CHAPTER 1

Women Seek Constitutional Equality

WOMEN AND U.S. LAW BEFORE THE FOURTEENTH AMENDMENT

The nineteenth-century women's movement began with the first Women's Rights Convention in Seneca Falls, New York in 1848. At this time, the legal and social obstacles discussed in the Introduction were pervasive in every state of the union. The nineteenth-century women's rights movement (assisted by allies with a variety of motivations) succeeded in attaining state legislative elimination of the vast majority of the married women's property restrictions between 1850 and 1900. (For a discussion of Supreme Court amelioration of late-twentieth-century remnants, see *Orr v. Orr* [1979] and *Kirchberg v. Feenstra* [1981] in Chapter 5.) The Fourteenth Amendment and the democratic process eventually made it possible to remove other obstacles, but the change came slowly and with much travail.

Many Americans assume that any statute that strikes them as fundamentally unjust must be somehow unconstitutional; indeed, their chances of convincing federal judges on the point have increased dramatically since the nineteenth century. That increase would not have been possible without three specific developments of the post-Civil War period: the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) amendments to the U.S. Constitution. Before those amendments were adopted, although the federal government was hemmed in by various clauses, including the Bill of Rights (the first 10 amendments to the Constitution), state governments were left almost entirely unfettered by the Constitution.[1] Most of the legislation affecting our daily lives is state legislation, and state governments were originally free to infringe on freedom of speech, to establish religions, to try people without giving them lawyers, and to treat various groups of persons—including women—as unequally as they pleased. During the nineteenth century, state governments did all these things and many others that

seem equally shocking to us in our twenty-first-century notions of the Constitution.

The post-Civil War amendments changed this situation, placing the shield of the national Constitution between the basic citizen rights of individuals and the potentially tyrannical government of their own states. The Thirteenth Amendment freed the slaves, and the Fifteenth Amendment prohibited states from depriving persons of the right to vote on the grounds of race or previous servitude. The Fourteenth Amendment cast its net more broadly, encompassing what might be viewed as the fundamental rights of citizenship, or even the fundamental rights of life within a free and just society. It contains three clauses that together shouldered the burden of most of the important constitutional litigation of the twentieth century:

1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

2. nor shall any state deprive any person of life, liberty, or property without due process of law;

3. nor deny to any person within its jurisdiction the equal protection of the laws.

Reference is made to these three clauses so frequently that they are called simply (1) the privileges or immunities clause, (2) the due process clause, and (3) the equal protection clause. Although the privileges or immunities clause seems to sweep the most broadly of the three, its efficacy was drastically undermined in early Fourteenth Amendment litigation. This left to the two remaining clauses the job of protecting civil rights and civil liberties against state governmental interference. Indeed, the task of protecting women's rights, as well as of protecting virtually all other constitutional rights, has fallen on the due process clause and the equal protection clause.

THE PRIVILEGES OR IMMUNITIES CLAUSE: THE *SLAUGHTERHOUSE CASES* (1873)

Women's rights litigation is about as old as Fourteenth Amendment litigation. The first women's rights case, *Bradwell v. State of Illinois* (1873) (see below), was decided by the Supreme Court in 1873 on the day after the Court had handed down its first Fourteenth Amendment decision in the *Slaughterhouse Cases,* 83 U.S. 36 (1873). In the *Slaughterhouse Cases*, the Court laid down the basic rules of the game for future Fourteenth Amendment litigation—rules effective, to some

extent, today. The basic impact of those cases was to decimate the privileges or immunities clause as a potential grounds for attacking state statutes.

The cases arose out of challenges by a number of butchers to a Louisiana statute that granted to a single corporation located in a prescribed area a 25-year monopoly for maintaining "slaughterhouses, landings for cattle and stockyards" within the metropolitan area surrounding and including New Orleans. Under this 1869 statute, butchers who wanted to continue to carry on their trade in the New Orleans area had to rent facilities from the monopoly at rates regulated by the state. Louisiana's rationale for passing the law was to protect the general population from the unpleasant fumes, sounds, and other disturbances associated with the slaughtering of animals by limiting those activities to a single, narrowly circumscribed area of town. The butchers argued that this law should be voided on several constitutional grounds; they claimed that it established "involuntary servitude" in violation of the Thirteenth Amendment and that in violation of the Fourteenth Amendment it abridged their "privileges or immunities" of American citizenship, took their liberty and property without due process of law, and denied them equal protection of law.

The Thirteenth Amendment argument did not impress the Court. The majority simply dismissed as implausible the claim that a law restricting the slaughtering of cattle to a single part of the city, even if it did grant monopoly privileges to some, somehow placed the non-monopolists in a state of servitude. To answer the Fourteenth Amendment privileges or immunities argument, the Court had to work a little harder. An 1823 federal circuit court case had interpreted the words *privileges and immunities* rather broadly, although the precedent involved not the Fourteenth Amendment but the privileges and immunities clause of Article IV (which calls for granting to out-of-staters "the privileges and immunities of citizens of the several states"). *Corfield v. Coryell* (1823) had established that this phrase referred to

> those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless, to such restraints as the government may prescribe for the

> general good of the whole; the right of a citizen of one State to pass through, or reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.[2]

The four dissenters in *Slaughterhouse* argued that *Corfield* and later Supreme Court cases established that one's right to pursue a livelihood, and all other privileges that are so basic that they "belong of right to the citizens of all free governments," were now to be shielded by the Fourteenth Amendment from any harm one's own state government might attempt upon them. In other words, all those protections that the Article IV privileges and immunities clause created for citizens traveling into new states, the Fourteenth Amendment privileges or immunities clause now provided for citizens vis-a-vis their home-state governments. State governments would no longer be allowed to create and abolish civil rights according to their whims; civil rights of Americans would become truly nationalized. This was a radical shift in the governmental structure of the United States (although its being radical is not surprising if one recalls that the country had just fought a protracted and bloody Civil War over the states' rights question). It was such a radical shift that the Supreme Court majority in *Slaughterhouse* refused to acknowledge that it had taken place.

Instead, Justice Miller wrote for the majority that the language of the Fourteenth Amendment privileges or immunities clause had not unequivocally signaled an intent to impose such a radical change on the governmental structure:

> When, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments . . . in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; . . . in the absence of language which expresses such a purpose too clearly to admit of doubt we must reject the "radical" interpretation.[3]

What, then, did Justice Miller make of the privileges or immunities clause? The answer is a simple one: not much. He argued that the Fourteenth Amendment phrase "privileges or immunities of citizens *of the United States*" meant something different from the notion of fundamental civic rights expressed in the Article IV phrase "privileges and immunities of citizens *of the several states*." The Fourteenth Amendment, he maintained, safeguarded only the rights of *national* citizenship (a collection he very narrowly circumscribed). The basic civil rights described in *Corfield v. Coryell* he placed in the category of *state* citizenship rights, and these, he claimed, lay out of reach of the Fourteenth Amendment.

As for the content of those national citizenship rights, he explained that they were the special rights accorded to Americans by virtue of our living in a single united nation under a national constitution. For example, as national citizens we have a right of free access to all American seaports. This right derives from the clause that gives to Congress (rather than to the states) authority to regulate foreign commerce. The strange thing about Justice Miller's interpretation is that all the rights he places under the shield of the Fourteenth Amendment privileges or immunities clause were already protected by the national Constitution before the Fourteenth Amendment was adopted. He rendered the privileges or immunities clause a virtual nullity. And such it has remained to this day.

What did not endure from Justice Miller's *Slaughterhouse* opinion was the limited scope that he also tried to impose on the due process and equal protection clauses. In answer to the argument that a lawfully adopted statute regulating the property of butchers could be viewed as having deprived them of "property without due process of law," Miller took his bearings by the well-established meaning of the due process clause of the Fifth Amendment, which restrained the national government in words identical to those restraining the states in the Fourteenth. Miller said simply that "under no construction of that provision that we have ever seen, or any that we deem admissible" could such a property regulation be viewed as unlawful (83 U.S., at 81). Justice Miller was following the well-entrenched idea that "due process of law" referred simply to the proper legal procedures or processes that had to accompany any taking of life, liberty, or property. He could not treat seriously enough even to design a counterargument the claim that the due process clause regulated the *substantive* qualities of laws. He did not frame any real response to the novel viewpoint of dissenters Swayne and Bradley that if a law, in its substance, took away liberty or property to a degree that was not "fair" or "just," it violated the due process clause.[4] (As becomes apparent in *Lochner v. New York* [1905] below, it took roughly 30 years for what was a new viewpoint in 1873 to become the official law of the land.)

Finally, Justice Miller's majority opinion disposed of the equal protection clause argument with two sentences:

> We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[5]

Miller did not unconditionally reject the possibility that the equal protection clause might be used to protect nonracial groups, such as women, but he expressed deep skepticism that a strong enough case would ever be presented to convince the Court to depart from the specific historical intention of the Fourteenth Amendment.

Miller's predictions concerning the restricted application of the equal protection clause proved considerably more durable than his expectations on the due process clause.[6] Although the reach of the clause fairly quickly stretched beyond "Negroes as a class" to strike down legislation that discriminated against the Chinese (a nationality group but of a non-Caucasian race),[7] the clause did remain, until the mid-twentieth century, almost exclusively a prohibition on *racial* discrimination. This exclusive application, although not following the strict words of Miller's *Slaughterhouse* opinion, certainly seems to have been guided by its spirit of a narrow interpretation based on historic intent.

The only extension beyond the racial-discrimination concept of the equal protection clause that the Supreme Court ventured before the 1940s occurred in an area closely related to that of racial discrimination. In 1915 the Court used the equal protection clause to strike down a law that blatantly discriminated against aliens.[8] Alienage, especially in that era of frankly race-based restrictions on who could become a naturalized citizen, was closely tied conceptually to race. The logical heritage, then, from the *Slaughterhouse Cases* version of the equal protection clause endured more or less intact well into the twentieth century.

Nevertheless, this narrow application of the Fourteenth Amendment was accompanied historically by a series of cases that gave lip service, but only lip service, to an equal protection standard of much more far-reaching potential. That standard was the rule that whenever the law "classified" different groups of persons, or treated them unequally, the classification had to have some "reasonable" relationship to promoting the public good. In other words, laws could treat people unequally if (but only if) there was some reasonable basis for doing so. In practice, however, this standard was all bark and no bite. An honest

acknowledgment of its toothlessness is provided in one of the Court opinions from this period: "A classification may not be merely arbitrary, but necessarily *there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.'* "[9]

The legacy of the *Slaughterhouse Cases* was as follows: (1) the privileges or immunities clause was emptied of any real meaning; (2) the idea that the due process clause might create a limit on the substance of legislation, requiring that the mandate of a statute be "fair," was summarily rejected—so summarily that the majority opinion devoted virtually no discussion to determining what the due process clause did mean; (3) the equal protection clause was interpreted to focus narrowly on the evil of racial discrimination. Although the Court soon began to give lip service to the idea that the equal protection clause had a considerably more general impact, in practice it continued to follow the lead of the *Slaughterhouse Cases* until the mid-twentieth century.

ACCESS TO THE BAR: *MYRA BRADWELL V. STATE OF ILLINOIS* (1873)

The first case challenging a sex-based classification as a violation of the Fourteenth Amendment was *Myra Bradwell v. State of Illinois* (1873).[10] In fact, *Bradwell v. Illinois* appears to have been the first Supreme Court case to present a Fourteenth Amendment challenge to any legislation. Although *Bradwell* was argued at the Supreme Court two weeks before the *Slaughterhouse Cases* were argued, the Supreme Court handed down the *Slaughterhouse Cases* decision one day in advance of the *Bradwell* decision. This timing rendered the *Slaughterhouse Cases* the historic first official interpretation of the Fourteenth Amendment. For this reason, the Court presented much more thorough and detailed arguments in the *Slaughterhouse Cases* than the justices presented in the *Bradwell* decision. In deciding Myra Bradwell's fate, they could simply announce, in effect, that they were following the Fourteenth Amendment principles they had explicated the day before. By this twist of fate, a case involving a few butchers who resented geographic limitations on their trade became the "landmark" constitutional law case—included in virtually every constitutional law course and casebook—whereas the case of Myra Bradwell, who in 1869 had been forbidden to practice law for no reason other than that she was a married woman, which actually reached the Court first with the same arguments, gathered dust in the proverbial bin of history.

Illinois officials did not even send a lawyer to Washington to present their side of the case. In fact, the Illinois legislature, apparently unbeknownst to the

U.S. Supreme Court, had adopted a law in 1872 *forbidding* the barring of employment to any person on the basis of sex.[11] (A Court decision in her favor therefore would not have altered Illinois law but could protect women's job access in other states.) The Supreme Court opinion does complain, "The record [of what transpired at Myra Bradwell's earlier hearing in the Illinois Supreme Court] is not very perfect" (83 U.S., at 137). The lack of a properly presented case may partially explain why the Supreme Court did not wish to use Myra Bradwell's case for making constitutional history.

Myra Bradwell had trained for the Illinois bar under the tutelage of her husband, an attorney. By the time she passed the state bar exam, she had already attained respect in legal circles for her editorship of *The Chicago Legal News*, a journal that provided up-to-date case summaries of current legal developments. Her application to the Illinois bar was not unprecedented. In 1869 the Iowa judiciary admitted Arabella Mansfield, who had passed the bar exam with high honors, to the bar of that state, despite an explicit reference to males in the Iowa statutes on bar eligibility.[12]

The arguments of Mrs. Bradwell's attorney, Senator Matthew Hale Carpenter, are in fact more interesting than the Supreme Court's opinion. He had to grapple seriously with the meaning of the Fourteenth Amendment, because the *Slaughterhouse Cases*, explicating the clauses of that amendment, had yet to be handed down. Apparently, Senator Carpenter viewed the equal protection and due process clauses as clauses about the way laws should be applied rather than about limits on the content of laws. He viewed the privileges or immunities clause as the really forceful clause of the Fourteenth Amendment, as the one that shields the basic civil rights of Americans against potentially oppressive state legislation. The wording of the three important clauses of the Fourteenth Amendment makes it difficult to disagree with his implicit ranking of them. After the Supreme Court had disagreed with him, however, knocking all meaning out of the privileges or immunities clause in its *Slaughterhouse Cases* decision, the very claims that Carpenter made about the privileges or immunities clause were eventually applied to the equal protection clause. His argument serves as a model for future equal protection litigation. The relevant portion follows.

