 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."⁵⁹ Thus, the maximum hours law did not violate the right to liberty of contract. Nor was the law improper class legislation. "Woman," Brewer wrote, is "properly placed in a class by herself, and legislation designed for her

52. Pp. 97-98. Muller's brief also claimed that laundry work was not especially unhealthy, and therefore the hours law was unconstitutional under *Lochner*. P. 120.

53. WOLOCH, *supra* note 41, at 34.

54. *Id.* at 35.

55. *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

56. See David E. Bernstein, *Lochner's Legacy's Legacy*, 92 TEXAS L. REV. (forthcoming 2003).

57. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

58. *Id.*

59. *Id.* at 422.

protection may be sustained, even when like legislation is not necessary for men and could not be sustained."⁶⁰

Brandeis typically gets credit, including from Novkov (p. 128), for persuading the Court to uphold the hours law because of the data contained in his brief. Indeed, the so-called "Brandeis Brief" — heavy on sociological data and light on legal argument — became a staple of constitutional argument over Progressive reforms. The importance of Brandeis's brief in *Muller*, however, has been exaggerated. While Brewer, who certainly had no sympathy for Brandeis's progressivism, made the unusual gesture of acknowledging Brandeis's brief in a footnote,⁶¹ Brewer stated that the brief simply provided evidence of the "widespread belief" that long hours of labor were harmful to women and their progeny.⁶² Because under *Holden* and *Lochner* either common knowledge or scientific evidence was sufficient to justify a regulation that was defended as a health law within the police power, Brandeis's brief was largely superfluous.⁶³

Women reformers were elated with their victory (p. 112). They argued that protective measures would actually "enhance women's liberty by enabling women to make fairer bargains with their employers" (p. 96). Even the sexism in the opinion reflected a "maternalist" ideology that was widely accepted among the Progressive activists of the National Consumers' League and the National Women's Trade Union League.⁶⁴ To the extent they were troubled by some of the implications of the opinion for women's rights, leaders of both groups "seemed to agree that abstract commitments to liberty were secondary to the concrete task of ensuring better conditions for women's labor" (p. 96).

60. *Id.*

61. *Id.* at 419 n.1.

62. *Id.* at 420.

63. Erickson reaches the same conclusion, Erickson, *supra* note 17, at 249, as does Anne Dailey. See Anne C. Dailey, *Lochner for Women*, 74 TEXAS L. REV. 1217, 1218 (1996) ("If the Court meant what it said, the statute in *Muller* would have been upheld even without Brandeis's voluminous statistical effort . . ."). Dailey, however, errs when she argues that "the *Muller* opinion actually defied the reformist Progressive agenda by promoting an abstract ideal of the virtuous mother." *Id.* at 1217. The maternalist ideal was in fact promoted by Progressive reformers, see *infra* note 64 and accompanying text, and Brandeis's brief certainly emphasized the threat to women's maternal obligations posed by industrial labor. Indeed, one feminist author blamed Brandeis for introducing into the legal debate "the potential-mothers-of-the-race argument, an argument which, from the inevitability of its popular appeal and its imperviousness to embarrassment on grounds of scientific inaccuracy, was nothing less than a stroke of genius." Blanche Crozier, Note, *Constitutional Law — Regulation of Conditions of Employment of Women. A Critique of Muller v. Oregon*, 13 B.U. L. REV. 276, 278 (1933).

64. On the history and influence of maternalism, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

Moreover, Kelley and other reformist leaders believed that protective laws for women would eventually lead to protective laws for all workers, as had occurred in England.⁶⁵ And if some women workers were in the meantime harmed by protective legislation — after the Supreme Court ruled against Kurt Muller, he apparently fired all his women employees and replaced them with male Chinese, and later with deaf mutes⁶⁶ — that was a small price to pay to advance progressive policies.⁶⁷ Indeed, some reformers saw women workers as an obstacle to their goal of persuading society that employers should be required to pay male heads of households a wage sufficient to support their families, known in labor-union circles as the “family wage” (p. 96). The National Consumers' League opposed publicly funded daycare, healthcare for working mothers, and any other reform that might tempt women to enter the workforce.⁶⁸

Novkov, like other writers, suggests that dissension among feminists over the issue of protective legislation for women did not begin in earnest until the mid-1910s (p. 133). As early as 1906, however, a female economist wrote in the *Journal of Political Economy* that “no one should lose sight of the fact that [protective] legislation is not enacted exclusively, or even primarily, for the benefit of women themselves.”⁶⁹ Two years later, *Muller* attracted criticism from some feminists. For example, Louisa Harding, writing in *The Woman's Standard*, the official organ of the Iowa Suffrage Association, found *Muller* to be an “abominable” decision.⁷⁰ Restricting women's work hours, she argued, “practically amounts to confiscation of whatever amount would have been earned during the forbidden hours.”⁷¹

65. WOLOCH, *supra* note 41, at 9.

66. Jennifer Friesen & Ronald K.L. Collins, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 472, 472 (1983). Nancy Woloch's efforts to confirm this assertion have been unsuccessful. E-mail from Nancy Woloch to David Bernstein (Mar. 2, 2003) (on file with author).

67. See SUSAN LEHRER, ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925, at 165 (1987) (explaining that this attitude was denounced by women opponents of protective legislation); cf. ELIZABETH FAULKNER BAKER, PROTECTIVE LABOR LEGISLATION 437 (1925) (noting that advocates of protective laws for women believed that “that the few women who suffer from special protective laws should surrender their individual interests for the benefit of larger groups of women”); SANDRA F. VANBURKLEO, “BELONGING TO THE WORLD”: WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 217-18 (2001) (“reformers thought that the social advantages of state intervention outweighed losses of freedom, and they knew full well that women paid a steep price for a measure of security”).

68. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 33 (2001).

69. S.P. Breckinridge, Note, *Legislative Control of Women's Work*, 14 J. POL. ECON. 107, 108 (1906).

70. Louisa Harding, *Male Socialism*, WOMAN'S STANDARD (Waterloo, Iowa), Apr. 1908, at 2.

71. *Id.*; see also Louisa Dana Harding, *Pertinent Queries*, WOMAN'S TRIB., May 9, 1908, at 19 (suggesting that the true aim of women's labor legislation was not to protect women

III. THE ERA OF LABORER-CENTERED ANALYSIS, 1911-1923

Muller firmly established the constitutionality of women-only hours regulation. Over the next seven years, the Supreme Court issued several more rulings upholding maximum hours laws for women, including laws that limited women to an eight-hour day.⁷² Meanwhile, state courts acquiesced to *Muller* (p. 140), including courts that had previously advanced strong libertarian arguments against protective laws for women. The Illinois Supreme Court reversed *Ritchie* and upheld a new maximum hours law.⁷³ The court reasoned that “woman’s physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life,” and therefore protective legislation was within the police power.⁷⁴ The New York Court of Appeals, meanwhile, which had previously invalidated an hours law for women in *Williams*, justified a ban on nighttime work for women based on “the peculiar functions which have been imposed on [women] by nature.”⁷⁵ Cases involving protective legislation for women were now established “as a separate category within due process” (p. 138).

Opinions upholding protective laws for women focused “on women’s biological differences from men and these physical differences’ impact on women’s health” (p. 139). Many feminist reformers would have preferred the courts to instead rely on the perceived need for protection of women workers due to women’s inferior socioeconomic position, and the need for government intervention on behalf of workers more generally (p. 139). Such socioeconomic arguments soon became more prominent. The National Consumers’ League filed a brief supporting a minimum wage law for women in *Stettler v. O’Hara*.⁷⁶ The brief, authored by Brandeis, Goldmark, and

but to prevent them from being “enabled in some measure to enjoy the pleasure of an independent life”); *Against Justice Brewer’s Decision*, WOMAN’S TRIB., May 9, 1908, at 19 (reporting that the Women’s Henry George League of New York had vociferously denounced *Muller*); *Special Legislation for Women*, WOMAN’S TRIB., Feb. 29, 1908, at 16 (“The principle of sex legislation is absolutely wrong and unjust, and no superstructure of justice can be built upon it.”).

None of these early critiques by women of protective legislation appear in the bibliography of *Constituting Workers, Protecting Women*.

72. See *Bosley v. McLaughlin*, 236 U.S. 385, 392-94 (1915) (reviewing an eight-hour daily maximum for women, as applied to graduate nurses in hospitals); *Miller v. Wilson*, 236 U.S. 373, 379-82 (1915) (evaluating statutory limitations of an eight-hour day for women in a wide range of occupations); see also *Hawley v. Walker*, 232 U.S. 718 (1914) (per curiam) (upholding a maximum hours law for women on the authority of *Muller*); *Riley v. Massachusetts*, 232 U.S. 671, 679-81 (1914) (reviewing a ten-hour daily limit for women working in manufacturing or mechanical establishments).

73. *W. C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910).

74. P. 122; *Wayman*, 91 N.E. at 697.

75. *People v. Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915); see also p. 154.

76. 243 U.S. 629 (1917).

Felix Frankfurter, claimed that the law should be upheld because women were unable to negotiate effectively with their employers for a variety of biological and socioeconomic reasons (pp. 144-45). The brief also made a nongendered argument in favor of minimum wage laws, arguing that “[w]hen no limit exists below which wages may not fall, the laborer’s freedom is in effect totally destroyed.”⁷⁷ Thus, true liberty was not liberty of contract, but the right to a decent wage.⁷⁸

Although Novkov gives the *Stettler* brief a lot of attention, it may not have been especially influential. Chief Justice (and *Lochner* dissenter) Edward D. White, clearly unimpressed with the brief, sardonically remarked that he “could compile a brief twice as thick to prove that the legal profession ought to be abolished.”⁷⁹ In any event, the *Stettler* Court upheld the law in a four-four per curiam ruling with no opinion. Brandeis, who had just joined the Court, recused himself. Because he was a clear fifth vote in favor of upholding the law, the constitutionality of minimum wage laws for women seemed established, and such laws spread to states around the country.

Beyond *Stettler*, 1917 was a banner year for supporters of protective labor legislation. The Supreme Court upheld a maximum hours law for railroad workers that seemed to guarantee them an increase in hourly pay,⁸⁰ three workmen’s compensation laws;⁸¹ and a maximum hours law for all (male and female) industrial workers.⁸² The latter case, *Bunting v. Oregon*,⁸³ seemed to vindicate the National Consumers’ League’s strategy of using maximum hours laws for women as a wedge to expand the scope of these laws to include all workers. Justice McKenna wrote for the Court, “It is now demonstrable that the considerations that were patent as to miners in 1898 are today operative, to a greater or less degree, throughout the industrial system.”⁸⁴ *Holden*, and not *Lochner*, had apparently carried the day.

Meanwhile, latent feminist opposition to sex-based protective laws was gaining institutional support. The Women’s League for Equal

77. P. 145 (quoting Brief for Defendants in Error upon Reargument at 330, *Stettler*, 243 U.S. at 330 (internal quotation marks omitted)).

78. P. 168. One should note, however, as Novkov does not, that the brief also made *Muller*-type arguments to the Court. For example, the brief asserted the “mother of the race” argument, contending that “[t]he health of the race is conditioned upon preserving the health of women, the future mothers of the republic.”

79. ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 31 (1968) (quoting Chief Justice Edward D. White).

