

Introduction



PROTECTIVE LABOR LEGISLATION lies at a crossroads where women's history and legal history converge. At the end of the nineteenth century, progressive reformers launched a campaign to improve the lives of industrial workers—to limit hours, raise wages, ameliorate working conditions, and promote occupational safety. A mix of popular, legislative, and judicial resistance impeded the passage of laws that affected men in the workforce. Laws to protect women and children, however, surged to the top of reformers' agendas; women who pressed for such measures assumed central roles in progressive reform. In the first two decades of the twentieth century, most states passed not only laws to regulate child labor but also at least some type of women's labor laws, that is, measures to provide maximum hours, minimum wages, night work bans, or occupational exclusions. Such laws, their advocates claimed, would redress the special disadvantages that women faced in the labor market. They would also provide an "entering wedge" for more "general" laws that affected men—a beachhead from which to promote labor standards for all employees.

Over the course of the twentieth century, the "entering wedge" strategy both succeeded and failed. A legal revolution in the New Deal vindicated the reformers' efforts: the Fair Labor Standards Act of 1938 provided labor standards for men and women and laid a foundation for the modern regulatory state. Women-only protective laws thus served a major purpose that their proponents had envisioned. The reformers' triumph, however, had a downside. The Progressive Era left in its wake scores of state protective laws that treated women as a separate class, that confirmed and perpetuated a gendered division of labor, and that remained in place for decades to come. In the 1920s, the laws evoked heated conflict among activist women who debated the merits of protection versus the unknown impact of a proposed equal rights amendment. The debate persisted, though with wavering intensity, until the 1960s, when a second legal revolution, catalyzed by Title VII of the 1964 Civil Rights Act, led to the death of single-sex protective laws. The long history of protective legislation in the twentieth century, in short, embraces two issues: 1. Whether the state can regulate conditions of employment, and 2. Whether women are different or equal under law. Political and judicial upheavals ultimately resolved both issues, though vestiges

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of the disputes once linked to each survive today—in efforts to extend or revoke workplace standards or in debates among feminists over strategies to insure equality.

This book explores the development and impact of single-sex protective labor laws from their origins at the end of the nineteenth century to the 1990s. It considers the context in which they arose, the goals of their proponents, their effects on employers and employees, the resistance they faced, the feuds they provoked, the factors that led to their collapse in the 1960s and 1970s, the debates that persisted until (and even after) their death, and their many ramifications over time—in politics, the workplace, the women's movement, the labor movement, and the legal system. Of special concern: the personnel of protection—the groups of reformers, social scientists, labor leaders, lawyers, and judges who shaped protective policies; the women's institutions and bureaucracies that sustained protective laws, notably the National Consumers' League and the Women's Bureau; the growth of a feminist opposition; the ways in which women workers affected by protective laws responded to them; and above all, the constitutional conversation that protective laws generated—the decades of argument over the laws, in the courts and outside them. Embracing two parallel fields of scholarly inquiry, this study underlines the points at which legal history and women's history intersect and explores the circuitry that connects them. The legal process and constitutional questions unquestionably shaped protectionists' options and tactics, though the road ran two ways; activist women also shaped—and then reshaped—the law.

Why did single-sex protective laws remain in place for so long and why did the women's movement that had long endorsed such laws eventually reject them? The longevity of protective laws rests in part on reformers' bifocal defense. The goal of such laws, their proponents claimed, was to compensate for women's disadvantages in the labor market *and* to serve as the linchpin of a larger plan to achieve wage-and-hour standards for all employees. This double-planked rationale (though contradictory) proved versatile and enduring; it suited constituents with varied priorities. Protective laws' longevity also rested on effective social feminist organization and, after 1920, on the federal Women's Bureau, an invaluable bulwark. But in retrospect, single-sex protective laws were an unwieldy means to achieve egalitarian ends—or what women reformers of the 1920s called “industrial equality.” The laws failed to redress disadvantage, critics charged, and even compounded it. Protection's supporters also confronted developments they could not anticipate and shifts in attitude they could not foresee. Was the downfall of single-sex protective laws inevitable or an accident? The laws'