BRIEF OF BRADWELL'S COUNSEL FOR *BRADWELL V. ILLINOIS* (1873)

The conclusion is irresistible that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for

entering upon this pursuit, it cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification to which a whole class of citizens can never attain is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a state legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. I presume it will be admitted that such an act would be void. The only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life is the provision that "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens." If this provision protects the colored citizen, then it protects every citizen, black or white, male or female.

Why may a colored citizen buy, hold and sell land in any state of the Union? Because he is a citizen of the United States, and that is one of the privileges of a citizen. Why may a colored citizen be admitted to the bar? Because he is a citizen, and that is one of the avocations open to every citizen, and no state can abridge his right to pursue it. Certainly no other reason can be given.

Now, let us come to the case of Myra Bradwell. She is a citizen of the United States and of the state of Illinois, residing therein. She has been judicially ascertained to be of full age, and to possess the requisite character and learning. Indeed, the court below in its opinion found in the record says: "Of the ample qualifications of the applicant we have no doubt." Still, admission to the bar was denied the petitioner; not upon the ground that she was not a citizen; not for. . . reasonable regulations prescribed by the legislature; but upon the sole ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit: that her clients might have difficulty in enforcing the contracts they might make with her as their attorney, because of her being a married woman.

Now, with entire respect to that court, it is submitted that this argument *ab inconvenienti*, which might have been urged with whatever force belongs to it against adopting the Fourteenth Amendment in the full scope of its language, is utterly futile to resist its full and proper operation, now that it has been adopted.

I maintain that the Fourteenth Amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable

> professions as well as the servile employments of life; and that no citizen can be excluded from anyone of them. Intelligence, integrity and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters and our daughters. . . .

Justice Miller in the Supreme Court opinion that follows does not address the arguments of Bradwell's counsel at all. Relying on the distinction drawn in his *Slaughterhouse Cases* opinion, Miller simply asserts that the opportunity to enter the legal profession, if it is a "privilege or immunity" of citizenship, pertains only to state citizenship. As he explained in *Slaughterhouse*, the Fourteenth Amendment protects only the privileges and immunities of national citizenship, and because the opportunity to become a lawyer does not fall into that category (except for practice in the federal courts, which was not directly at issue here), Mrs. Bradwell's plight is unaffected by the Fourteenth Amendment. As is also evident, the Court's opinion is totally silent concerning the equal protection clause. That is at least a bit puzzling in light of the combination of Miller's statements in *Slaughterhouse* and the Bradwell attorney's argument here. Miller made clear in his *Slaughterhouse Cases* opinion that he agrees with Senator Carpenter in the conclusion that anti-Black legislation is prohibited by the Fourteenth Amendment. Whereas Carpenter finds this prohibition in the privileges or immunities clause, Miller finds it in the equal protection clause. The counsel's argument, then, has not been met: he claims, in effect, that if the generally worded commands of the Fourteenth Amendment prohibit discrimination on account of race (i.e., exclusion of a whole class of people irrespective of their individual strengths), they implicitly prohibit it on account of sex. Because the equal protection clause contains the same degree of generality in its wording as the privileges or immunities clause, Senator Carpenter's claim, as it would apply to the equal protection clause, seems to deserve a response. Justice Miller's *Slaughterhouse Cases* opinion reveals that he believed the equal protection clause applied only to racial discrimination and not to other forms of discrimination. He did not repeat the point here, but perhaps he believed that his reference to his *Slaughterhouse Cases* opinion of the preceding day was adequate explanation.

The four dissenters of the *Slaughterhouse Cases* do take these arguments more seriously than Miller does, apparently because they take the privileges or immunities clause itself more seriously. Only Chief Justice Chase, however, was willing to accept the full implications of the views on the privileges or immunities clause with which he had aligned himself the day before. He dissented here

without opinion, but the lines of his reasoning are not difficult to surmise. He had concurred with the dissent in the *Slaughterhouse Cases* that had argued that "equality of right, among citizens in the pursuit of the ordinary avocations of life. . . with exemption from all disparaging and partial enactments. . . is the distinguishing privilege of citizens of the United States."[13] Because the first clause of the Fourteenth Amendment granted citizenship to "all persons" born in the United States, and because women were clearly persons, the validity of Mrs. Bradwell's claim would seem to be the obvious conclusion.

Justice Bradley viewed it differently; he explained on behalf of the two other dissenters of yesterday why they now concurred with Justice Miller. Justice Bradley's own *Slaughterhouse Cases* dissent, just 24 hours earlier, had included the following statement: "If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law. . . depriving a large class of citizens of the privilege of pursuing a lawful employment does abridge the privileges of those citizens."[14] Is his explanation here in *Bradwell v. Illinois* a convincing explanation for treating women as a "peculiar" case?

MYRA BRADWELL V. STATE OF ILLINOIS

83 U.S. 130 (1873)

[Material omitted from court opinions is marked by ellipses, except for omissions of footnotes or repetitious or tangential case citation material. Brackets indicate material added by the book authors, except when the bracket is inside an internal quotation or parentheses. Footnotes are those from the Court opinions, except when marked "AU."—AU.]

MR. JUSTICE MILLER delivered the opinion of the Court.

[In the official recitation of the facts of the case that preceded Miller's opinion, the U.S. Reports note the Illinois Supreme Court denied her application on the grounds that she is a married woman, so not obligated by contracts. 83 U.S. 131] In regard to [the Fourteenth] Amendment counsel for the plaintiff. . . says that there are certain privileges and immunities which belong to a citizen of the United States as such. . . and he proceeds to argue that admission to the bar of a state, of a person who possesses the requisite learning and character, is one of those which a state may not deny.

. . .[W]e are not able to concur. . . . We agree with him that there are privileges and immunities belonging to citizens of the United States. . . and that it is these. . . which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them. This right in no sense

depends on citizenship of the United States. . . . [Many] distinguished lawyers have been admitted to practice, both in the state and Federal courts, who were not citizens. . . . But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of the state, it would relate to citizenship of the state, and as to Federal courts, it would relate to citizenship of the United States. The opinion just delivered in the *Slaughterhouse Cases*, from Louisiana, renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principle on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say, they are conclusive of the present case. The judgment of the State Court is, therefore *Affirmed.*

MR. JUSTICE BRADLEY:

I concur in the judgment of the Court. . . but not for the reasons specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counselor at law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The supreme court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar. . . The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons or class of persons not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modification of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and, in my opinion in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and

callings shall be filled and discharged by men, and shall receive the benefits of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

MR. JUSTICE FIELD and MR. JUSTICE SWAYNE:

We concur in the opinion of MR. JUSTICE BRADLEY

Dissenting, MR. CHIEF JUSTICE CHASE.

Case Questions

1. Is Justice Miller admitting that the opportunity to enter the bar for federal courts is a privilege or immunity of "citizens of the United States" and that therefore states may not abridge that opportunity on the basis of gender?

2. Justice Miller in the *Slaughterhouse Cases* characterized "the privileges and immunities of the citizens of the United States," as rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Since the 1870s, women have not used the privileges or immunities clause for challenges to gender-based discrimination. Are there arguments that might render the clause useful in such challenges?

3. Bradwell's lawyer, Senator Carpenter, argued, in effect, for a "reasonableness" test as a standard for the privileges or immunities clause. Had he convinced the court as to that standard, would Mrs. Bradwell have won a favorable result?

Case note: Myra Bradwell applied again, this time successfully, to the Illinois bar in 1890, and in 1892 she was admitted to the U.S. Supreme Court bar.[15]

WOMEN'S SUFFRAGE AND THE FOURTEENTH AMENDMENT DEBATES

Although the Fourteenth Amendment included three clauses that inspired much helpful women's rights litigation, the amendment also contained a clause that was anathema to a large segment of the early women's suffrage movement.[16] Section two of the amendment puts the word *male* into the U.S. Constitution, and suffragists fought hard but unsuccessfully to keep that from happening. Now that slavery had been outlawed in the Thirteenth Amendment, the section in question first gets rid of the old three-fifths rule for counting non-free persons for

representation in Congress and then adds: "But when the right to vote [for federal or state officials] . . . is denied to any of the male inhabitants of [a]. . . state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation [in Congress for that state shall be proportionately]. . . reduced."

The suffragists' argument was straightforward: If the right to vote was to be granted to men of all races, they argued, why not to both sexes? The congressional debates on the amendments give the impression that Congress never took this idea as seriously as the feminists did. Nor did abolitionist leaders back the women up. Even Frederick Douglass, long a supporter of women's suffrage in principle, insisted that the timing was not right, in a piece titled "This Is the Negro's Hour." The suffragists and abolitionists, once partners, became increasingly estranged. Elizabeth Cady Stanton's response to Douglass's words, which Douglass published in his own newspaper, helped widen the breach.

ELIZABETH CADY STANTON TO THE EDITOR, 'THIS IS THE NEGRO'S HOUR,' *NATIONAL ANTI-SLAVERY STANDARD,* NEW YORK, 26 DECEMBER 1865

Sir, by an amendment of the Constitution, ratified by three-fourths of the loyal States, the black man is declared free. The largest and most influential political party is demanding Suffrage for him throughout the Union, which right in many of the States is already conceded. Although this may remain a question for politicians to wrangle over for five or ten years, the black man is still, in a political point of view, far above the educated women of the country.

The representative women of the nation have done their uttermost for the last thirty years to secure freedom for the negro, and so long as he was lowest in the scale of being we were willing to press *his* claims; but now, as the celestial gate to civil rights is slowly moving on its hinges, it becomes a serious question whether we had better stand aside and see "Sambo" walk into the kingdom first.

As self-preservation is the first law of nature, would it not be wiser . . . when the Constitutional door is open, [to] avail ourselves of the strong arm and blue uniform of the black soldier to walk in by his side, and thus make the gap so wide that no privileged class could ever again close it against the humblest citizen of the Republic?

"This is the negro's hour." Are we sure that he, once entrenched in all his inalienable rights, may not be an added power to hold us at bay? Have not

"black male citizens" been heard to say they doubted the wisdom of extending the right of Suffrage to women? Why should the African prove more just and generous than his Saxon compeers?

If the two millions of Southern black women are not to be secured in their rights of person, property, wages, and children, their emancipation is but another form of slavery. In fact, it is better to be the slave of an educated white man, than of a degraded, ignorant black one. We who know what absolute power the statute laws of most of the States give man, in all his civil, political, and social relations, do demand that in changing the status of the four millions of Africans, the women as well as the men should be secured in all the rights, privileges, and immunities of citizens.

. . .The struggle of the last thirty years has not been merely on the black man as such, but on the broader ground of his humanity. Our Fathers, at the end of the first revolution, in their desire for a speedy readjustment of all their difficulties, and in order to present to Great Britain, their common enemy, a united front, accepted the compromise urged on them by South Carolina, and a century of wrong, ending in another revolution, has been the result of their action.

This is our opportunity to retrieve the errors of the past and mold anew the elements of Democracy. The nation is ready for a long step in the right direction; party lines are obliterated, and all men are thinking for themselves. If our rulers have the justice to give the black man Suffrage, woman should avail herself of that new-born virtue to secure her rights; if not, she should begin with renewed earnestness to educate the people into the idea of universal suffrage.

Despite the efforts of the early suffragists, both the Fourteenth and Fifteenth Amendments did attain ratification without explicit inclusion of women. Efforts then turned to the courts. Virginia Minor and 149 other female suffragists just went to the polls on the national election day, 1872, in 10 states and D.C. Four had their votes counted, most were arrested, and Virginia Minor simply had her request to register refused. Her husband, an attorney, appealed all the way to the Supreme Court.[17]

MINOR V. HAPPERSETT

88 U.S. 162 (1875)

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court:

The question is presented in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the States, which confine the right of suffrage to men alone. . . .

It is contended that the provisions of the Constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States and, therefore, void. The argument is, that as a woman, born and naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or Constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the Fourteenth Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this Amendment to give them that position. Before its adoption, the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. . . . For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as. . . better suited to the description of one living

under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the Amendment, it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

[Here followed a lengthy documentation of the conclusion that state and federal law have treated women as citizens since the beginning. The opinion referred to naturalization laws, laws that limited inheritance to citizens, homesteading laws that did the same, and access to federal courts in controversies between "citizens" of two different states.—AU.]. . . [S]ex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the State, of which she is a citizen from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of the citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States. . . The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State Legislature. Const, art. I, § 2. Senators are

to be chosen by the Legislatures of the States, and necessarily the members of the Legislature required to make the choice are elected by the voters of the State. Const, art. I, § 3. Each State must appoint, in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. Const, art. II, § 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each State by the Legislature thereof: but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. Const, art. I, § 4. . . .The power of the State in this particular is . . . supreme until Congress acts.

The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. [Emphasis added—AU.] No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws. . .

It is clear . . . that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship. . . .

. . .Upon an examination of [the original thirteen state] Constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. [Here followed the suffrage requirements of the first thirteen states.—AU.]

In this condition of the law in respect to suffrage in the several states, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared. But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article IV, § 2, it is provided that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters.

It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the Amendment we have been considering (the Fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the Legislature to deny the right of suffrage to some male inhabitants? . . . Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the appropriation is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated, if suffrage was the absolute right of all citizens.

And still again; after the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." The Fourteenth Amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc.? . . .

It is true that the United States guaranties to every State a republican form of a government. Const, art. IV, § 4. Also . . . no State can pass a bill of attainder, Const, art. I, § 10, and no person can be deprived of life, liberty or property without due process of law. Const, amend. V.

All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances. The guaranty is of a republican form of government. No particular government or form of government . . . is

designated as republican. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their Constitution and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So, also, of the Amendment which declares that no person shall be deprived of life, liberty or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective. The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1790. Vermont was the first new State admitted to the union, and it came in under a Constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. [The Court gave two more, similar examples.—AU.] . . .No new State has ever been admitted to the Union which

has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. . . . Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new Constitutions, republican in form. In no one of these Constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the Constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

. . . If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may, perhaps, be sufficient to induce those having the power to make the alteration but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. Nor argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we can find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the Constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we *Affirm* the judgment of the court below.

Case Questions

1. Does it seem puzzling that persons not allowed to vote could be considered "citizens"? Are American-born persons under the age of 18 considered "citizens"?

2. What portion of the "citizen" privileges cited by Justice Waite are what could be called economic, as distinguished from political or legal, rights? Is a certain level of economic participation implied by the word *citizen*? If there is no intrinsic connection between citizenship and voting, why is it the custom that "republican governments" say "citizens" in contexts where other kinds of government say "subjects"?