80. *Wilson v. New*, 243 U.S. 332, 341 (1917).

81. *New York Cent. R.R. v. White*, 243 U.S. 188, 202 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 224 (1917); *Hawkins v. Bleakley*, 243 U.S. 210, 212-13 (1917).

82. *Bunting v. Oregon*, 243 U.S. 426, 433-34 (1917).

83. *Id.*

84. *Id.* at 433.

Opportunity was founded in 1915 by women enraged at the displacement of thousands of women workers by New York's prohibition of night work by women.⁸⁵ Women printers, restaurant employees, and streetcar workers had been particularly hard hit.⁸⁶ Two years later, another group of women founded the Equal Rights Association to educate the general public about the negative effects of protective laws for women.⁸⁷ The National Federation of Business and Professional Women also opposed sex-based protective laws.⁸⁸

The most important opponent of protective laws for women was the National Women's Party ("NWP") (p. 133). Formerly a radical suffragist group, the NWP dissolved after passage of the Nineteenth Amendment and reconstituted for the purpose of lobbying for passage of an Equal Rights Amendment ("ERA") that would guarantee women full legal equality (p. 186). Progressive reformers, both within and without the NWP, urged the NWP to agree to except protective laws from the ERA.⁸⁹ After some hesitation, the NWP, under the leadership of Alice Paul, refused.⁹⁰ Paul and other NWP leaders believed that protective laws prevented women from entering male-dominated professions and set a dangerous precedent for other sex-based legislation.⁹¹

Consistent with the decline of classical liberalism in the United States at this time,⁹² few NWP members supported laissez-faire economic policies,⁹³ and indeed, many of them supported protective laws

85. BAKER, *supra* note 67, at 425-26.

86. *Id.* at 336, 425-26; MAURINE WIENER GREENWALD, *WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES* ch. 4 (1980); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 193-94* (1982); LEHRER, *supra* note 67, at 167.

87. BAKER, *supra* note 67, at 190. Neither of these organizations is mentioned by Novkov.

88. See Gail Laughlin, *Why an Equal Rights Amendment?*, 11 EQUAL RTS. 61, 61 (1924) (quoting a 1920 resolution of the Federation), available at <http://womhist.binghamton.edu/era/doc5.htm>.

89. Nancy F. Cott, *Feminist Politics in the 1920's: The National Woman's Party*, 71 J. AM. HIST. 43, 61-64 (1984).

90. See 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*, 78 J. AM. HIST. 188, 221-24 (1991).

91. Cott, *supra* note 89, at 56-60. For more on Alice Paul and the NWP, see AMY E. BUTLER, *TWO PATHS TO EQUALITY: ALICE PAUL AND ETHEL M. SMITH IN THE ERA DEBATE, 1921-1929* (2002), and CHRISTINE A. LUNARDINI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928* (1986).

92. See ARTHUR A. EKIRCH, JR., *THE DECLINE OF AMERICAN LIBERALISM 175-95* (1955).

93. Feminist supporters of libertarian-economic policies seem to have congregated in the League of Equal Opportunity. LEHRER, *supra* note 67, at 161-64, 213-14 (finding that

that covered all workers (pp. 187, 198), a position the NWP officially adopted during the Great Depression (p. 199). Nevertheless, the NWP's opposition to sex-based protective laws led to criticism that they de facto supported laissez-faire policies and were tools of big business.⁹⁴ NWP leaders retorted that the American Federation of Labor ("AFL") — which in the 1910s began to endorse and lobby for protective labor legislation that applied only to women, while opposing such legislation for men⁹⁵ — supported sex-based protective legislation to keep women from competing for men's jobs.⁹⁶

IV. THE ERA OF GENDERED REBALANCING, 1923-1937

The "era of gendered rebalancing" began with the case of *Adkins v. Children's Hospital*, involving the constitutionality of a federal law establishing a minimum wage for women workers in the District of Columbia.⁹⁷ The drafters of the law went out of their way to try to ensure that the law could not be deemed "arbitrary" — and therefore a violation of due process — by calibrating the required compensation with results of studies showing the wage a woman needed to earn to be able to afford necessities.

The D.C. Court of Appeals nevertheless declared the law unconstitutional as a violation of liberty of contract and women's rights. The District of Columbia hired Felix Frankfurter to defend the law before the Supreme Court. Frankfurter filed a "Brandeis Brief" containing

members of this group used arguments that "coincided with . . . old-line notions of laissez-faire capitalism"). The League, unlike the NWP, opposed gender-neutral protective laws.

Suzanne La Follette, a disciple of Albert Jay Nock, was a prominent feminist-libertarian opponent of protective laws for women and for everyone else, though, like Nock, she favored the rather odd economic theories of Henry George. See SUZANNE LA FOLLETTE, CONCERNING WOMEN 175-84 (1926) (discussing her opposition to protective legislation for male or female workers). For a brief biography, see Sharon Presley, Susanne La Follette: The Freewoman (1999), at <http://www.alf.org/papers/LaFollette.html>.

94. MEREDITH TAX, THE RISING OF THE WOMEN 201 (1980); Cott, *supra* note 89, at 62.

95. Pp. 96, 152 n.4; HART, *supra* note 43, at 78; KESSLER-HARRIS, *supra* note 68, at 69. Minimum wage legislation for women only passed where organized labor was supportive. HART, *supra* note 43, at 69, 83. A contemporary source states that by the early 1930s, the AFL was the most important supporter of protective labor legislation, and played that role to protect the jobs of its male members from women. Crozier, *supra* note 63, at 287-88. Crozier's note is one of several important sources that surprisingly do not appear in Novkov's bibliography.

