

South Dakota Newspapers, #7
"We the People"
October 8, 2022

"Muller v. Oregon: Protection for Women in
the Workplace"

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The U.S. Supreme Court's long, tortured road to recognizing women's constitutional rights in the late 20th Century was preceded by victories based, not on the principle of their equality, but on the perception of their inferiority. The Court had laid the groundwork in *Bradwell v. Illinois* (1873), by declaring women weak and therefore unfit for the practice of law. Their place, said the High Tribunal, was in the home. They required protection from the ugly occupations of civil life.

In 1908, the Court, in *Muller v. Oregon*, rendered a historic decision that upheld the state's law that prohibited women from working in laundries and factories for more than ten hours a day. The Court's decision transformed the law for American workers by permitting states to impose basic labor standards in the marketplace. It was a pathbreaking decision that poured the foundation for New Deal laws that would win victory in the Supreme Court for federal laws governing maximum working hours and minimum wages, and other measures that had been long term goals of reformers who sought to curtail industrial abuse.

Curt Mueller was the owner of a Portland, Oregon laundry. He had been convicted for violating the state's maximum working hour law when he kept a female employee at work beyond the 10-hour limit. Muller challenged the constitutionality of the law on grounds that it violated his freedom of contract under the Due

Process Clause of the 14th Amendment. He was convinced of the merits of his position since the Court, in 1905, in *Lochner v. New York*, had declared unconstitutional a law that barred bakery employees from working more than 60 hours per week.

Louis Brandeis, one of the nation's eminent attorneys, and destined for a seat on the Supreme Court, represented Oregon. He argued to the Court that *Lochner* permitted regulation of the workplace in those circumstances where a genuine health interest was at stake. Brandeis told the Court that employment in a laundry raised real concerns about the health and welfare of its employees. Brandeis presented overwhelming "facts" in a long brief—the famous "Brandeis Brief" -- about the relationship between long hours, worker health and the public welfare. He argued that "overwork" is "more disastrous to the health of women than of men and entails upon them more lasting injury." In addition, "the deterioration is handed down to succeeding generations" and the "overwork of future mothers thus directly attacks the welfare of the nation."

The Court, in an opinion written by Justice David Brewer, unanimously upheld the Oregon law. The Court, for the first time in its history took "judicial notice" of the sociological "facts" presented in the Brandeis Brief. The Court was fairly mesmerized by Brandeis's presentation. Its embrace of the emerging school of sociological jurisprudence—consideration by courts of social and economic data—charted a new method for attorneys to write briefs and present their cases to the Court. From that point forward, attorneys' briefs routinely provided data from the life of America, beyond the pertinent facts integral to the legal issues. Justice Brewer wrote: "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."

In Muller, the Court for the first-time treated women as a separate class, and not, under the cover of their husbands, as the lingering doctrine of coverture had provided. This was progress, of course, for it gave women standing before the law, but "female exceptionalism," that is, "single sex" protections would prove to be a two-edged sword. After all, separate considerations of and for women, advanced the premise of "female difference."

The premise of "female difference," or sex or gender as a legitimate classification --on the basis of sex--served as a rationale for many discriminatory laws in various fields for the next several decades, well into the 1950s and 1960s. Feminist critics could say that the Muller decision, and thus the Brandeis Brief, laid a path for gender bias in protective legislation. The principle of gender equality, they could say, was harmed by separate treatment of women.

Yet, Brandeis employed a strategy for victory--victory for his client, the state of Oregon, and the long-term goal of improving the lives of all industrial workers through laws that would limit hours, improve factory conditions, raise wages and advance occupational safety. Brandeis's supporters agreed that he could not win his case through a frontal assault on the freedom of contract doctrine, for the Court in Lochner, just three years before Mueller, had given it a full head of steam. If Brandeis, however, could win from the Court a ruling that upheld state authority to impose basic labor standards, would that not be significant enough to open the door for more opportunities to work on behalf of labor? Don't we often say that half a loaf is better than none? Brandeis thought so.

Brandeis could scarcely imagine a nation in which women, and a few good men, could take up the cudgels on behalf of full-blown gender equality. Indeed, how many could, even during the heyday of the Warren Court, when the Justices were rendering decisions that struck down racial barriers, but not gender barriers?