3. In the light of the italicized statement about the privileges or immunities clause, can one conclude that the Court believed that the clause added nothing to the Constitution? (N.B. the phrase "additional guaranty.")

4. The members of the Court say that their "province is to decide what the law is, not to declare what it should be." Do they always follow this maxim? Should they? Should the words of the Constitution always mean what they meant to people in 1790? Always mean what the authors of the words intended?

CASE NOTE

The Supreme Court's rejection of the Minors' privileges or immunities clause argument in this case had two decisive effects on the women's movement. First, the Court's emphatic denial that the privileges or immunities clause added any new civil rights to the Constitution motivated women's rights litigants to turn their attention to other clauses of the Constitution in subsequent cases. Second, this decision made it clear that an additional constitutional amendment would be required if women were ever to gain nationwide suffrage at a single stroke. Litigation efforts on the basis of the existing Constitution offered no hope for the suffragists. Within three years, the eventual Nineteenth Amendment was introduced into Congress for the first time by Senator Aaron Sargent of California.[18] It was to be 42 years before that amendment obtained ratification.

WOMEN AND MODERN CITIZENSHIP, PART ONE: THE VOTE BY CONSTITUTIONAL AMENDMENT

While most books on constitutional law do not discuss the political process by which formal constitutional amendments are obtained, a discussion of women's constitutional rights would be incomplete without the story of the successful battle for the Nineteenth Amendment. That account has meaning not

only because it fills in the picture of the costs of Virginia Minor's failure at the Supreme Court but also because a second constitutional amendment to expand the legal rights of women came within inches of ratification in the late twentieth century. Today, if women's equal rights advocates begin to lose consistently in the halls of the Supreme Court, they will have no choice but to renew their political campaign for the Equal Rights Amendment (ERA). It is possible that women today will find it necessary to follow the lessons of those who in the past labored for decades to gain in the Constitution's own words what one of their allies failed to gain by judicial interpretation.

In the aftermath of the Minors' failure at the Supreme Court, it was not immediately obvious to the suffragists that amending the national Constitution was the surest route to victory. At that time there were two nationwide suffragist organizations: the American Woman Suffrage Association, led by Susan B. Anthony and Elizabeth Cady Stanton, and the National Woman Suffrage Association, led by Lucy Stone and Julia Ward Howe. The former lobbied Congress steadily from 1878 to 1893 for passage of what came to be known as the Anthony Amendment.[19] The latter, for decades, focused its efforts on persuading the states, on a one-by-one basis, to grant women the vote. The suffragists' variegated and often uncoordinated efforts were summed up by one of the veterans of the campaign as follows:

> To get the word "male" in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign. . . . During that time they were forced to conduct 56 campaigns of referenda to male voters; 480 campaigns to get [state] legislatures to submit suffrage amendments to voters; 47 campaigns to get state constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get state party conventions to include woman suffrage planks; 30 campaigns to get presidential party conventions to adopt woman suffrage planks in party platforms; and 19 campaigns with 19 successive Congresses.[20]

In short, it was a long and arduous struggle, in which millions of dollars and millions of hours of labor were expended on many fronts: in political organizing, propagandizing, petitioning, speech making, parading, lobbying, and picketing. The story includes a cast ranging from prominent socialites to immigrant factory workers, former slaves, and their daughters. Before the struggle ended, it was also to include mob violence, jail sentences, hunger strikes in jail accompanied by brutal forced feedings, and legislative votes so close that partisans were carried in on stretchers.[21]

In 1893 the two suffragist armies decided to combine forces into the National American Woman Suffrage Association (NAWSA). Despite the protestations of Susan B. Anthony, the NAWSA decided to de-emphasize the lobbying effort for a constitutional amendment. As a result of this decision, the amendment stopped receiving favorable committee reports in Congress in 1893, and after 1896 it did not even manage to get out of committee for a floor vote. The amendment remained a dead issue until it was stirred back into life by a new women's suffrage group, the Congressional Union for Woman Suffrage, that formed under the leadership of Alice Paul in 1913.

One factor that weakened the suffrage movement was its exclusiveness. The breach between the white feminists and the abolitionists created by the controversy over the Fourteenth Amendment widened and intensified. For the rest of her life, Stanton made public references to "Sambo" and unfavorably compared the status of American women with the enfranchisement of "Africans, Chinese, and all the ignorant foreigners the moment they touch our shores."[22]

Black women refused to allow this racist rhetoric to keep them out of the struggle. They were active on their own, often at the price of opposition and condescension from the African-American press. The Chicago-based Negro Fellowship League, under the leadership of Ida B. Wells-Barnett, played a major role in the successful campaign in Illinois. But at the 1913 suffrage parade in Washington, D.C. (described below in the paragraph on 1913–1915), Wells-Barnett and her group were relegated to the rear of the march; when her protest against this "jim-crowing" failed, she joined the Illinois delegation at the head.[23]

By the twentieth century, class exclusiveness, too, limited the feminist constituency. Nineteenth-century leaders Stanton, Anthony, and their colleagues, women from privileged backgrounds, had nevertheless welcomed trade union women as allies. The second generation of leaders, women like Carrie Chapman Catt and Rachel Foster Avery, rebuffed working-class women.[24]

During the period from 1893 to 1913, the NAWSA exhausted its energies in hundreds of state campaigns. By 1910 it had won only four victories: Wyoming (in 1890) and Utah (in 1896) each entered the Union retaining the women's suffrage they had adopted while still territories, and Colorado (in 1893) and Idaho (in 1896) each adopted women's suffrage in state referenda. All four states were sparsely populated and lacked significant political impact.

Toward the end of this period, from 1910 to 1913, NAWSA efforts did take on some added vigor. The association was stimulated by newly forming suffrage groups led by women who had participated in the more militant British suffragist

movement; these groups introduced more flamboyant tactics into the American campaign. This period added outdoor ("protest") meetings, street parades, automobile tours, and trolley tours to the women's movement. Also, the new groups introduced the political organizing tactics often associated with political party machines: the keeping of file cards on all voters on a precinct basis, careful voter canvassing, and the appointment of thousands of election district "captains" whose job it was to mobilize voters in their own districts.[25] With this new style of campaigning, by 1911 the NAWSA managed to win victories in state referenda in two western states: Washington and California. In 1912, they brought in three more victories, in Arizona, Kansas, and Oregon.

Although by this time women had the vote in nine states with a total of 45 electoral votes, a discouraging pattern was emerging. Women were winning in some state referenda, but they were losing in many others. And the ones in which they lost were the more industrialized, more populated, more politically powerful states of the Midwest and East. Liquor interests, fearing that women would favor Prohibition, and other conservative business interests funded massive antisuffrage campaigns, which included the plying of legislators with liquor and blatant frauds at the ballot box. It was apparent by 1913 that the bigger and more important the state, the more impressive the antisuffrage campaign would be. This pattern continued through 1915. Out of a total of 11 state referenda, in 1914 and 1915, the suffragists managed to win only in the two least populated states, Montana and Nevada. They lost both of the Dakotas, Nebraska, Missouri, Ohio, New York, Pennsylvania, New Jersey, and Massachusetts.[26]

The period 1913–1915, however, brought a number of crucial changes to the American women's suffrage effort. The first was the rise to prominence of Alice Paul. Ms. Paul, who had worked in the militant British suffrage movement, returned to the United States in 1910 and began chairing the NAWSA's Congressional Committee in 1912. For her first major contribution, Ms. Paul organized a suffrage parade; 5,000 women marched through Washington, D.C., on the day before Woodrow Wilson's inauguration in 1913. The paraders were physically harassed by crowds of hostile onlookers, and for some reason the police ignored the problem. Along parts of the route full-scale rioting broke out, and the National Guard was finally called in to restore order.[27] This incident produced tremendous publicity and stimulated a variety of pro-suffrage pilgrimages to Washington. In April 1913, Ms. Paul organized the Congressional Union (soon to become the Women's Party), which aimed at a single-minded campaign for a constitutional amendment. Within the year, Ms. Paul left the NAWSA, whose

leadership still felt that the time was not ripe for an all-out drive for the federal amendment.[28]

The next two important changes involved the leadership of the NAWSA. In late 1914 it received $2 million in the form of a personal bequest from Miriam F. Leslie (a wealthy publisher) to Carrie Chapman Catt with instructions that the money be used "to the furtherance of the cause of woman suffrage."[29] Then, in December 1915, Ms. Catt was drafted for the presidency of the NAWSA. The combination of Ms. Catt's organizational genius, the NAWSA's newfound prosperity, the militant tactics of the Congressional Union, and the undeniably major role that women played in the World War I economy eventually proved too powerful even for the wealthy anti-suffrage forces.

The lobbying pressures of the Congressional Union brought the suffrage amendment to the floor of Congress for the first time since 1896. It was voted down in the Senate in March 1914 and in the House in January 1915.[30] Whereas the Congressional Union took the approach of castigating "the party in power" for failure to pass the amendment, the NAWSA developed close ties to President Wilson, inviting him to their 1916 convention, where their leaders believed he was converted to their cause. At that same convention, Carrie Chapman Catt propounded a secret plan for a concerted six-year drive for the federal amendment.[31] It succeeded in four.

The drama of the long quest for women's suffrage reached its climax in the 13-month stretch from January 1917 through January 1918. In January 1917, Alice Paul's organization, now called the Women's Party, initiated a new tactic: it stationed silent picketers outside the White House, as a constant reminder of women's demands. The picket signs and banners carried messages that grew more strident as the United States entered World War I. When American "patriots" saw such statements as "Democracy Should Begin at Home" and derogatory references to "Kaiser Wilson," fights broke out between onlookers and the women picketers. Beginning in June, the police started arresting picketers for obstructing the sidewalks. Their attackers were never arrested. At their trials the women refused to address the charges against them; they either stood mute or delivered speeches for the suffrage cause. They also refused to pay fines, claiming that such payment would imply admission of guilt. When given the "option," they chose jail instead of paying fines. One spokeswoman described their feelings as follows: "As long as the government and the representatives of the government prefer to send women to jail on petty and technical charges, we will go to jail. Persecution has always advanced the cause of justice."[32] The earliest arrestees were dismissed without jail sentences. As the picketing and violence continued, jail

sentences of a few days, then a few weeks, and finally six months were imposed. By the time the first session of Congress ended, a total of 218 women from 26 states had been arrested, and 97 women had gone to prison.[33]

Once in prison, these women drew added attention to their cause by demanding to be treated as political prisoners rather than as common criminals. To dramatize this complaint, the women went on hunger strikes. Police administrators resorted to brutal forced feedings. This sequence of events drew continuous and nationwide media attention. The forced feedings, in particular, produced newspaper stories replete with gory details. The public outcry grew so intense that the Wilson administration ordered the unconditional release of all picketers on November 27 and 28.[34]

Although it publicly disavowed any connection with the militant picketers, the NAWSA took advantage of the sympathetic atmosphere generated by the intense publicity about the women prisoners. The NAWSA membership campaigned tirelessly all around the country, buttonholing legislators, canvassing precincts, petitioning congressmen. Major political successes finally began to accumulate. In 1917 the first congresswoman took her seat, Jeannette Rankin of Montana. In New York, women finally won a referendum for suffrage in a heavily populated eastern state. Six state legislatures avoided the difficulties of a referendum by taking advantage of Article II, section 1, of the Constitution, which states that presidential electors are to be appointed "in such manner as the Legislature thereof may direct." Thus North Dakota, Ohio, Indiana, Rhode Island, Nebraska, and Michigan joined Illinois (which had done so in 1913) in granting women presidential suffrage. And the Arkansas state legislature, in March 1917, granted women the primary vote, which in the then one-party Democratic South was as meaningful as the vote in northern general elections.[35]

In December 1917, just two weeks after the picketers had been released from jail, the House of Representatives set January 10, 1918, as the date for voting on the suffrage amendment. The drama of that vote was unsurpassed by any in American history. Women in the galleries watched anxiously as four of the determining votes for the amendment came in literally from sickbeds. Congressman T. W. Sims of Tennessee had a broken arm and shoulder but refused to have them set, lest he miss the crucial vote. Despite the excruciating pain, he stayed on to the end, trying to persuade those colleagues who were ambivalent. The Republican House Leader, James Mann of Illinois, deathly pale and barely able to stand, came to the session straight from a six-month stint in the hospital. Representative Robert Crosser of Ohio also came in ill. And Henry Barnhart of Indiana was actually carried in on a stretcher for the last roll call. One

congressman, Frederick Hicks of New York, even left his wife's deathbed to come to Washington for the vote. Mrs. Hicks, a dedicated suffragist, died just before he left; after the vote, he returned home for her funeral. The amendment passed the House with no votes to spare; it attained exactly the number needed for the required two-thirds majority, 274–136.[36]

Although the amendment just missed the needed two-thirds majority in the Senate that year, and although in 1918 there were more pickets, more jailings, and more hunger strikes,[37] the tide had turned. The later stages of victory were somewhat anticlimactic. Steady campaigning by the NAWSA and their allies increased the prosuffrage majority in the Senate to within one vote of two-thirds in the February 1919 (lame-duck) session. The newly elected 66th Congress finally passed the amendment in May 1919 by exactly two-thirds in the Senate and by 304–89 in the House.[38] Ratification in three-fourths of the state legislatures came remarkably quickly. By August 26, 1920, American women had obtained the vote as a matter of explicit constitutional right.

LIBERTY OF CONTRACT: *LOCHNER V. NEW YORK* (1905)

Women's efforts to attain equal legal treatment via the privileges or immunities clause of the Fourteenth Amendment, as explained above, did not succeed. The suffragists turned their attention eventually to amending the Constitution to gain suffrage, but long before they obtained the Nineteenth Amendment, women again came to the attention of the Supreme Court in a number of cases concerning workplace reform legislation challenged under the Fourteenth Amendment's due process clause.

As they had for the butchers in Louisiana in 1873, corporate lawyers continued for years to hammer away at state economic regulations, using the Fourteenth Amendment as their principal weapon. The most effective section of that weapon proved to be the due process clause, interpreted so as to limit the substance of legislation (not just the procedures by which the legislation was adopted or enforced). Toward the end of the nineteenth century, the Court turned away from the deferential attitude toward state legislative authority that had characterized the *Slaughterhouse Cases* and started declaring various pieces of state economic legislation unconstitutional on the grounds that they clashed with the due process clause. The first apogee of this new trend was reached in *Lochner v. New York*.[39] The Court saw itself in this era as protecting the citizen rights of the individual against government power; the civil "rights" that they defended were

economic or "property" rights. The particular economic "right" receiving attention in *Lochner* is one that the Court dubbed "freedom of contract."