96. Cott, *supra* note 89, at 61. This accusation had some merit. See, e.g., KESSLER-HARRIS, *supra* note 86, at 201-05 (describing labor unions' support of various "protective" measures for women because the unions knew the laws would lead to women's exclusion from their industries); LEHRER, *supra* note 67, at 159 (noting that the Iron Molders' Union used concerns about women's health to encourage the government to eliminate them from high-paying jobs); Jane Norman Smith, *Hours Legislation for Women Only*, EQUAL RTS., Jan. 16, 1932, at 396, 396 (noting that some labor leaders explicitly supported "protective" laws for women so that men could take their jobs).

97. 261 U.S. 525 (1923).

over one thousand pages of documentation supporting the law. Unlike Brandeis's brief in *Muller*, however, Frankfurter also spent substantial energy on legal argument. Also in contrast to the original Brandeis Brief, Frankfurter did not focus on women's purported or assumed disabilities, but instead "emphasiz[ed] the fictitious nature of freedom of contract when the employee was bargaining for a wage that did not meet her cost of living."⁹⁸ He spent only a page rebutting the lower court's suggestion that the law unconstitutionally discriminated against women. The brief relied on *Muller* for the proposition that the legislature could take differences between men and women into account. The opposing brief, meanwhile, made a strong women's rights argument, relying on information supplied by the NWP.⁹⁹

In a surprise to most legal observers, who had believed that *Lochner* was defunct after *Bunting*,¹⁰⁰ the Court revived *Lochner*¹⁰¹ and invalidated the minimum wage law. The Court suggested that the law unconstitutionally infringed on liberty of contract in a variety of ways, especially by placing an arbitrary, unfair burden on employers to support employees lacking the skills to earn a better wage.¹⁰² The Court also denounced the law as illicit class legislation disfavoring women. The Court, in dramatic language, adopted the position that women were, after passage of the Nineteenth Amendment, fully equal

98. Pp. 200-01. Other advocates of protective laws, however, continued to rely on "fundamental" "physical and biological differences between men and women" as a rationale for protective laws. *E.g.*, Frances Perkins, *Do Women in Industry Need Special Protection? Yes*, SURV. 529, 530 (1926).

99. See Zimmerman, *supra* note 90, at 220.

100. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting) ("It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case*, and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*."); 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 463 (1922) (contending that *Lochner* "if not now practically overruled, is certain in the near future to be disregarded by the Court"); Edward S. Corwin, *Social Insurance and Constitutional Limitations*, 26 YALE L.J. 431, 432 (1917) (concluding that *Lochner*'s "[c]onstitutional rigorism is dead").

101. See Thomas I. Parkinson, *Minimum Wage and the Constitution, in THE SUPREME COURT AND MINIMUM WAGE LEGISLATION* 148, 153 (National Consumers' League ed., 1925) ("[*Adkins*] suggests that the majority of the Court is disposed to return to the attitude of the Court in the *Lochner* case and to emphasize the individual's right to freedom from restraint, rather than the public welfare which justifies legislative restriction of that freedom." (emphasis omitted)); Samuel A. Goldberg, Note, *The Unconstitutionality of Minimum Wage Laws*, 71 U. PA. L. REV. 360, 365 (1923) ("Instead of following the policy of previous decisions culminating in *Bunting v. Oregon* . . . the court has reverted to *Lochner v. New York*, which has always been considered an unfortunate decision and had been supposed to have been overruled by *Bunting v. Oregon*." (footnote omitted)); Francis B. Sayre, *The Minimum Wage Decision: How the Supreme Court Becomes Virtually a House of Lords*, SURV., May 1, 1923, at 150, reprinted in *SELECTED ARTICLES ON MINIMUM WAGES AND MAXIMUM HOURS* 119, 124 (Egbert Ray Nichols & Joseph H. Baccus eds., 1936) ("Many lawyers thought that the much criticized and apparently contrary New York bakeshop decision of 1905 had long been virtually overruled The latest decision upsets any such idea.").

102. *Adkins*, 261 U.S. at 557-58.

citizens, which in turn created a presumption that laws subjecting women to special disabilities or allowing special privileges are unconstitutional. While the physical differences between men and women could justify certain types of sex-based protective labor legislation, the Court could not "accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances."¹⁰³

Novkov notes the strong equal rights language in this opinion (p. 226), but thinks it ironic that "because women now had the ability to vote, they could no longer be protected through the legislative process. . . . [T]heir political equality with men had rendered them subject to the same deprivations" (p. 226). Novkov fails to note that one of the plaintiffs in *Adkins* lost her job due to the minimum wage law,¹⁰⁴ or that minimum wage laws often price their "beneficiaries" out of the labor market by raising marginal wage rates above marginal productivity.

Novkov apparently finds *Adkins*'s women's rights argument a ploy — at best superfluous and at worst disingenuous — to cover the Court's support of reactionary economic policies.¹⁰⁵ After all, the Court continued to uphold laws regulating women's work hours, so the principle of equality was not consistently applied.¹⁰⁶ Yet *Adkins*'s author, Justice George Sutherland, had been a leading Senate supporter of the Nineteenth Amendment¹⁰⁷ and an adviser to the NWP during the ratification battle. He also advised the NWP regarding the drafting of the Equal Rights Amendment.¹⁰⁸

103. *Id.* at 553. Daniel Ernst suggests that the Nineteenth Amendment was significant to Sutherland less because it demonstrated public acceptance of women's equality, and more because the fact that women could vote opened the possibility that politicians would seek to win their votes by promising them special favorable legislation, an idea that raised concerns that purportedly protective laws would actually amount to illicit class legislation. Daniel R. Ernst, *Homework and the Police Power from Jacobs to Adkins*, 39 LAB. HIST. 417, 420-22 (1998).

104. *Adkins*, 261 U.S. at 542-43.