decline rested in part on reformers' success: the expansion of "general" labor standards in the 1930s both validated and undercut the rationale for single-sex laws. World War II and especially the postwar economy changed the context in which protective laws applied; steady, incremental growth of the female labor force, a growth that accelerated after the war, reshaped attitudes toward single-sex protective laws in contradictory ways. But the laws never lost their constituency. Postwar women workers found reason to appreciate facets of protective laws as well as to challenge them. A growing conflict involved the practice of "overtime," first mentioned in law in 1913. The death of women-only protective laws in the late 1960s and early 1970s, which took place mainly though not exclusively in federal court, was surprising and dramatic; few expected the sudden confluence of circumstances that imperiled the laws. The end of single-sex protective laws—like much of their history—rested in part on unpredictable developments and unintended consequences.

Questions proliferate. Were proponents of protection, such as Florence Kelley and her associates in the National Consumers' League, misguided in their defense of sexual difference and their commitment to the family wage? Did the next generations of social reformers inherit a flawed ideology and vulnerable mission? Were their nemeses in the National Woman's Party of the 1920s and thereafter, in contrast, heralds of laissez-faire individualism and instruments of conservative legal strategies? Did single-sex laws improve the lives of employed women, and if so, under what circumstances? Does classification by sex invariably stigmatize those so classified and increase disadvantage? Alternatively, does gender-neutral law run the risk of denying difference, increasing inequality, and requiring conformity to standards set by men?

The historiography of women-only protective laws starts with the economists and social scientists who began their careers in the Progressive Era. Scholarly studies of single-sex protective laws date back to the 1920s and 1930s; major works include those by economist Elizabeth Faulkner Baker (1925), the US Women's Bureau (1928), reformer Clara Mortenson Beyer (1929), and economist Elizabeth Brandeis (1935). In recent decades, among historians, single-sex protective laws have started to receive explicit attention, first, because current scholarship has moved women who promoted protection from the margins to the center of progressive reform; second, because controversy has erupted among scholars over the nature of these reformers' achievements; and third, because the story of single-sex protective laws offers an instance in which gender affects the course of "general" history. Controversial in the past, the subject of protective laws remains a

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minefield of clashing interpretation. I began my inquiry into this subject with a study of one of the major cases in the history of protective laws, *Muller v. Oregon* (1908). My exploration of *Muller* (continued here) introduced me to the constitutional issues that shape protective policies. Drawing on recent publication, I have profited from the analyses of many scholars in history, law, and social science.

This book is a narrative history. It tells a story, one that continues over many decades; each chapter overlaps the one that precedes it. Chapter 1 describes the context in which the Progressive campaign for protective laws arose; it assesses reformers' rationales and the opposition they faced. Chapter 2 discusses how the courts shaped protective policy from the 1890s to 1907. Chapter 3 assesses *Muller v. Oregon* (1908), its significance, and the law it upheld, Oregon's ten-hour law of 1903. Chapter 4 examines *Muller's* aftermath in legal history through the landmark case of *Adkins v. Children's Hospital* (1923). Chapter 5 revisits *Adkins* and considers the feud over protective laws that arose in the women's movement in the 1920s. It also assesses studies about the enforcement and impact of protective laws. Chapter 6 surveys changes in federal and state protective policies from the New Deal through the 1950s; these crucial decades encompass the major triumph of the "entering wedge" strategy and some subsequent turning points in protection's history. Chapter 7 covers the rise of feminism in the 1960s and the downfall of single-sex protective laws. Chapter 8 explores the legal challenges that workplace pregnancy posed in the 1970s and 1980s; the Supreme Court definitively rejected the protective rationale in 1991. A concluding chapter considers the nature of protective law, the crucial historical issue of over-time, and public policy after the dismantling of women-only protective laws. Throughout, I hope, the chapters restore a sense of contingency, identify lost opportunities, and illuminate areas of conflict, which abound. It is now over a century since the *Muller* decision declared woman "in a class by herself" under law, and several decades since the states, the courts, and the federal government discarded the *Muller* principle. Still, the arguments over single-sex protective laws radiate energy, vie for attention, and compel engagement.