Ironically, this first protection of citizen rights, in one sense, evolved into an inhibition of women's rights, in a second sense. As indicated in the discussion of the various meanings of "women's rights" in the Introduction, "rights" can refer to a "thou-shalt-not-infringe" statement to the legislature, but the term can also refer to a "thou-may-provide-special-protection-for" statement to the legislature. The economic rights (in the thou-shalt-not-sense) of the individual that the Supreme Court enshrined in *Lochner v. New York* eventually (in *Adkins v. Children's Hospital* [1923]) were applied so as to undercut women's right to be accorded special protection in economics legislation.

This abstract discussion of concepts of rights takes on more concrete meaning in the actual circumstances of the *Lochner* case. As a public welfare measure, the state of New York had enacted a statute that prohibited bakery employees from working any longer than a 10-hour day or a 60-hour week. While many people might think of this statute in terms of the public's (or legislature's) "right" to protect its health by regulating labor conditions in food-producing establishments, and while some might conceptualize it in terms of the right of the economically powerless to be protected by special legislation, the Supreme Court viewed it differently. They focused on the individual's right to be "free" (in the sense of unrestrained by regulatory legislation) in deciding how long to employ, or be employed by, another individual. In other words, while the Supreme Court majority saw themselves as guarding the working man's "right" to work as long as he "wanted," many people viewed the Court as destroying the working man's "right" to protect himself, by legislation, against demands from his employer that he work cruelly long hours. The Supreme Court was reading the due process clause as though it commanded the following to the legislature: thou shalt not interfere with the right of freedom of contract on the mere pretext that workers need protection against their bosses. Only special circumstances, such as widespread agreement that particular forms of labor are extraordinarily unhealthy (e.g., coal mining), could justify interference with liberty of contract.

LOCHNER V. NEW YORK

198 U.S. 45 (1905)

MR. JUSTICE PECKHAM delivered the opinion of the Court:

The indictment, it will be seen, charges that the plaintiff in error violated . . . the labor law of the State of New York, in that he wrongfully and unlawfully

required and permitted an employee working for him to work more than sixty hours in one week. . . . It is assumed that the word [“required”] means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. . . .

The employee may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana,* 165 U.S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere, *Mugler v. Kansas,* 123 U.S. 623; *In re Kemmler,* 136 U.S. 436; *Crowley v. Christensen,* 137 U.S. 624.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one’s property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. . . . [W]hen the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract . . . it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from

laboring or from entering into any contract to labor beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones. . . . Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy,* 169 U.S. 366. A . . . Utah act limiting the employment of workmen in all underground mines or workings, to eight hours per day. . . was held a valid exercise of the police powers of the State. . . . It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. . . . There is nothing in *Holden v. Hardy* which covers the case now before us.

It must, of course, be conceded that there is a limit to the valid exercise of the police power. . . . Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. . . . [T]he question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?. . .

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State?, and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for

themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. . . .

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free . . . in his power to contract in relation to his own labor.

* * *

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid . . . . there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual. . . . In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. . . . There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. . . . [A]lmost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid,

although such limitation might seriously cripple the ability of the laborer to support himself and his family. . . .

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary. . . . Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case the individuals . . . are under the protection of the Federal Constitution. . . . A prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if

cleanly then his "output" was also more likely to be so. . . . We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual. . . In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. . . .

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber,* 136 U.S. 313; *Brimmer v. Rebman,* 138 U.S. 78.

It is manifest to us that the limitation of the hours of labor as provided for. . . has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

* * *

Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting:

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and state courts.

All the cases agree that this power extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights. . . . .

[This court said] in *Barbier v. Connolly,* 113 U.S. 27: "But neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." This was declared in *Allgeyer v. Louisiana,* 165 U.S. 578, 589. But in the same case it was conceded that the right to contract in relation to persons and property or to do business, within a State, may be "regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes" (p. 591).

So, as said in *Holden v. Hardy,* 169 U.S. 366, 391:

> This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. . . . [T]he police power. . . may be lawfully resorted to for the purpose of preserving

> the public health, safety or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele,* 152 U.S. 133, 136.

Referring to the limitations placed by the State upon the hours of workmen, the court in the same case said (p. 395): "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In *Jacobson v. Massachusetts,* 197 U.S. 11, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only "when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law"—citing *Mugler v. Kansas,* 123 U.S. 623, 661; *Minnesota v. Barber,* 136 U.S. 313, 320; *Atkin v. Kansas,* 191 U.S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, and yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words,. . . the burden of proof. . . is upon those who assert it to be unconstitutional. *McCulloch v. Maryland,* 4 Wheat. 316, 421.

* * *

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief to the people of New York that. . . labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health. . . . I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler v. Kansas*. . . Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute . . . applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said:

> The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It. . . requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, [and the baker must]. . . . perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health.

Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. . . ." [Other scientific references were cited here.—AU.]

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor

in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. . . .

* * *

. . .It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all questions, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. . .

. . .No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . *Atkin v. Kansas,* 191 U.S. 207, 223.

The judgment in my opinion should be affirmed.

MR. JUSTICE HOLMES dissenting:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts,* 197 U.S. 11. . . . The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy,* 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.

. . .Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Case Questions

1. How convincing are the following assertions from the majority opinion?

a. "This is not a question of substituting the judgment of the court for that of the legislature."

b. "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or sixty hours per week."

c. "There is . . . no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of individuals who are following the trade of a baker."

2. The "police power" (general legislating power) of the state is, as the Court puts it, the power to promote "the safety, health, morals, and general welfare of the public." Even if one were to concede that this is not a "health" regulation, is it plausible to argue that maximum-hours labor regulations might have a "direct relation, as a means to an end," to one or more of the other goals within the police power?

3. The majority builds part of its case on the premise that bakers are "grown and intelligent men" and "able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State." If the Supreme Court would permit 10-hour-day legislation for women workers only if the Court were convinced that women do need to be, in a sense, wards of the state, would you advise women to forgo the legislation rather than stoop to such an argument?

Protection for Women as Wedge into Liberty of Contract

Muller v. Oregon (1908)

In 1908, a young lawyer named Louis D. Brandeis (the same Brandeis who later became a Supreme Court justice) presented to the Court a radically new form of legal argument. The case of *Muller v. Oregon* involved a challenge to an Oregon maximum-hours statute forbidding the employment of women in factories, laundries, or other "mechanical establishments" for any longer than 10 hours a day. In response to the *Lochner* majority's assertion that it was not "reasonable" to believe that maximum-hours legislation promoted public health, Oregon's lawyer, Brandeis, devoted over 100 pages of his brief to subject matter that theretofore had not been viewed as part of a "legal" argument: a heavily statistical discussion of the relationship between hours of labor and the health and morals of women, including cross-cultural analysis of American and European factory legislation. (The actual research of gathering these statistics was performed by prominent women reformists Josephine Goldmark and Florence Kelly.) Only two pages of the brief followed the traditional pattern of explaining American legal precedents as they related to the case.

Brandeis's new approach was a huge success. He won a unanimous opinion in behalf of the statute's constitutionality. As the following excerpt reveals,

however, the assumptions about the "nature" of women that brought about this "victory" may leave contemporary feminists more than a little uncomfortable.

MULLER V. OREGON

208 U.S. 412 (1908)

MR. JUSTICE BREWER wrote for the Court:

The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. . . .

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. . . .

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner v. New York,* 198 U.S. 45, that a law providing that no laborer shall be required or permitted to work in bakeries more than sixty hours in a week or ten hours in a day was not, as to men, a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under [the Fourteenth Amendment of] the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

. . . It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.

[Here followed a footnote by the Court citing sections of the statutory codes of 19 states that contained restrictions on women's labor and references to similar statutes in the laws of seven European nations. The court then concluded its summary of the brief as follows—AU.] . . . Then follow extracts for over ninety [governmental] reports . . . to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but

all agree as to the danger. . . . Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. . . . Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: 'The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of her children, (d) the maintenance of the home—are all so important and so far-reaching that the need for such reduction need hardly be discussed.'

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute. . . . Without stopping to discuss at length the extent to which a state may act in this respect, we refer to the following cases in which the question has been considered: *Allgeyer v. Louisiana,* 165 U.S. 578, *Holden v. Hardy,* 169 U.S. 366, *Lochner v. New York*.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, 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 and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, 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. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close ones eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection: that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a

difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

* * *

For these reasons, and without questioning in any respect the decision in *Lochner v. New York,* we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution,. . . and the judgment of the Supreme Court of Oregon is

Affirmed.

Case Questions

1. If *Lochner* had really established a constitutional right to "freedom of contract," does *Muller v. Oregon* amount to a statement that women have fewer constitutional rights than men?

2. Does this decision hinge on women's physical weakness? Could an employer who tests all his women employees for physical endurance before hiring them claim that he should be exempted from the statute?

3. Does this decision hinge on women's supposed psychological dependence on men? On women's unique capacity to bear future generations? If physical weakness and psychological dependence were scientifically disproved, would women's birth-giving, fetus-carrying role continue to justify special treatment by society?

4. The Court refuses to question the *Lochner* ruling: Is it saying here that maintaining healthy mothers is legitimately an "object of public interest" but that having healthy fathers is not?

Bunting v. Oregon (1917)

In a sense, the combination *of Lochner* (with its acceptance of the *Holden v. Hardy* precedent allowing an 8-hour day for miners) and *Muller* amounted to a rule that liberty of contract could be restricted only for exceptionally dangerous occupations (like mining) or exceptionally weak people (like women). Only nine years later, in the case of *Bunting v. Oregon*, the Supreme Court again changed the rules, upholding a 10-hour-day statute that applied to workers in milling or manufacturing establishments of every kind.

By the time this case was argued, Brandeis had already been nominated to the Supreme Court (although he did not take his seat in time to participate in the decision). Oregon's counsel this time was another future Supreme Court justice,

Felix Frankfurter, who again presented what was by now called a "Brandeis brief" to defend the rationality of the statute. By this time, the rationality of maximum-hours legislation as a health measure appeared so obvious that the Supreme Court devoted most of its argument to an ancillary part of the statute that dealt with overtime pay requirements—to rebutting the contention that this law was a wage regulation in disguise. They tersely laid to rest the somewhat decayed corpse of the *Lochner* approach to hours legislation, giving the whole subject no more than one paragraph (reprinted below), and managing to avoid any explicit reference to *Lochner*.

BUNTING V. OREGON

243 U.S. 426 (1917)

MR. JUSTICE MCKENNA delivered the opinion of the court:

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the state, as the supreme court of the state decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. . . .

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the state in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day. . . .

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories, and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries, is, in Australia, 8 hours; in Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France, and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

Further discussion we deem unnecessary.

Judgment *affirmed.*

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE MCREYNOLDS, dissent.

[without written opinion].

Adkins v. Children's Hospital (1923)

By this time, the strategy for liberals who wanted social welfare legislation seemed obvious. They needed only (1) to restrict their social welfare legislation at first to women, (2) use the weaker-sex rationale to convince the Court to accept the protective legislation as "reasonable," and (3) then, having obtained this concession, enact the same reasonable measures to protect the men of the community as well. Nevertheless, at the next plateau of social welfare legislation, minimum-wage statutes, this three-step strategy collapsed at step two.

The first minimum-wage case settled by the Supreme Court was *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).[40] It involved a District of Columbia statute that created a minimum-wage board with authority to set minimum wages for child labor and to establish for women workers minimum wages geared to "the necessary cost of living" and adequate to maintain those workers "in good health and to protect their morals." Although this case presented a usual challenge, one from a thwarted employer, the Children's Hospital, the Court's opinion also contained the decision for an unusual companion case, *Adkins v. Lyons*, in which objection to the minimum-wage law came from a dissatisfied female employee. This woman worked at the Congress Hall Hotel for $35 a month and two free meals a day. She claimed that these wages were the best she was capable of earning, and if she were not permitted to settle for these, she would have to go without work. In other words, she believed that her labor skills were not worthy of the minimum wage and that if the law were enforced she would be fired and would not be able to find a new job.

Once again, Felix Frankfurter argued the case for the statute, and once again Justice Brandeis refrained from participating in the decision. Justice Brandeis's daughter Elizabeth was secretary of the District of Columbia Minimum Wage Board, and the appearance of conflict of interest had to be avoided. Because the case came from the District rather than from a state, the constitutional clause at issue was the Fifth Amendment due process clause, which commands the federal government, rather than the Fourteenth Amendment due process clause, which is addressed to the states. Because the two clauses contain identical wording, however, what the Court said about the due process clause here also applied to

the states. And what they said was that minimum-wage laws constitute "undue" interferences with the "liberty of contract." Justice Sutherland's majority opinion (the Court divided 5–3) contained a number of surprises. One was that he relied heavily on the *Lochner v. New York* precedent, even though that case appeared to have been silently overruled by *Bunting v. Oregon*. (With an uncanny ability to look in two opposite directions at once, Sutherland faced *Bunting* long enough to admit that it established the constitutionality of maximum-hours legislation—just what *Lochner* had denied—and simultaneously looked to *Lochner* to find the precedent that created and rendered virtually inviolable the right to freedom of contract.)

A second surprise was Sutherland's assertion that the Nineteenth Amendment (giving women the vote) nullified the constitutional basis to single out women for special protection; Americans had transcended the myth of "the ancient inequality of the sexes" and had brought the "civil and political" differences between the sexes "to the vanishing point," he claimed (at 261 U.S., 553). Sutherland's argument was that although hours legislation properly took gender into account, because of women's physical weakness, wage legislation was premised on an assumption of women's incapacity to fend for themselves in the economy. Now that women had the vote, as well as the legal right to make contracts, Sutherland believed that there was no longer any justification for putting further "restrictions" on women's "freedom." He made these assertions notwithstanding the undisputed evidence that then, as now, women's earnings were, on the average, at the bottom of the pay scale (e.g., within every racial group, women earn less per year than men).

Nonetheless, Sutherland's views did have contemporaneous support from Alice Paul, leader of the decidedly militant branch of the women's suffragist movement, who had been rallying her forces, since 1913, behind the slogan "Equality Not Protection." Not satisfied with the success of the suffrage amendment effort in 1920, Ms. Paul and her Women's Party within three years had drafted and submitted to Congress the Equal Rights Amendment, to prohibit unequal treatment of men and women by legislation (The legal import of the Equal Rights Amendment, or ERA, is detailed in Chapter 2.) This was the same year that *Adkins v. Children's Hospital* was handed down.