105. See also Sybil Lipschultz, *Hours and Wages: The Gendering of Labor Standards in America*, 8 J. WOMEN'S HIST. 114, 127 (1996) ("The Supreme Court's decision in *Adkins v. Children's Hospital* made a farce of women's equality.").

106. Just one year after *Adkins*, the Court, in an opinion also written by Sutherland, upheld a law banning night work for women because common knowledge suggested that women have weaker constitutions than men do. *Radice v. New York*, 264 U.S. 292, 293-95 (1924).

107. See Speech of Senator George Sutherland of Utah, at the Woman Suffrage Meeting, Belasco Theater 3-4 (Dec. 13, 1915):

To my own mind the right of women to vote is as obvious as my own. . . . Women on the average are as intelligent as men, as patriotic as men, as anxious for good government as men. . . . [T]o deprive them of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made of women, who should, therefore, be ruled.

Novkov provides no indication that she is aware of Sutherland's sincere support for women's rights. In this regard, she is hardly alone among feminist historians who have written about the controversy over protective laws for women. Joan Zimmerman, for example, suggests that Sutherland's support for women's rights in *Adkins* was insincere, but she provides no evidence beyond an apparent suspicion that no one with "conservative" economic views could be a true ally of women's rights.¹⁰⁹ As for Sutherland's (and the Court's) acquiescence to restrictions on women's work hours, *Muller* had established the constitutionality of such restrictions by unanimous vote only fifteen years earlier, and it would have been quite remarkable for the Court to reverse that decision.

As the Great Depression approached, the Supreme Court invalidated two more minimum wage laws,¹¹⁰ and the unconstitutionality of minimum wage legislation seemed settled. In 1935, the Supreme Court invalidated as beyond federal power the National Industrial Recovery Act, which set industrial wage codes in an attempt to raise wages and stem deflationary pressures.¹¹¹ Attention shifted to the constitutionality of state minimum wage laws, all of which applied to women only. During the Depression, some states began enforcing

108. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1014 (2002).

Felix Frankfurter attacked Sutherland's opinion as a "triumph for the Alice Paul theory of constitutional law, which is to no little extent a reflex of the thoughtless, unconsidered assumption that in industry it makes no difference whether you are a man or woman." BAKER, *supra* note 67, at 98. Other critiques also lambasted the Court's assertion of women's equality. See Goldberg, *supra* note 101, at 363 ("[T]he comfort which the court gets from the Nineteenth Amendment is unwarranted. The amendment gives women political rights, but does not for that reason render them practically and economically equal to men."); Barbara N. Grimes, Comment, *Minimum Wage for Women*, 11 CAL. L. REV. 353, 357 (1923):

Will the learned justices of the majority be pardoned for overlooking the cardinal fact that minimum wage legislation is not and never was predicated upon political, contractual or civil inequalities of women? It is predicated rather upon evils to society, resulting from the exploitation of women in industry, who as a class labor under a tremendous economic handicap.

By contrast, a defender of the decision wrote that "I feel that it is distinctly harmful to the best interests of women to limit their opportunities for employment and advancement by artificial distinctions between them and men." Charles Cheney, *Protect Individual Liberty*, 50 SURV. 220 (1923).

109. See Zimmerman, *supra* note 90, at 219-20; see also VANBURKLEO, *supra* note 67, at 229 (portraying Sutherland's invocation of the Nineteenth Amendment in *Adkins* solely in terms of his desire to preserve "laissez-faire jurisprudence" and neglecting to note Sutherland's longstanding interest in women's rights issues). For a far more sympathetic portrayal of Sutherland's opinion in *Adkins*, see HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* (1994).

110. *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (per curiam); *Murphy v. Sardell*, 269 U.S. 530 (1925) (per curiam).

111. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 521-22 (1935).

minimum wage laws that had been dormant since *Adkins*, while other states passed new legislation.¹¹²

A combination of economic hardship and several relatively liberal Hoover appointments to the Supreme Court (Cardozo, Hughes, and Roberts) suggested that the issue was ripe for reconsideration. The Hoover appointees were critical to the result in *Nebbia v. New York*,¹¹³ a 1934 case upholding a law regulating the price of bread, in which the Court by a five-four margin seemed to abandon core *Lochnerian* premises. In particular, the Court abandoned the notion that government could only regulate prices charged by "businesses affected with a public interest." Because the *Adkins* Court had analogized the government's power over the price of labor to its power over the price of goods, *Nebbia* seemed to advocates of minimum wage laws like a promising precedent.

Nevertheless, in 1936 the Court struck down New York's minimum wage law.¹¹⁴ Hoover appointee Justice Owen Roberts joined the conservative "Four Horsemen" in the five-four decision. The following year, however, Roberts switched sides, and the Court issued a broad opinion, authored by Chief Justice Charles Evan Hughes, upholding a minimum wage law for women.¹¹⁵ The Court's primary argument did not directly negate the Court's protection of liberty of contract. Instead, the Court narrowed liberty of contract's scope and signaled its acquiescence to protective laws for both men and women.¹¹⁶ The Court argued that liberty of contract was merely a subset of liberty and could be abrogated in the public interest, as other Supreme Court precedents during the *Lochner* era had shown. Given economic conditions during the Depression, the Court could not say it was unreasonable for a state legislature to try to guarantee women workers in general a living wage, even if the statutory means chosen harmed workers who could not command the minimum.¹¹⁷

112. See generally Jane Norman Smith, *Wage Laws Result in Unemployment*, SURV., Feb. 4, 1933, at 5 (discussing widespread agitation for minimum wage laws in 1933).

113. 291 U.S. 502 (1934).

114. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). The NWP had filed an amicus brief in this case, asking the Court to reaffirm *Adkins*, and arguing that women's "Magna Charta is found in the words of Mr. Justice Sutherland." Brief of Amici Curiae National Women's Party et al. at 34, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (No. 838).

115. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

116. See pp. 12, 14; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 364 (1998) ("Hughes's opinion cited *Lochner* with approval, accepted the idea that the Due Process Clause contains a principle of freedom of contract, and patiently reviewed the cases limiting this basic *Lochnerian* principle.").

117. *W. Coast Hotel Co.*, 300 U.S. at 398-400.

Hughes, echoing a portion of Frankfurter's brief in *Adkins*,¹¹⁸ also asserted that when an employer pays less than a living wage to a worker in an unequal bargaining position, the employer is implicitly relying on subsidies from taxpayers, i.e., relief payments, to sustain the worker. "The community," Hughes wrote, "is not bound to provide what is in effect a subsidy for unconscionable employers."¹¹⁹ Liberty, according to Hughes, can neither be defined as the right of a necessitous worker to make a contract for less than a living wage, nor as the right of the employer to loot the public fisc by relying on tax money to subsidize inadequate wages.

Progressives were elated with their victory in *West Coast Hotel*, but in retrospect the decision was a step backwards for women's rights. The *West Coast Hotel* Court adopted a *Muller*-like patriarchal view of women's place in society, even quoting *Muller* for the proposition that "though limitations upon personal and contractual rights may be removed by legislation, there is that in [women's] disposition and habits of life which will operate against a full assertion of those rights."¹²⁰ The sexist language in the *West Coast Hotel* opinion was unnecessary, because it seems clear that the majority's reasoning could have supported sex-neutral minimum wage laws as well. As Novkov notes, "[t]he initial focus on women as particularly vulnerable workers had enabled the logical extension of the argument that the state could intervene in any relationship of employment" once the legal system "acknowledged inequalities in bargaining power as potentially burdensome for the state" (p. 224). Although superfluous, the Court's holding that "class legislation" could be used to "protect" women was

118. Brief for Appellant in Error at xii-xliii, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (No. 795) *overruled in part by W. Coast Hotel Co.*, 300 U.S. 379 (1937). Because this argument was not briefed in *West Coast Hotel*, its presence in the opinion leads to the interesting question of whether this idea was simply "in the air" or whether Hughes was somehow influenced by Frankfurter.

119. *W. Coast Hotel*, 300 U.S. at 399-400.

120. *Id.* at 394-95 (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908)). By contrast, Sutherland wrote in dissent:

The common law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so.

Id. at 411-12 (Sutherland, J., dissenting). He added that "[t]he ability to make a fair bargain, as everyone knows, does not depend on sex. *Id.* at 413. An unidentified NWP-style feminist wrote to Sutherland: "May I say that the minority opinion handed down in the Washington minimum wage case is, to me, what the rainbow was to Mr. Wordsworth? . . . You did my sex the honor of regarding women as persons and citizens." *Quoted in WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 176 (1995).

relied upon for the next three decades to uphold the constitutionality of laws that excluded women from various occupations.¹²¹

Novkov contends that *West Coast Hotel's* reasoning permitted the Court to uphold broader workplace legislation, such as the Fair Labor Standards Act ("FLSA"). Therefore, she argues, the longstanding debate over protective labor legislation for women ultimately paved the way for modern workplace regulation. Novkov, however, exaggerates the historical importance of the *West Coast Hotel* opinion. While *West Coast Hotel* seemed very important when it was decided, its reasoning became almost completely irrelevant by the time the FLSA reached the Supreme Court in 1941. In 1937, when *West Coast Hotel* was decided by a vote of five-four, the swing votes on the U.S. Supreme Court — Roberts and to a lesser extent Hughes — were moderate *Lochnerians*,¹²² with views akin to Justice Harlan's in his dissent in *Lochner*.¹²³ If these Justices had remained the swing votes, *West Coast Hotel's* reasoning would have been crucial in subsequent litigation over labor regulations, because that reasoning expanded the states' regulatory police power without completely abdicating the judiciary's role in reviewing such legislation.

Instead, within the next several years, the Court was taken over by a wave of Roosevelt appointees, all of whom were chosen because they could be relied upon to uphold economic regulations under almost any circumstances.¹²⁴ As early as 1938, the Court famously announced its view that economic regulations did not impinge on fundamental rights, and that only laws threatening civil liberties and

121. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a law prohibiting a woman from being licensed as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment).

122. For example, Hughes and Roberts had voted with the *Lochnerian* majority in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating a law granting an ice monopoly). A year after *West Coast Hotel*, Roberts relied in part on the Due Process Clause in arguing for the unconstitutionality of regulatory legislation in his opinion in *United States v. Rock Royal Co.-op. Inc.*, 307 U.S. 533, 587 (1939) (Roberts, J., dissenting):

As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law.

See generally G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 218-25 (2000) (arguing that Hughes never completely abandoned "guardian review" of economic regulations).

123. Despite his dissent in *Lochner*, Harlan was a "*Lochnerian*" in the sense that he believed that liberty of contract was a fundamental right that should be protected from arbitrary government regulations. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (Harlan, J.) (invalidating a federal law prohibiting the enforcement of "yellow dog" contracts). He was moderate in the sense that he generally, but not always, deferred to state claims that particular regulations were not arbitrary because they were within the state's police power.

