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Introduction

In January 1908, the Supreme Court considered the case of Curt Muller, owner of a Portland laundry that had kept a woman employee at work overtime. Convicted of violating an Oregon law of 1903 that barred the employment of women in factories and laundries for more than ten hours a day, Muller challenged the constitutionality of the law, which, he claimed, violated his right to freedom of contract under the due process clause of the Fourteenth Amendment. Representing the state of Oregon, lawyer Louis D. Brandeis argued that freedom of contract could be curbed by the state to protect the health and welfare of its people. In a lengthy brief, the famous "Brandeis brief," he presented a barrage of "facts" to show the relationship among long hours, worker health, and public welfare. Overwork, the brief contended, "is more disastrous to the health of women than of men, and entails upon them more lasting injury." Furthermore, "the deterioration is handed down to succeeding generations" and "the overwork of future mothers thus directly attacks the welfare of the nation." Six weeks later, the Court unanimously upheld the Oregon law. "As healthy mothers are essential to vigorous offspring," declared Justice David J. Brewer, "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."¹

To progressive reformers, *Muller v. Oregon* was a momentous triumph. Three years before, their campaign for protective laws had been thwarted by the ominous decision in *Lochner v. New York* (1905), in which the Supreme Court rejected a ten-hour law for bakery workers. The Oregon case, which legitimized maximum-hours laws for women workers, was a turning point. By gaining acceptance for "sociological jurisprudence" — consideration by courts of social and economic data — the Brandeis brief opened a channel through which new protective laws could be steered; by winning protection for women in industry, reformers inched closer to a broader goal, protection by the state of all workers. Their drive to curb industrial abuse ultimately led, in the New Deal, to

federal laws that provided maximum hours, minimum wages, and other parts of the progressive agenda. A long trail of scholarship, launched by the progressives themselves, applauds their achievements, among which the Brandeis brief and the *Muller* decision loom large. Well into the 1960s, *Muller v. Oregon* seemed to be a “judicial landmark unscarred by criticism.”²

More recently, however, *Muller*'s stock has plummeted. Fueled by the feminist movement of the 1960s, a new generation of analysts points to another facet of the *Muller* decision: It embedded in constitutional law an axiom of female difference. Women, said the Brewer opinion, could be treated as a class in different ways than men. Protective laws that treated women workers as a separate class remained in effect for six decades, until toppled by a legal revolution in the 1960s and 1970s. Moreover, the principle of sex as a valid basis of classification served as a rationale for discriminatory laws in other fields from family law to criminal law. To feminist critics, the progressive achievement in *Muller v. Oregon* has come to represent a colossal mistake. The *Muller* decision now seems a repository of retrograde ideas that harmed women more than they helped and consequently impeded the arrival of sexual equality. “Beyond any doubt *Muller* opened the door to gender bias in protective legislation,” writes historian Joan Hoff in one of the more temperate critiques. “In retrospect . . . it is possible to question the long-term wisdom of the Brandeis approach in *Muller*.”³

Muller v. Oregon thus leads a double life in constitutional history — as both a step forward on the road to modern labor standards and a step backward away from sexual equality. Why did the struggles for workers' rights and women's rights collide? The answer to this question spans the twentieth century, for the *Muller* case had both complex origins and long-term consequences. The story opens around the turn of the century, when progressive reformers sought remedies to problems posed by industrialization. We turn first to the campaign for protective laws, the goals and tactics of reformers, and the progressive strategy of the “entering wedge” — the use of sex-specific laws to gain a foothold from which to pursue a larger legislative agenda.