ADKINS V. CHILDREN'S HOSPITAL

261 U.S. 525 (1923)

MR. JUSTICE SUTHERLAND wrote for the Court:

. . .The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The . . . legislative branch of the government,. . . by enacting it, has affirmed its validity; and that determination must be given great weight. This Court . . . has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. *Allgeyer v. Louisiana,* 165 U.S. 578, 591; New *York Life Insurance Co. v. Dodge,* 246 U.S. 357, 373–374; *Coppage v. Kansas,* 236 U.S. 1, 10, 14; *Adair v. United States,* 208 U.S. 161; *Lochner v. New York,* 198 U.S. 45; *Butchers' Union Co. v. Crescent City Co.,* 111 U.S. 746; *Muller v. Oregon,* 208 U.S. 412, 421. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to

obtain from each other the best terms they can as the result of private bargaining. . . .

In *Coppage v. Kansas* (p. 14), this Court, speaking through Mr. Justice Pitney, said:

> Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State.

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest.

1. *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest*. . . .

2. *Statutes relating to contracts for the performance of public work*. . . . These cases sustain such statutes as depending. . . upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it. . . . We may, therefore. . . dismiss these . . . as inapplicable.

3. *Statutes prescribing the character, methods and time for payment of wages*. . . . In none of the statutes thus sustained, was the liberty of employer or employee to fix the amount of wages. . . interfered with. Their tendency and purpose was to prevent unfair and perhaps

fraudulent methods in the payment of wages and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

4. *Statutes fixing hours of labor*. It is upon this class that the greatest emphasis is laid in argument and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. In some instances the statute limited the hours of labor for men in certain occupations and in others it was confined in its application to women. No statute has thus far been brought to the attention of this Court which by its terms, applied to all occupations. . . .

[Here followed two pages of quotes from *Lochner* to the effect that legislative interferences with liberty of contract may not be "arbitrary" or "unreasonable."—AU.]

Subsequent cases in this Court have been distinguished from that decision, but the principles therein stated have never been disapproved.

In *Bunting v. Oregon,* 243 U.S. 426, a state statute forbidding the employment of any person in any mill, factory or manufacturing establishment more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state legislature and State Supreme Court had found such a law necessary for the preservation of the health of employees in these industries, this Court would accept their judgement, in the absence of facts to support the contrary conclusion. The law was. . . sustained as a reasonable regulation of hours of service. . . .

In the *Muller Case* the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. . . . But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* Case (p. 421) has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to

say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot 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. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of the woman employer contracting with a woman employee as it does when the former is a man.

The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter. . . deal with incidents of the employment having no necessary effect upon the heart of the contract, that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

. . .[This] is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services

of a desirable employee.[1] The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: the individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman lives alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The cooperative economies of the family group are not taken into account though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons,. . . the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals. . . must

be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

* * *

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. . . . The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. . . . The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused

nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. . . . A statute requiring an employer to pay. . . the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things. . . is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

We are asked, upon the one hand, to consider the fact that several States have adopted similar statutes, and we are invited, upon the other hand, to give weight to the fact that three times as many States presumably as well informed and as anxious to promote the health and morals of their people, have refrained from enacting such legislation. We have also been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads.

It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several States, where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting but only mildly persuasive. . . .

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. . . . . . A wrong decision does not end with itself: it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. . . . [T]he good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

. . .The act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are

Affirmed.

Opinion Footnote

1 This is the exact situation in the *Lyons case* as is shown by the statement in the first part of this opinion.

MR. CHIEF JUSTICE TAFT, dissenting:

I regret much to differ from the Court in these cases.

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our Court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question . . . how far a statutory requirement of maximum hours or minimum wages may be useful . . ., and whether it may not make the case of the oppressed employee worse. . . . But it is not the function

of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.

The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee . . . has been firmly established. . . . *Bunting v. Oregon* . . . sustained a law limiting the hours of labor of any person, whether man or woman working in any mill, factory or manufacturing establishment to ten hours a day. . . . The law covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. Yet the opinion in the *Bunting* case does not mention the *Lochner* case. No one can suggest any constitutional distinction between employment in bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. 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*. Yet the opinion of the Court herein in support of its conclusion quotes from the opinion in the *Lochner* case as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the *Bunting* case.

However, the opinion herein does not overrule the *Bunting* case . . . and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the Court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received. . . . One is the multiplier and the other the multiplicand.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and. . . quoted at length in the

briefs, that they are equally harmful in this regard. Congress took this view and we cannot say it was not warranted in so doing.

With deference to the very able opinion of the Court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a *non sequitur*. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly [there is a]. . . wide difference between prescribing a minimum wage and a maximum wage. . . .

Moreover, there are decisions by this Court which have sustained legislative limitations in respect to the wage term in contracts of employment. . . . While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. . . . In *Bunting v. Oregon,* employees in a mill, factory or manufacturing establishment were required if they worked over a ten hours a day to accept for the three additional hours permitted not less than fifty per cent more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as to hours; but it necessarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those three hours. I do not feel, therefore, that either on the basis of reason, experience or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the application of the minimum wage to women. If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller v. Oregon,* 208 U.S. 412, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than ten hours. This covered a pretty wide field in women's work and it would not seem that any sound distinction between that case and this can be built upon the fact

that the law before us applies to all occupations of women with power in the board to make certain exceptions. [T]he Court in *Muller v. Oregon,* based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases [limiting the employment of women] which may be said to have established a rule of decision. *Riley v. Massachusetts,* 232 U.S. 671; *Miller v. Wilson,* 236 U.S. 373; *Bosley v. McLaughlin,* 236 U.S. 385. . . .

I am not sure from a reading of the opinion whether the court thinks the authority of *Muller v. Oregon* is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. . . . I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.

But for my inability to agree with some general observations in the forcible opinion of MR. JUSTICE HOLMES who follows me, I should be silent and merely record my concurrence in what he says. . . .

I am authorized to say that MR. JUSTICE SANFORD concurs in this opinion.

MR. JUSTICE HOLMES, dissenting:

The question in this case is the broad one, whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men. . . . [I]n the present in stance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. *German Alliance Insurance Co. v. Lewis,* 233 U.S. 389. [Several precedents on contractual limits follow here.—AU.]. . .Finally women's hours of labor may be fixed; *Muller v. Oregon*; *Riley v. Massachusetts,* 232 U.S. 671, 679; *Hawley v. Walker,* 232 U.S. 718; *Miller v. Wilson,* 236 U.S. 373; *Bosley v. McLaughlin,* 236 U.S. 385; and the principle was extended to men with the allowance of a limited overtime to be paid for "at the rate of time and one-half of the regular wage," in *Bunting v. Oregon*.

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. . . . It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this act. *Quong Wing v. Kirkendall,* 233 U.S. 59, 63. But after *Bunting v. Oregon,* I had supposed that it was not necessary, and that *Lochner v. New York* would be allowed a deserved repose.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's

> business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. . . .
>
> The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held. . . . If a legislature should adopt. . . the doctrine that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," 29 *Harv. Law Rev.* 13, 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. . . .
>
> I am of opinion that the statute is valid and that the decree should be reversed.

Case Questions

1. When the Court majority says that the minimum-wage statute is *arbitrary,* what do they mean by that term? Does it mean that it is irrational to think that a minimum wage will raise living standards (and thereby improve health)? That it is irrational to think that a woman's earning power affects her "morals" (i.e., sexual behavior)? That it is unfair to employers? As you read the due process clause, does it seem to prohibit taking property or liberty by "unfair" laws? By foolish laws?

2. If one agrees with Sutherland that women are not less able to fend for themselves than men, how might one otherwise explain the pattern of their being systematically lower paid than men, then as now?

3. Everyone on the Court except Holmes (and Brandeis, who was silent) assumes that a maximum-wage law would be clearly unconstitutional. Would it? Even as a "wage price stabilization act" to control inflation?

Protecting Women by Limiting Their Freedom: *Radice v. New York* (1924)

The case of *Radice v. New York,* 264 U.S. 292 (1924), decided only months after *Adkins*, illustrates more clearly than the latter why Alice Paul and her pro-ERA followers opposed legislation aimed at protecting women in the economic arena. Although minimum-wage laws do discernibly promote public health to the degree that (in a pre-food-stamp era) they prevent the paying of literally starvation

wages, the relationship between public welfare and the statute challenged by Mr. Radice, a Buffalo, New York, restaurateur, was not all that obvious.

The part of the New York statute that *Radice* was contesting prohibited employing women between the hours of 10:00 PM and 6:00 AM in restaurants or "in connection with any restaurant" in large cities. (Other parts of the statute, not under challenge, established maximums of the 9-hour day and a 54-hour week for women in restaurant work.) The statute was riddled with exceptions: it did not apply to restaurants in small cities or towns, it did not apply to "singers and performers of any kind," it did not apply to cloakroom and restroom attendants, it did not apply to hotel-related restaurants and their kitchens, and it did not apply to employees-only eating establishments operated by employers for their workers. In short, it meant that women in major cities could not work as waitresses or cooks or hostesses in most restaurants after 10:00 at night, but they could work in the same restaurants in other capacities (e.g., as a coat checker), and they could even work as waitresses, cooks, or hostesses in small cities. Although the statute was challenged by an employer, it is not hard to see that this law had the impact of stamping certain jobs as "men only." These were the same jobs that women were permitted to do during daylight hours or in smaller towns.

How did nine Supreme Court justices convince themselves that this complex combination of permissions and prohibitions was "reasonably" related to the promotion of public health or welfare? They simply "assumed" certain beliefs to be facts—beliefs about the "more delicate organism" of women, which were alleged in the state's defense of its statute. Justice Sutherland's opinion provides no satisfactory explanation why the Court continued to assume that beliefs alleged by legislators in behalf of wage legislation (such as the law voided in *Adkins*) had no basis in reality, but that beliefs alleged in relation to what hour of the night a person worked did have such a basis.

Another curious aspect of Sutherland's opinion is the disparity in his treatment of the due process challenge to the statute and the equal protection challenge to it. Supposedly, "reasonableness" was to be the test for applying either clause. Just as liberty was not to be limited unless that limitation bore a rational relationship to promoting public welfare, so statutory classifications differentiating groups of people were to be based on a reasonable connection to the public good. The reason Sutherland identified for prohibiting women from these particular night jobs in big cities was the goal of protecting women from what he termed "the dangers and menaces incident to night life in large cities." Sutherland actually proffers no reason, however, why working at night as a waitress in a hotel-related or employee-service restaurant would have a less harsh

impact on women's health or welfare than working at the same job in a non-hotel restaurant. Here is what he said about the equal protection challenge to the statutory exceptions (at 264 U.S., 296–298):

> The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution. The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free; but a case where all in the same class of work, are included in the restraint. Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious." *American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 92. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary." *Arkansas Natural Gas Co. v. Railroad Commission,* 261 U.S. 379, 384, and cases cited. . . . Directly applicable are recent decisions of this Court sustaining hours of labor for women in hotels but omitting women employees of boarding houses, lodging houses, etc., *Miller v. Wilson* [236 U.S. 373 (1915)], at p. 382; and limiting the hours of labor of women pharmacists and student nurses in hospitals but excepting graduate nurses. *Bosley v. McLaughlin* [236 U.S. 385 (1915)], at pp. 394–96. The opinion in the first of these cases was delivered by Mr. Justice Hughes, who, after pointing out that in hotels women employees are for the most part chambermaids and waitresses; that it cannot be said that the conditions of work are the same as those which obtain in the other establishments; and that it is not beyond the power of the legislature to recognize the differences, said (pp. 383–84):
>
>> The contention as to the various omissions. . . ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone v. Pennsylvania,* 232 U.S. 138, 144. It is free to recognize degrees of

> harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business" it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll v. Greenwich Insurance Co.,* 199 U.S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co. v. Taylor,* 234 U.S. 224, 227. Upon this principle which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels.

In short, the Court's "one step at a time" doctrine for equal protection seemed to permit states to carve out exceptions to statutes when there was little more explanation for the exception than the political strength of some lobby favoring the exemption.

Capitulation on Minimum Wages for Women: *West Coast Hotel v. Parrish* (1937) and *U.S. v. Darby* (1941)

Despite its concessions for hours legislation, the Court continued its opposition to minimum-wage legislation through the Great Depression and through the first administration of Franklin D. Roosevelt (FDR). As late as 1936, the justices invalidated a women's minimum-wage law of the State of New York,[41] again essentially on the grounds that the due process clause forbids laws that in their substance constitute unfair (in the Court's eyes) regulations of property. (This notion has come to be known as the doctrine of "economic substantive due process.") Using other legal doctrines, they also invalidated a great many other social welfare measures, including the bulk of Roosevelt's New Deal. An infuriated FDR, after his overwhelming electoral victory of 1936, introduced into Congress his famous (or notorious) Court-packing plan. By adding six judges to the Court, all his own appointments, FDR would have been able to transform the 6–3 and 5–4 decisions against his programs into, at worst, 9–6 decisions in his favor.

Just as the debate on this plan was taking place in Congress, the Supreme Court dramatically reversed itself on a number of legal issues, including minimum wages for women and various central planks of the New Deal platform. Although

Roosevelt lost his Court-packing plan, he "won the war." After the crucial doctrinal switch in 1937, which evidently discouraged his four most die-hard opponents on the Court, and after new Congressional legislation that allowed Supreme Court justices to retire at full pay, Roosevelt had the opportunity to replace retirements with seven new justices between 1937 and 1941. By the time Roosevelt died, he had appointed eight of the nine justices on the Court (the ninth was Roberts).

The Court's reversal on minimum wages for women occurred in the case of *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937). At issue was a statute of the State of Washington that paralleled in every major respect the District of Columbia statute that the Supreme Court had voided in *Adkins*. It created a board to establish minimum wages for women and children, specifying that in the case of women workers, the wage be adequate "for the decent maintenance of women" and "not detrimental to health and morals." One interesting variation in this case involves the original plaintiff. The person who initiated the lawsuit was one Elsie Parrish, an employee who, unlike the woman employee in the companion case to *Adkins v. Children's Hospital*, wanted this law *enforced*. Elsie Parrish was suing her employer, the West Coast Hotel, for back pay owed her to bring her wages up to the legal minimum of $14.50 a week (for 48 hours of work).