124. See LEUCHTENBURG, *supra* note 120, at 220 (discussing Roosevelt's choice of "faithful lieutenants" to fill the many vacancies that occurred between 1937 and 1941).

civil rights would receive anything more than the most limited scrutiny.¹²⁵ Contrary to Novkov's claims, there is little doubt that had the debate over protective legislation for women never occurred, the Roosevelt Court would still have upheld the FLSA and other New Deal labor legislation with no hesitation, just as it overturned 150 years of Commerce Clause jurisprudence in cases such as *Wickard v. Filburn*.¹²⁶

V. FURTHER ANALYSIS

Constituting Workers, Protecting Women has some important strengths. Novkov deserves praise for considering such a wide range of *Lochner* era cases and for reading many of the related legal briefs, an often overlooked but extremely important source for constitutional history. Novkov also provides some compelling analysis. For example, she is one of the few scholars to recognize that *Holden v. Hardy*, and not *Lochner v. New York*, was the leading case on the constitutionality of protective labor legislation for much of the so-called *Lochner* era. The book is also very good at its primary task — explaining how considerations of sex affected legal arguments regarding protective laws for workers during the period studied.

On the other hand, several flaws make *Constituting Workers, Protecting Women* less valuable than it might have been. First, Novkov pays almost no attention to any form of economics. Admittedly, this is an endemic problem among nonquantitative social scientists in general, and historians of labor especially, so it is hard to blame Novkov for merely meeting the professional norm.¹²⁷

Nevertheless, just a little economic analysis could have added a great deal to the book. For example, Novkov never seriously considers whether economic logic suggests that maximum hours laws or minimum wage laws that applied only to female workers actually aided them. Novkov acknowledges that some women's rights advocates argued that applying minimum wage laws to women only benefited male competitors by limiting women workers' ability to compete with men. But Novkov never considers an even more basic case against special minimum wage laws — that in a free labor market, workers are paid a wage close to their

125. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

126. 317 U.S. 111 (1942).

127. The author of this Review has used economics in his own work on labor and constitutional history. See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURT FROM RECONSTRUCTION TO THE NEW DEAL* (2001); David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 290 (1999).

More generally, economics is finally attracting the attention of legal historians. See Ron Harris, *The Encounters of Economic History and Legal History*, 21 L. & HIST. REV. 297 (2003); Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. ILL. L. REV. 1167.

marginal productivity.¹²⁸ Employers faced with a minimum wage law will necessarily dismiss their employees who are covered by that law if the mandated wage exceeds long-term marginal productivity.

Novkov seems to accept uncritically the position of *Lochner* era Progressives that women industrial workers had special disadvantages in the labor market — primarily, that most of them were young, single women who quit once they got married — that made them unusually dependent on their employers. Moreover, reformers of the *Lochner* era, and even some skeptics of the reformers' legislative goals,¹²⁹ were convinced that workers' wages and working conditions only improved because of pressure from labor unions, and not because of productivity increases. The fact that few women joined or were welcome in labor unions therefore suggested to reformers that women were particularly vulnerable to exploitation.¹³⁰ Under such circumstances, in the absence of wage legislation protecting them, it was thought that women workers would accept any wage short of starvation, even when their productivity would have justified a much higher wage.

Yet modern economic theory suggests, and economic studies show, there is no correlation between overall wage levels and unionization. Rather, wage growth tracks productivity.¹³¹ Novkov, meanwhile, presents no evidence that women workers during the *Lochner* era were paid significantly less than their marginal productivity. In short, Novkov does not seriously address the economic consequences of "protective" legislation from the perspective of either economic theory or economic history.

Novkov also fails to discuss the empirical evidence regarding the effect of sex-specific protective labor laws on women workers.

128. See sources cited *infra* note 131 (explaining that wages are correlated with productivity).

129. See, e.g., Elizabeth Faulkner Baker, *Do Women in Industry Need Special Protection? We Need More Knowledge*, SURV., Feb. 15, 1926, at 531, 532 (arguing that because of low overall rates of unionization, "[t]here are many more men than women who are unable to demand human and economic justice before their employers").

130. Perkins, *supra* note 98, at 530 (explaining that women need protective laws because women do not recognize the benefits of labor unions, so it "will be a very long time before trade unions can force the desired industrial conditions for women"). See generally CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 198 (1990) (recounting that many advocates of protective legislation for women saw such legislation as "an indispensable substitute for collective action by women workers").

131. F.A. HARPER, WHY WAGES RISE (1957); HENRY HAZLITT, ECONOMICS IN ONE LESSON 140 (1979); CAMPBELL R. MCCONNELL, ECONOMICS 651 (10th ed. 1987); DOUGLASS C. NORTH, GROWTH AND WELFARE IN THE AMERICAN PAST 179 (1966); LLOYD G. REYNOLDS ET AL., LABOR ECONOMICS AND LABOR RELATIONS 301, 314 (9th ed. 1986). Economists have found that to the extent that unions raise the wages of their members, the long-term gains come largely, perhaps solely, at the expense of other workers. ALBERT REES, THE ECONOMICS OF TRADE UNIONS 87-89 (3d ed. 1989). In industries with female workforces, any long-term gains from unionization would likely have come at the expense of other female workers.

Admittedly, this evidence is scanty, but Novkov does not cite, either in the text or bibliography, any of the published evidence.¹³² Novkov also shows no interest in the public choice aspects of protective labor legislation for women, noting only in passing that protective legislation was often promoted by labor unions that excluded women to prevent them from competing for jobs held or sought by union members.¹³³

Questions of political economy are not the focus of *Constituting Workers, Protecting Women*, but it's hard to see how one can adequately cover the relevant subject matter without at least briefly examining these issues, if only to understand the mindset of important individuals such as Justice Sutherland who sincerely opposed protective legislation and also supported women's rights. If Novkov had considered economic issues more closely, she might have been more sympathetic to Justice Sutherland's opinion in *Adkins*, which was the strongest statement on behalf of women's equality in a majority opinion of the United States Supreme Court for decades to come.¹³⁴