This time the Supreme Court openly and explicitly overruled its own precedent. First, the Court majority (of five) pointedly noted the following about the "freedom of contract" claim that the employer was making (and that had driven this whole series of cases since *Lochner*) (at 391):

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [T]he Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Next the Court simply reiterated the logic of the *Adkins* dissent to explain what was reasonable about minimum wage laws for women and children—the lowest-paid workers. It supplemented these arguments by reference to the current, extraordinarily harsh economic conditions of the Great Depression. Finally, as was traditional for nonracial discrimination in this time period, it gave short shrift

to the equal protection claim, citing many of the same precedents cited in *Radice*. It addressed the equal protection claim with the following brief discussion (at 400):

> The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." . . . This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. . . . Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment. [Citations omitted.]

Although the *West Coast* majority opinion did not directly address the question of the constitutionality of potential minimum-wage laws that would apply to workers in general, it was not too long before the Court squarely faced that question. In the 1941 case of *United States v. Darby*, the Court confronted the issue of the constitutionality of the national Fair Labor Standards Act (or Wages and Hours Act) of 1938. This act established minimum wages and maximum hours for all workers producing goods intended for interstate commerce. As in *Adkins v. Children's Hospital*, the Court here dealt with the Fifth Amendment due process clause (because national legislation was involved), but presented arguments that applied equally to the Fourteenth Amendment due process clause.

The parallels between the *West Coast Hotel v. Parrish*/*United States v. Darby* pattern and the earlier *Muller v. Oregon*/*Bunting v. Oregon* pattern are striking. As with the hours legislation pattern, this minimum-wage acceptance pattern presented a piece of general welfare legislation to the Supreme Court within a few years after the same kind of legislation on a protection-of-women basis had been acknowledged as reasonable by that Court. The proponents of social welfare legislation, once again having used the need to protect women as the cutting edge of their argument, were widening its wedge so as to shelter all members of society behind the same rationale.

The second striking similarity between the two patterns involves the relative amounts of attention devoted to due process clause arguments between the first and the second cases in each series. Like *Muller v. Oregon*, *West Coast Hotel v. Parrish*

was largely devoted to the due process question, and the weight of the argument in both cases rested largely on the assumption of the special needs and/or weaknesses of women. Similarly, like the *Bunting* sequel to *Muller*, the *Darby* sequel to *West Coast Hotel* spent little time on the due process question, devoting the rest of a rather lengthy opinion to other legal issues. (In *Darby,* those questions involved the constitutional relationship between national and state legislative power.) In other words, once the constitutionality of women's legislation had been seriously debated, the due process question for similar legislation of *general* applicability was again simply assumed to have been already settled.

The repeated success of the *Muller/Bunting* and *West Coast Hotel/Darby* approach to obtaining societal acceptance of social welfare legislation via the women-and-children-first technique renders understandable why veterans of social welfare legislation battles, such as the AFL-CIO, for years prior to the mid-1960s opposed the Equal Rights Amendment. Those groups were reluctant to potentially negate protective legislation given its utility as a mechanism for advancing broader protections for all workers. Even as of the twenty-first century, the Supreme Court has not declared unconstitutional all laws that treat men differently from women, so this issue has not entirely disappeared.

EQUAL PROTECTION CLAUSE

After failing twice in pleas based on the privileges or immunities clause, women's rights litigants themselves shifted their attention to the Fourteenth Amendment's equal protection clause. That "no state shall deny to any person within its jurisdiction the equal protection of the law" is a command, like most of those in the Constitution, with more than one possible interpretation. Obviously, it means at least that all shall be equal "in the eyes of the law," that is, that the law as written shall be applied evenhandedly to all persons without regard to wealth or station. Although even this minimal meaning of the clause establishes a worthy (but, sadly, too often unattained) goal for the legal system, judges and legislators recognized from the start that the clause surely requires something more. That extra something in the way of "equal protection" refers to a certain measure of equality in the content of the laws themselves.

All laws treat different people differently. Some of them, one recognizes intuitively, do not violate the idea of "equal protection": A person who kills another under circumstances of self-defense may go free; a person who kills without those circumstances must go to prison. A murderer with a history of three prior criminal convictions receives a more severe penalty than a murderer with no prior convictions. Fifteen-year-olds who commit murder receive a lesser sentence

than 30-year-olds who commit the same act. Persons who are certifiably insane and commit murder are sent to a hospital; legally "sane" murderers are sent to prison. All these inequalities of treatment are mandated by statute law, and none of them violates the equal protection clause. Nonetheless, certain kinds of legal categorizations do violate that clause, as that clause has always been understood.

It is much easier to itemize the classifications forbidden by the equal protection clause than it is to explicate the principle underlying that prohibition. Everyone understood, as shown in the *Slaughterhouse Cases*, that the equal protection clause was intended to outlaw the Black Codes, or Slave Codes, which then prevailed throughout the South. These codes prohibited all Black persons or all persons who had once been slaves from owning property, from entering certain occupations, from attending schools, and so forth. In the phrase "equal protection of the law," Congress and the states that ratified the amendment[42] were announcing the rule that laws denying rights on the basis of race or previous condition of servitude were henceforth unconstitutional. While this is not a suitable context for exploring the anomalies of the separate-but-equal approach to this rule, which distorted it from 1896 to 1954, it is nonetheless true that laws depriving Black individuals of rights granted to white persons were widely understood to have been rendered unconstitutional by the equal protection clause. Thus, as early as 1880, a law excluding Black individuals from jury duty was declared invalid by the Supreme Court.[43]

This prohibition on racial discrimination by overt legal mandate was soon broadened to cover the example of a law that, as applied, resulted in excluding virtually all persons of Chinese origin from entering certain occupations.[44] Not long after that, the prohibition was further extended to cover the case of laws that discriminated against aliens without good reason.[45]

This sort of race or nationality discrimination, when it has no other basis than majority dislike of a minority group, is termed "invidious discrimination" by the Supreme Court and is banned by the equal protection clause.

Not every racial classification in laws is banned, however. Instead of creating a ban on racial classifications, the equal protection clause imposes a heavy burden of justification on those classifications. In situations of extreme public need, where a "compelling" or "overriding" governmental need can be demonstrated, the Court will permit legislative lines to be drawn on the basis of race. The busing of schoolchildren and the racially-oriented gerrymandering of school district lines for desegregation in the 1960s and 1970s are examples of these justified exceptions. Instead of being forbidden classifications, then, race and nationality are said to be "suspect classifications." They are suspected (or assumed) to be

"invidious" (based on unreasoned group antagonisms) until proven to be justified by a "compelling legislative purpose."

The historical circumstances surrounding the adoption of the Fourteenth Amendment provide a ready explanation for labeling racial classifications as "suspect" by virtue of the equal protection clause. When one notices that the original case treating nationality discrimination as suspect involved Chinese individuals,[46] that is, a non-Caucasian group who were at the time not permitted to become naturalized (in effect, condemned to be permanently aliens), the conceptual connection between racial and nationality classifications takes on even more concrete reality.

In the 1960s, the Supreme Court appeared to be extending the label "suspect" to classifications based on poverty as well. This further extension of the category is not as readily explainable, but did look solidly entrenched by the early 1970s.[47] By 1969, Chief Justice Earl Warren was referring to lines "drawn on the basis of wealth or race" as involving "two factors which independently render a classification highly suspect."[48]

What characteristics race, nationality, and poverty have in common that would render them equally suspect as "invidious" are not easy to determine, and, indeed, the Court since the early 1970s has largely backed away from treating poverty this way. But during the early 1970s, whatever those characteristics were, other discriminated-against groups were litigating in an effort to claim a share in them and thus to gather shelter from the suspect classification umbrella. Most prominent among such groups were women.[49]

An understanding of the way that the suspect classification doctrine operates is absolutely crucial for understanding how the U.S. Constitution does and does not protect women's rights. For one thing, sex may yet be declared a suspect classification under the existing Fourteenth Amendment equal protection clause. In 1973, in the case of *Frontiero v. Richardson*[50] the Court came bewilderingly close to doing just that. Although at present it looks as if the Court will continue to refrain from taking that step, the possibility nonetheless remains that the Court will someday declare gender to be a suspect classification on the basis of the equal protection clause alone.

At the same time, however, growing awareness about the complexities of sex and gender challenge the correlation between these two characteristics and further complicate this debate. As discussed in Chapters 3 and 6, existing legislative prohibitions on sex discrimination have been interpreted at times to include protections for transgender and gender non-conforming individuals, but the U.S.

Supreme Court has yet to decide a case involving the equal protection clause and gender identity. Thus, it is not clear if and when the justices will embrace the contemporary understanding of sex and/or gender: one that acknowledges the mutability of these characteristics. Such an acknowledgment would have consequences for the level of scrutiny applied to future Fourteenth Amendment equal protection claims alleging sex and/or gender discrimination.

Second, if the Equal Rights Amendment, which missed being added to the Constitution by only three states in the 1970s, is ever adopted, the need to understand the legal ramifications of suspect classifications will no longer rest on a hypothetical possibility. For it is certain that, just as the historical circumstances surrounding the adoption of the equal protection clause rendered it a pronouncement that racial classifications in the law would be "suspect," so the wording of the ERA would cause it to be interpreted as rendering sex-based classifications "suspect." An examination of a sample of the Court's treatment of racial classifications will thus provide an accurate estimate of the degree of justification that would be required before a sex-based classification could be upheld under an ERA.

Although many racial exclusions had earlier been struck down by the Court, the grounding of such a move in the rule that racial classifications are "suspect" under the equal protection clause occurred for the first time in the case of *McLaughlin v. Florida* in 1964.[51] The case involved a Florida statute making it a crime for a "Negro man and a white woman or a white man and Negro woman" to "occupy in the nighttime the same room." Both members of the couple could receive up to one year in jail. No proof of fornication was required to prove guilt. Florida had additional statutes punishing fornication, adultery, and "lewd cohabitation," all of which required proof of sexual intercourse to determine guilt, so this statute clearly concerned a "crime" based solely on the race of the "offenders." Florida argued that this law's purpose derived from its support for another Florida statute—the law against miscegenation. The Supreme Court's unanimous reply was that, even assuming for the sake of argument that the anti-miscegenation statute was constitutional (three years later, they were to make clear that it was not),[52] and that this statute in fact aided its enforcement, such justification was simply not enough. Here are their own words concerning the degree of justification needed to support racial classification in the law (at 379 U.S., 192–196, emphasis added):

> The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect,"

> *Bolling v. Sharpe*, 347 U.S. 497, 499; and subject to the "most *rigid scrutiny*," *Korematsu v. United States*, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 81, 100. . . .Our inquiry, therefore, is whether there clearly appears in the relevant materials *some overriding statutory purpose* requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in § 798.05 is reduced to an invidious discrimination forbidden by the Equal Protection Clause. . .[L]egislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group. Such classifications *bear a far heavier burden of justification*. . . . There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though [we might assume that it was] enacted pursuant to a valid state interest, *bears a heavy burden of justification*, as we have said, and will be upheld only if it is *necessary, and not merely rationally related, to* the accomplishment of a *permissible state policy*.

As the Court stated in *McLaughlin,* and as we emphasized in italics, the constitutional test for any suspect classification is that it must be proved "necessary" for the accomplishment of some "overriding" legislative purpose. What, then, is an "overriding" purpose? It means, in general, a weighty or important purpose, so important as to outweigh the constitutional condemnation of racial discrimination; sometimes the adjective "compelling" has been used by the Court in place of "overriding." Two overriding purposes held adequate to justify racial classifications have been (1) national defense during wartime, which was used to justify the evacuation and incarceration of Japanese Americans residing on the West Coast after Japan attacked the U.S. during World War II,[53] and (2) the need, in the late twentieth century, to eliminate *de jure* school segregation in communities where decades of governmentally forced segregation had an inevitable and enduring effect on shaping school attendance habits and neighborhood residential patterns.

The Court not only permitted racial classifications to be used for desegregation purposes, but also declared unconstitutional a law forbidding such classifications. The North Carolina Anti-Busing Law stated, "No student shall be assigned or compelled to attend any school on account of race, creed, color, or national origin." In 1971, the Supreme Court unanimously struck down the

statute, explaining that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."[54] The constitutional guarantee of which they were speaking was the fundamental right of children (under earlier decisions interpreting the equal protection clause) to equal educational opportunity. If any community had a "dual," or two-race, school system in the past, its constitutional obligation was to disestablish, or desegregate, that dual system to provide equal educational opportunity, and such rectification required looking at student race. When they were essential in this way, racial classifications were not only permitted but even required.[55]

More recently, however, the Court has indicated that in its imposition of the strict scrutiny test, it draws a sharp distinction between governmental action to undo segregation where it was forced upon people initially and governmental action to integrate communities or schools segregated due to other-than-governmental forces. For the latter, sometimes it upholds the government action and sometimes not.[56]

If sex were to become officially a suspect classification, some circumstances would surely arise, parallel to those of the busing situation, that still required sex-based distinctions in the law. (This matter receives further consideration in the case note following *Frontiero v. Richardson* in Chapter 2.)

Because the equal protection clause speaks in general terms without specific mention of race, at least in principle the clause soon acquired a general content with implications reaching far beyond its specific prohibition (or near-prohibition) of racial (or suspect) classifications. These implications comprised an alternative constitutional doctrine available to women's rights litigants as long as the "suspect classification" label eluded their grasp. It is important to examine this alternative equal protection approach in order both to understand the legal context that stimulated the ERA campaign of the 1970s and to grasp the significance of the changes in constitutional law wrought by the Supreme Court since the time of that campaign,[57] changes that likely contributed to the failure of the amendment to attain ratification. This general approach, or "ordinary" equal protection scrutiny, in the century before 1970 presented a partly cloudy/partly sunny picture of opportunity for litigants attacking sex discrimination.

The clouds in this picture were the first part to develop. The *Slaughterhouse Cases*, with the statement that the equal protection clause probably applied only to racial discrimination, forecast difficulty in expanding the equal protection clause beyond race, and the Supreme Court made only minor adjustments to this rule until the mid-twentieth century. Those minor adjustments were shaped by broad statements of principle that the Court applied with such a light touch that for the

first 50 years the impact of these statements was barely perceptible. Still, they did create at least a small opening in the precedent law to which later litigants could eventually appeal with much more noticeable success.

By 1886 the Supreme Court had acknowledged that "the equal protection of the laws is a pledge of the protection of equal laws."[58] "Equal laws," however, did not mean laws that affected all members of society equally. As explained above, all laws affect different people with differing impacts. What "equal laws" *did* mean was that the equal protection clause, in addition to denoting racial classifications suspect, created a certain standard of fairness against which all legislative classifications would have to be measured.

At first that standard of fairness was stated only in the vaguest, and therefore most unenforceable, of terms. In 1885 the Court explained the equal protection clause as though it were little (if anything) more than a guideline of legislative convenience:

> Special burdens are often necessary for general benefits. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are [acceptable if] designed, not to impose unequal or *unnecessary* restrictions upon anyone, but to promote, with *as little inconvenience as possible*, the general good. [Emphasis added.][59]

By "unnecessary" here the Court meant utterly groundless. Thus, the justices read the equal protection clause as stating that legislatures could not penalize particular groups of people in whimsical or "purely arbitrary" ways: equal protection required that there be some point to any classification that a legislature enacted into law. But what legislature would bother to enact a law that had absolutely no purpose? If this seems an exaggerated depiction of the turn-of-the-century Court's nonrule of equal protection, consider the following explanation of it in the Court's own words in a 1911 case:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of a wider scope of discretion in that regard, and avoids what is done *only when it is without any reasonable basis and therefore is purely arbitrary*. 2. A classification having *some* reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it, the existence of the state of facts must be assumed*. 4. One who assails the classification in such a law must carry

the *burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary*. [Emphases added.][60]

The italics, of course, stress the interpretation compatible with our point; we note that the requirement that classifications have a "reasonable" basis is one of the most accordion-like standards of the American legal system. Thus the Court's oft-quoted 1920 statement that equal protection required that classifications "be reasonable, not arbitrary and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"[61] can be read in a variety of ways. It looks like it means that legislative classifications must be in fact sensibly related to the public welfare purpose at which the law is aiming. This full-blown version would stress the "fair and substantial relation" phrase in the standard. Nevertheless, if the Court wanted to stress the word *some* (reading, "classifications. . . must rest upon *some* ground of difference") and wanted to interpret "object of the legislation" in a narrow way, the justices could collapse the reasonableness accordion into almost invisible size.

For example, a law that prohibited women from entering the state bar to become lawyers, by the expanded, or rigorous, reasonableness standard could be said to have no "fair and substantial" relation to the legislative objective of providing well-qualified lawyers to serve the public (the broad objective of bar admissions standards). But using the same 1920 statement as a guide, the Court could say of the same law that there is some ground for excluding women from the bar and that the (narrow) legislative objective of keeping women at home to care for their children does have a reasonable relationship to the legislative practice of excluding them from all paid professions.

The "reasonableness" standard for the equal protection clause provided the Court, one might say, with a hammer that it could wield with whatever strength it desired. Wielded by a strong arm, the hammer could be used to strike down much, even most, legislation—depending on how substantial the "substantial relation" had to be and the breadth of the "object of the legislation" on which the Court chose to focus. Wielded by a gentle hand, the reasonableness hammer could strike so lightly as to make no impression. Not needing the equal protection hammer for striking down economic legislation—the task that preoccupied the Court in the first few decades of the century, the era of *Lochner v. New York*, and for which the sledgehammer of economic substantive due process was more than adequate—the Supreme Court allowed the equal protection hammer to lie dormant, wielding it with only the gentlest of kid gloves during this period. *Radice v. New York* (above) provides a good period example of the Court's disparate

treatment of these two clauses. While the Court took the due process argument seriously there, its response to the equal protection argument was relatively cavalier: the legislature, the Court said, may proceed "step by step" (letting women work certain jobs at night but not others); "it is not necessary that the prohibition . . . be all-embracing [e.g., cover men and women workers equally]" (264 U.S., at 298). This is standard logic under ordinary equal protection scrutiny.

Thus, for several decades this "reasonableness" equal protection principle received no more than lip service from the Court. The justices openly admitted that the principle, as they interpreted it, permitted laws to be "ill-advised, unequal," and even "oppressive."[62] In other words, they were willing to view as "reasonable" any law for which the legislature, or legislature's counsel, could conjure up any rationale, even if unpersuasive or implausible.

This accordion-like "reasonableness" test for applying the equal protection clause, because it is the one applied in the common case—as contrasted with the "suspect classification" approach, which occurs only in the rare case—is often called the "ordinary scrutiny" approach to equal protection. Ordinarily, when a particular legislative classification is challenged as a denial of equal protection of the laws, the justices simply ask themselves whether this classification bears some "reasonable" or "rational" relationship to some valid legislative purpose. In the race case, *McLaughlin v. Florida*, the Court referred to the need to subject suspect classifications not to "ordinary scrutiny" but rather to "the most rigid scrutiny." The general rule then, circa 1970, was that suspect classifications received "strict scrutiny" (i.e., must be shown to be necessary for the attainment of a compelling governmental interest), whereas all other classifications receive merely "ordinary scrutiny," or—because the accordion is generally kept in its collapsed state—"minimal scrutiny" (i.e., need only bear some logical or "rational" relationship to any legitimate governmental purpose).[63]

The direction of, as well as the obstacles along, women's alternative to the suspect classification route should now be clear. Women's rights litigants could venture along the ordinary scrutiny path in challenging sex-discriminatory legislation as a violation of equal protection of the laws. To reach their goal of having those laws declared void, the litigants would need to surmount the obstacle of having to demonstrate that the laws had no rational relationship to promoting a valid legislative purpose. This task of demonstration would vary in difficulty according to the rigor with which the Court chose to apply the reasonableness test.

A Century of "Ordinary Scrutiny" of Sex-Based Classifications

Early-Twentieth-Century Cases. By the early 1900s, the principle that the equal protection clause broadly limited the content of legislation, according to the rationality standard described in the preceding section, was firmly established. As long as the Court followed the four guidelines for applying the reasonableness test quoted above, the chances were almost nil that a challenger could successfully prove that a law embodied an "unreasonable" classification. In short, as applied during the early twentieth century, the rule simply accorded every conceivable benefit of doubt to the side of the statute under attack.

The earliest equal protection clause challengers to gender discrimination were men rather than women, and they were attacking legislation that singled out women for special benefit. Whether legislation ostensibly protective of women helps them more than it hurts them is, of course, a subject of controversy.[64] But that it hurts men is often intuitively obvious, and "men's rights" advocates were quick to assert their claims in court.

Within a few years of *Muller v. Oregon*, the Supreme Court received a case, *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912), that challenged on sex discrimination grounds a law providing special economic benefits to women. Quong Wing, a male Chinese American[65] who operated a hand laundry in Lewis and Clark County, Montana, challenged a Montana law that imposed a 10-dollar "license tax" on all operators of hand laundries. The statute explicitly exempted steam laundries from this tax, and it also exempted women who ran laundries employing no more than two women. Quong Wing challenged both exemptions as a violation of the equal protection clause of the Fourteenth Amendment.

The Supreme Court's response to Quong Wing's challenge is illustrative of two prevalent tendencies in equal protection clause analysis of this early period. First, it illustrates in stark colors the Court's willingness to swallow any argument in defense of legislation providing special treatment to women. Justice Oliver Wendell Holmes devotes all of one sentence to the matter of the "reasonableness" of this sex-based occupational tax: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference."[66] Second, the Holmes majority opinion illustrates the bifurcated approach to equal protection scrutiny that had already developed by this time. Racial discrimination was scrutinized with far more care than "ordinary"

classifications were. Justice Holmes indicates the Court's grounds for suspecting that this sex discrimination law may be a race discrimination law in disguise; he notes that many Chinese men but virtually no men "of our race" operate hand laundries. If it were a matter of race discrimination, Justice Holmes admits, it "would be a discrimination that the Constitution does not allow."[67] Holmes's defense of the constitutionality of this law offered no hints why the equal protection clause would forbid the same discrimination against Chinese-American men that it would permit against men in general.

The Supreme Court's cavalier approach to male complaints about sex discrimination continued long after Justice Holmes left the Court. In 1937, in *Breedlove v. Suttles*, 302 U.S. 277 (1937), the Court again, and this time unanimously, rejected the constitutional arguments of a man complaining about sex-based discrimination in tax laws.

The state of Georgia required all males (except the blind) between the ages of 21 and 60 to pay a $1 annual tax. This tax was called a "poll tax," evidently because it was collected when people tried to register to vote and because they were not allowed to vote if their poll taxes were not paid in full. Despite the label, however, alien males, who were not permitted to vote, had to pay the tax, and elderly males who did vote were excused from the tax on the basis of age. Women in the 21–60 age group, regardless of their marital status, had to pay the tax only if they registered to vote.

A 28-year-old man named Nolan Breedlove tried to register to vote without having paid his poll taxes. When the registrars turned him away, he initiated a suit in the local courts to have these tax laws declared unconstitutional on the grounds that they conflicted with the equal protection clause, the privileges or immunities clause, and the Nineteenth Amendment. The county court and the state supreme court both rejected his claims, and Breedlove appealed to the U.S. Supreme Court.

The Supreme Court paid little attention to Breedlove's privileges or immunities argument. Justice Butler's opinion followed the old *Minor v. Happersett* ruling that the right to vote was not a privilege of national citizenship.

The Court opinion took the Nineteenth Amendment argument only slightly more seriously. Because members of both sexes, if they wanted to vote, had to pay the tax, the Court saw no plausibility in the claim that this tax tended to abridge the right to vote "on account of sex." The Court buttressed this reasoning with the observation that requiring "the payment of poll taxes as a prerequisite to voting" was a widely accepted practice in the American states. (Eventually, in

1966, the Supreme Court did declare poll taxes a violation of equal protection of the laws.)[68]

The Court gave the most weight to Breedlove's equal protection argument. Beginning with the reminder, "The equal protection clause does not require absolute equality," Justice Butler first justified exempting minors and the elderly from the tax. The young do not generally support themselves, so taxing them would usually result just in extra taxes on their parents. And the old are excused from a variety of public duties, such as jury duty and service in the militia. Justice Butler reasoned that this tax exemption did not differ to a "substantial" degree from those other exemptions for the elderly. His arguments aimed at justifying the tax discrimination between nonvoting women and nonvoting men were as follows:

> The tax being upon the person, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State may reasonably exempt them from poll taxes. [Case citations omitted.] The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden. Moreover, Georgia poll taxes are laid to raise money for education purposes, and it is the father's duty to provide for education of the children.
>
> Discrimination in favor of all women being permissible, appellant may not complain because the tax is laid only upon some or object to the registration of women without payment of taxes for previous years.[69]

Goesaert v. Cleary (1948)

When legislation purporting to protect women blatantly cut them off from certain job opportunities, they, too, took complaints to court. As the *Radice v. New York* case made evident, due process challenges to such laws generally foundered on the *Muller v. Oregon* precedent. Eventually, women tried asserting their rights under the equal protection clause. Confronting the Court's any-rationalization-is-reasonable approach to "ordinary scrutiny," these women fared no better than the men's rights litigants.

The 1948 case of *Goesaert v. Cleary*[70] provides a typical sampling of the Court's approach to "ordinary" equal protection scrutiny by the mid-twentieth century. Ms. Goesaert was challenging a Michigan statute that prohibited a woman from serving liquor as a bartender unless she was "the wife or daughter of the male

owner" of a licensed liquor establishment. In marked historical contrast to the *Bradwell* case, Ms. Goesaert's case was argued at the Supreme Court by a woman lawyer. Nevertheless, Ms. Goesaert fared no better than Myra Bradwell had.

Justice Frankfurter, who writes the majority opinion here, had served as lawyer on the *Bunting v. Oregon* and the *Adkins v. Children's Hospital* cases, in which he had argued that the Fourteenth Amendment does not prohibit states from enacting social welfare legislation that gives special protection to women. While his conclusions in *Goesaert v. Cleary* are obviously consistent with his previous advocacy role, one can argue that he did not take seriously the question whether a principled distinction can be drawn between hours and wage legislation protective of women, on the one hand, and legislation barring some women from certain trades, on the other. What is the answer to that question?

GOESAERT ET AL. V. CLEARY ET AL., LIQUOR CONTROL COMMISSION

335 U.S. 464 (1948)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court:

. . .The claim, denied below, one judge dissenting, 74 F. Supp. 735, and renewed here, is that Michigan cannot forbid females generally from being barmaids and at the same time make an exception in favor of the wives and daughters of the owners of liquor establishments. Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it.

. . .[R]egulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have longed claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. See the Twenty-First Amendment. . . .The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147. Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

* * *

Nor is it unconstitutional for Michigan to withdraw from women the occupation of bar-tending because it allows women to serve as waitresses where liquor is dispensed. The District Court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. . . .

Judgment *Affirmed.*

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, dissenting:

While the equal protection clause does not require a legislature to achieve "abstract symmetry" or to classify with "mathematical nicety," that clause does requires lawmakers to refrain from invidious distinctions of the sort drawn by the statute challenged in this case.

The statute arbitrarily discriminates between male and female owners of liquor establishments. A male owner, although he himself is always absent from

> his bar, may employ his wife and daughter as barmaids. A female owner may neither work as a barmaid herself nor employ her daughter in that position, even if a man is always present in the establishment to keep order. . . . Since there could be no. . . conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection.

Case Questions

1. To what extent does Justice Frankfurter's opinion rely on the Twenty-first Amendment? In *California v. LaRue*, 410 U.S. 948 (1972), the Supreme Court held that a state's right to regulate liquor traffic under the Twenty-first Amendment overrode even some of the rights of free expression implied by the First Amendment. If the ERA were to be ratified, would the Twenty-first Amendment nonetheless keep this Michigan statute constitutional?

2. Just what is the "basis in reason" that Frankfurter finds for keeping women from behind the bar? For making an exception of wives and daughters of male bar owners? For not making an additional exception for female owners and their daughters "even if a man is always present to keep order"?

3. If the Michigan legislature altered the statute to comply with the dissenters' objections concerning an exemption for female bar owners, would the law still violate the equal protection clause? Would it violate an ERA?

Hoyt v. Florida (1961)

As is evident by now, in the name of ordinary equal protection scrutiny, the Supreme Court has allowed the flimsiest of "reasons" to support statutes challenged as denials of equal protection. This pattern continued to cloud the efforts of women's rights litigants even into the 1960s, a period when the Court was thought of as generally "liberal." And the case in question, *Hoyt v. Florida*, concerned what might be thought of as another basic citizen right besides voting, the right to serve on juries.

This 1960s example of the Court's acceptance of unreasoned "reasons" for denials to women of equal treatment involved an incident within that sanctuary of family life, the home. One Mrs. Hoyt of Florida assaulted and killed her husband with a baseball bat during a "marital upheaval," as the Court put it. Mrs. Hoyt not only suspected her husband of adultery, but had the further motivation that he rejected her when she said she was willing to forgive and take him back. She pleaded "temporary insanity" and was convicted of second-degree murder by an all-male jury.