A second problem with *Constituting Workers, Protecting Women* is that its perspective on constitutional change overemphasizes the importance of legal argument at the expense of both important personalities and crucial political developments. Novkov never notes, for examples, that the relative progressiveness of the 1910s Supreme Court was largely a result of relatively pro-regulation Theodore Roosevelt, William Howard Taft, and Woodrow Wilson appointees, as well as the Progressive spirit of the age. The Court's aggressive anti-statism of the 1920s, meanwhile, resulted from President Warren Harding's appointment of four relatively antistatist Justices during his

132. See Elizabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476, 478-80 (1980) (arguing that maximum hours laws reduced women's employment, especially among immigrant women); cf. Claudia Goldin, *Maximum Hours Legislation and Female Employment: A Reassessment*, 96 J. POL. ECON. 189, 190 (1988) (disputing Landes's conclusion); Nancy Breen, *Shedding Light on Women's Work and Wages: Consequences of Protective Legislation* 170, 190-91 (1988) (unpublished Ph.D. dissertation, New School for Social Research) (on file with author) (concluding based on study of the San Francisco labor market that protective legislation served to exclude women only from high-wage jobs where women had no traditional presence, while improving women's lot in other fields). The Women's Bureau of the Labor Department of the federal government, which depended on the support of labor unions and reformist women's groups for its existence, issued a report in 1928 claiming that protective laws created only minimal unemployment for women and aided the vast majority who retained their jobs. This report, and various problems with its validity, are discussed in KESSLER-HARRIS, *supra* note 68, at 210-11.

133. The coalition between Progressive activists and self-interested labor unions is an example of a classic "Baptists and Bootleggers" coalition, in which do-gooders and special interests combine forces to endorse legislation (such as Prohibition) that the "Baptists" believe to be morally worthy and the "Bootleggers" believe will benefit them economically. See Bruce Yandle, *Bootleggers and Baptists in Retrospect*, REGULATION: CATO REV. BUS. & GOV'T, 1999 Issue No. 3, at 5.

134. Siegel, *supra* note 108; see also Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175 (1993).

short tenure and from reaction against the statism of World War I, but Novkov never mentions these factors. Indeed, and remarkably for a book (by a political scientist!) about constitutional law that culminates in the New Deal era, Franklin Roosevelt's name does not appear in the index.

Novkov even ignores FDR's 1937 court-packing plan, which some historians believe was critical to breaking up the Court's anti-regulatory majority.¹³⁵ Nor is the reader ever made aware of the existence of Justice Owen Roberts, whose vote in *West Coast Hotel v. Parrish* swung the Court from a five-four majority against minimum wage laws to a five-four vote in favor of upholding them. A reader of *Constituting Workers, Protecting Women* could reasonably assume that Novkov thinks that such crucial people and events were mostly irrelevant.

A third problem with *Constituting Workers, Protecting Women* is that Novkov — perhaps getting a bit carried away with her research project — overstates the importance of the debate over protective laws for women in the general debate over the constitutionality of police power legislation more generally. The exaggerated import she attributes to *West Coast Hotel* has already been noted. To take another example, Novkov states that “the bulk of the discussion” in courts about due process jurisprudence between 1923 and 1937 “centered around minimum wages for women” and “the public focused attention on these cases” (p. 185). It's true that the controversy over minimum wage laws for women never petered out completely, and that the minimum wage issue was at the forefront of public debate in 1936 and 1937.

Nevertheless, it is a gross exaggeration to assert that the public and judicial discussion regarding due process jurisprudence “centered” on sex-based minimum wage laws for the whole 1923-1937 period. During this time, the Court decided many other extremely important and controversial cases under the Due Process Clause. The Court, for example, determined the constitutionality of such controversial and economically significant regulations as residential zoning,¹³⁶ the Transportation Act of 1920,¹³⁷ the Railway Labor Act,¹³⁸ and mandatory resolution of industrial disputes through government-imposed

135. This conventional understanding of the “switch in time” has been called into serious question by modern research. See, e.g., Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1896 (1994).

136. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

137. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456 (1924).

138. *Texas & New Orleans R.R. Co. & N.L.R. Co. v. Bhd. of Ry. Clerks*, 281 U.S. 548 (1930).

arbitration.¹³⁹ The Court also expanded its due process jurisprudence to non-economic areas, holding in *Meyer v. Nebraska*¹⁴⁰ that the Due Process Clause protects the rights "to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience,"¹⁴¹ along with other "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹⁴² *Meyer*, in turn, became the basis for other controversial decisions protecting civil liberties.¹⁴³

Constituting Workers, Protecting Women would have benefited from a more attention to such context, and more perspective in general. The debate over protective legislation for women played a very important and interesting role in American constitutional, labor, and women's history. Its significance does not need to be embellished to justify the attention Novkov pays to it.

CONCLUSION

Despite the reservations noted above, and the fact that the book would have benefited from a good editor, *Constituting Workers, Protecting Women* is recommended for readers interested in constitutional and women's history. While it does not deliver everything the author promises, or that this reviewer would have liked to have seen, it is a cogent account of an important legal and historical controversy. The definitive book on protective labor legislation and women during the *Lochner* era, however, remains to be written.¹⁴⁴

139. *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923).

140. 262 U.S. 390 (1923) (invalidating a law banning schools from teaching German).

141. *Meyer*, 262 U.S. at 399 (internal citations omitted).

142. *Id.* at 400 (citations omitted).

143. *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the Due Process Clause includes the right to counsel in capital cases, and invalidating the conviction of the "Scottsboro Boys"); *Stromberg v. California*, 283 U.S. 359 (1931) (invalidating a law banning display of the Communist flag); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating a law banning Japanese-language schools in Hawaii); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating a law banning private schools).

144. Nancy Woloch's book on *Muller v. Oregon* is not definitive, but it is recommended as an excellent and concise introduction to the controversy over protective legislation for women. See WOLOCH, *supra* note 45.