Florida law provided that no female could serve on a jury unless she had personally made a trip down to the circuit court office and specifically requested to be put on the jury list. Because men did not have to make such efforts, the law naturally produced an enormous disproportion of male to female jurors, which almost always produced all-male juries, like Mrs. Hoyt's. (Of some 10,000 persons on her local jury list of eligibles, only 10 were women.) Mrs. Hoyt claimed that this statute denied her equal protection of the law because (as Justice Harlan put it, at p.59) "women jurors would have been more understanding or compassionate than men in assessing the quality of [her] act and her defense of 'temporary insanity.' "

In deciding *Hoyt,* as is often the situation, the Court had available to it alternative lines of precedents that pointed in opposed directions. On one hand (against Mrs. Hoyt) were the equal protection cases presented above. On the other hand was a line of trial-by-jury cases that *might* have been used to infer the rule that impartiality in jury trials was a necessary element of equal protection and that impartiality required a fair cross-section of the community.

In its role as supervisor of the federal courts, in the 1940s the U.S. Supreme Court had outlawed the systematic exclusion of daily wage earners from federal juries with an argument that the "American tradition of trial by jury" demands "an impartial jury drawn from a cross-section of the community," and that this implied that jurors must be selected "without systematic and intentional exclusion of any [economic, social, religious, racial, political or geographical] groups" (*Thiel v. Southern Pacific*, 328 U.S. 217, 220).

The Court had also ruled in the 1946 case *Ballard v. U.S.*, 329 U.S. 187, that three elements of the Congressional statute governing federal jury selection (Judicial Code § 275, 28 U.S.C. § 411) "reflect a design to make the jury 'a cross-section of the community' and truly representative of it." Those three elements in the statute were (a) a prohibition on racial exclusion, (b) a command that jurors be chosen "without regard to party affiliation," and (c) a rule that jurors be selected from such parts of the district as to make most likely an impartial jury and not unduly burden the citizens of any one part of the district. (Note that it is not at all obvious that these three rules imply more strongly than does the phrase "equal protection of the laws" the rule that juries must be chosen from a representative cross-section of the community.) Having arrived at the representative cross-section rule in *Ballard,* the Court then used it to guide the interpretation of the federal statute requiring that jurors in federal trials be chosen according to state juror selection rules. California in 1946 (unlike 40 percent of the states) did make women eligible for jury duty. But as a matter of state practice women were not

called to serve. Federal courts in California, in a good faith effort to obey federal law, had been following state practice rather than the letter of state statute. The Supreme Court in *Ballard* held this federal practice in the particular state of California to be a "departure from the federal scheme Congress adopted" and to be an error to be corrected by the Court's power "over the administration of justice in the federal courts." In ordering this correction, the Supreme Court reasoned as follows:

> It is said, however, that an all-male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one [has] on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

It was Justice Douglas who wrote these words in 1946 regarding federal trials in one state. In *Hoyt v. Florida*, a case concerning state trials in a different state 15 years later, he shows no sign of remembering his own arguably relevant logic.

HOYT V. FLORIDA

368 U.S. 57 (1961)

MR. JUSTICE HARLAN delivered the opinion of the Court:

. . .Of course [Mrs. Hoyt's] premises misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the

jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary and systematic exclusions. See *Fay v. New York,* 332 U.S. 261, 284–85, and the cases cited therein. The result of this appeal must therefore depend on whether such an exclusion of women from jury service has been shown.

I

We address ourselves first to appellant's challenge to the statute on its face.

Several observations should initially be made. We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which "single out" any class of persons "for different treatment not based on some reasonable classification." *Hernandez v. Texas*, 347 U.S. 475, 478. We need not, however, accept appellant's invitation to canvass in this case the continuing validity to this Court's dictum in *Strauder v. West Virginia*, 100 U.S. 303, 310, to the effect that a State may constitutionally "confine" jury duty "to males." This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, see *Fay v. New York*, at 289–90, and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves.[2] Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues.

Manifestly, Florida's § 40.1 (1) does not purport to exclude women from state jury service. Rather, the statute "gives to women the privilege to serve but does not impose service as a duty.". . . This is not to say, however, that what in form may be only an exemption of a particular class of persons can in no circumstances be regarded as an exclusion of that class. Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation.

In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for such service; men, on the other hand, even

if entitled to an exemption, are to be included on the list unless they have [annually] filed a written claim of exemption. . . .

In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

Florida is not alone in so concluding. Women are now eligible for jury service in all but three States of the Union. Of the forty-seven States where women are eligible, seventeen besides Florida, as well as the District of Columbia, have accorded women an absolute exemption based solely on their sex, exercisable in one form or another. In two of these States, as in Florida, the exemption is automatic, unless a woman volunteers for such service. It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities. But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption.

Likewise we cannot say that Florida could not reasonably conclude that full effectuation of this exemption made it desirable to relieve women of the necessity of affirmatively claiming it, while at the same time requiring of men an assertion of the exemptions available to them. Moreover, from the standpoint of its own administrative concerns the State might well consider that it was "impractical to compel large numbers of women, who have an absolute exemption, to come to the clerk's office for examination since they so generally assert their exemption."

Appellant argues that whatever may have been the design of this Florida enactment, the statute in practical operation results in an exclusion of women from jury service, because women, like men, can be expected to be available for jury service only under compulsion. . . .

This argument, however, is surely beside the point. Given the reasonableness of the classification involved in § 40.01 (1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period." *Hernandez v. Texas* at 482.

We cannot hold this statute as written offensive to the Fourteenth Amendment.

II

Appellant's attack on the statute as applied in this case fares no better. . . .

This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service [citations omitted.] There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.

In the circumstances here depicted, it indeed "taxes our credulity," *Hernandez v. Texas* at 482, to attribute to these administrative officials a deliberate design to exclude the very class whose eligibility for jury service the state legislature, after many years of contrary policy, had declared only a few years before. [Women became "eligible" for Florida juries in 1948.]

. . . We must sustain the judgment of the Supreme Court of Florida.

Opinion Footnote

2 From the First Judiciary Act of 1798, § 29, 1 Stat. 73,88, to the Civil Rights Act of 1957,71 Stat. 634, 638, 28 U.S.C. § 1861—a period of 168 years—the inclusion or exclusion of women on federal juries depended upon whether they were eligible for jury service under the law of the State where the federal tribunal sat.

By the Civil Rights Act of 1957 Congress made eligible for jury service "Any citizen of the United States," possessed of specific qualifications, 28 U.S.C. § 1861, thereby for the first time making. . . women eligible for federal jury service even though ineligible under state law. There is no indication that such congressional action was impelled by constitutional consideration.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We cannot say from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground

of sex. Hence, we concur in the result, for the reasons set forth in Part II of the Court's opinion.

Case Questions

1. What "reason" justifies excluding single women from jury duty?

2. Should the fact that a particular classification appears in the statutes of a large number of states be treated as evidence that there is a reasonable basis for the classification?

3. Does the three-judge concurring opinion imply that those judges would view an across-the-board ineligibility for women jurors as unconstitutional? If statistics can be used to show that Blacks are purposely being kept off juries and that these purposeful acts are unconstitutional, why should a system that yields only 10 women in every 10,000 jurors not be unconstitutional even if one cannot show that it is being purposely manipulated by someone?

4. Is it likely that an all-male jury has certain biases not shared by women? That persons who earn less than $20,000 a year have biases not shared by those who earn over $40,000? That Democrats have biases not shared by Republicans? That persons over 60 have biases not shared by persons under 30? Should communities be required to have laws that do not produce systematic jury bias in any of these directions?

Case note: As recently as 1968 the Court refused to reconsider the issue settled in *Hoyt* (*State v. Hall*, 385 U.S. 98).

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[1] A few limits were placed on state governments. In regard to individual rights, states are forbidden from passing "bills of attainder" (laws that label named individuals as criminals, regardless of whether they have committed any illegal acts), "*ex post facto* laws" (statutes that declare punishments for past actions that, at the time they were committed, were legal), and laws "impairing the obligation of contracts" (for example, a law saying that particular debts would not have to be paid, thereby depriving the lender of his property right). (See Art. I, sec. 10, of the Constitution.) The states had to provide a "republican form of government" (Art. IV, sec. 4) and to refrain from granting titles of nobility (Art. I, sec. 10). States were ordered to give cognizance to property rights recognized by other states (Art. IV, sec. 1), including the property right in runaway "persons held to service or labor" (Art. IV, sec. 2). Finally, states had to grant "all privileges and immunities of citizens in the several states" to the citizens of each state. This confusingly worded clause (Art. IV, sec. 2) simply meant that states were not allowed to discriminate against out-of-staters in basic legal rights, such as access to the courts, the rights to buy and sell, or the right to be hired for a job.

[2] 4 Washington's Circuit Court 380, cited in *Slaughterhouse Cases*, 83 U.S. 36, 117.

[3] 83 U.S., at 78.

[4] Swayne dissent, 83 U.S., at 127.

[5] 83 U.S., at 81

[6] A classic analysis of the Fourteenth Amendment suggests that this is due to the "primacy of the American concern with liberty over equality" (Joseph Tussman and Jacobus ten Broek, "The Equal Protection of the Laws," 37 *California Law Review* 341 [1949]). The tremendous upsurge in equal protection litigation in the post-World War II era (desegregation, state legislative reapportionment, welfare rights, nonmarital

children's rights, prisoners' rights, in addition to the subject of this book) indicates that equality, as against liberty, took on increased importance in American political ideology.

[7] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[8] *Traux v. Raich*, 235 U.S. 33 (1915). A later case supporting the same principle was *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). Even into the 1970s, the late Chief Justice Rehnquist (at the time still an Associate Justice) would have limited the condemned classification doctrine to racial classifications. See his dissent in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

[9] *Heath and Milligan v. Worst*, 207 U.S. 338, 354 (1907), emphasis added. The interior quote is from *Mobile County v. Kimball,* 102 U.S. 691 (1881).

[10] 83 U.S. 130.

[11] Joan Hoff, *Law, Gender & Injustice* (New York, NY: New York University Press, 1991), 169.

[12] Edward James, *Notable American Women, 1607–1950* 3 vols. (Cambridge, MA: Belknap Press, 1971), 1:223–25, 2:492–93.

[13] 83 U.S. 36, 109–10.

[14] 83 U.S. 36, 122.

[15] Hoff, *Law, Gender, & Injustice*, 169.

[16] Indeed, the women's suffrage movement split in two over this issue. The branch that supported the Fourteenth Amendment was headed by Lucy Stone and Julia Ward Howe. See discussion of the suffrage movement in the section that follows *Minor v. Hapersett*.

[17] Eleanor Flexner, *Century of Struggle* (New York, NY: Atheneum, 1970), 165; Anne F. Scott and Andrew Scott, *One Half the People: The Fight for Woman Suffrage* (Philadelphia, PA: J.B. Lippincott, 1975), 19–20.

[18] Scott and Scott, *One Half the People*, 20. A women's suffrage amendment with different wording had been introduced unsuccessfully as early as 1868. Flexner, *Century of Struggle*, 173.

[19] Flexner, *Century of Struggle*, 173–75, 220–22.

[20] Carrie Chapman Catt and Nettie Rogers Shuler, *Woman Suffrage and Politics* (New York, NY: Charles Scribner's Sons, 1923), 107. The description is Ms. Catt's.

[21] Flexner, *Century of Struggle*, 291. The Flexner book contains the fullest account of the suffragist effort that can be found in a single volume. The five-volume *The History of Woman Suffrage* by Elizabeth Cady Stanton, Susan B. Anthony, Matilda Joslyn Gage, and Ida Husted Harper is more complete but not as well organized.

[22] Ibid., 144.

[23] Patricia A. Schechter, *Ida B. Wells-Barnett and American Reform, 1880–1930* (Chapel Hill, NC: University of North Carolina Press, 2001), Chapter 5, 200.

[24] Flexner, *Century of Struggle*, 219.

[25] Ibid. 248–257.

[26] *Id.* 254–268.

[27] *Id.* 264.

[28] *Id.* 265

[29] *Id.* 272–273.

[30] *Id.* 269.

[31] *Id.* 279.

[32] Doris Stevens, *Jailed for Freedom* (New York, NY: Boni & Liveright, 1920), 102.

[33] Flexner, *Century of Struggle*, 285.

[34] *Id.* 286.

[35] *Id.* 290.

[36] *Id.* 290.

[37] *Id.* 291–292.

[38] Flexner, *Century of Struggle*, 312–314.

[39] See *Chicago, Milwaukee and St. Paul Railway v. Minnesota*, 134 U.S. 418 (1890); *Allgeyer v. Louisiana*, 165 U.S. 578 (1898).

[40] The Supreme Court did hear arguments on Oregon's minimum-wage law for women in 1916 (*Settler v. O'Hara*, 243 U.S. 629) but then tied 4–4, leaving the lower court decision in place.

[41] *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587. An attorney for the National Consumers League, Dorothy Kenyon, submitted an *amicus* (friend of the court) brief endorsing the constitutionality of New York's women-only minimum-wage law. The same attorney in 1961 presented the Supreme Court case against Florida's women-only automatic jury exemption (see *Hoyt v. Florida* below). Ms. Kenyon also presented an *amicus* brief in the 1971 *Phillips v. Martin-Marietta* employment discrimination case (see Chapter 3). For the latter two cases, Ms. Kenyon was in the employ of the American Civil Liberties Union.

[42] The Southern states were pressured into ratifying the Fourteenth Amendment by a set of congressional requirements that, for the decision-making process, enfranchised Blacks and disfranchised participants in the rebellion, and that also made ratification a precondition for regaining representation in Congress. A. Kelly and W. Harbison, *The American Constitution*, 4th ed. (New York, NY: W.W. Norton, 1970), 465–473.

[43] *Strauder v. West Virginia*, 100 U.S. 303 (1880).

[44] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[45] *Traux v. Raich,* 239 U.S. 33 (1915). Although the law involved here (as well as various later ones that discriminated against aliens) was declared unconstitutional, the equal protection clause does allow some "discrimination" against aliens, e.g., the limitation of suffrage rights to American citizens. For the explanation of what is considered good enough "reason" to deprive aliens of certain privileges, see the text below.

[46] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[47] See *Edwards v. California*, 314 U.S. 160 (1941); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Harper v. Board of Elections*, 383 U.S. 663 (1966); *Williams v. Illinois*, 399 U.S. 235 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *James v. Strange*, 407 U.S. 128 (1972). But contrast *James v. Valtierra*, 402 U.S. 137 (1971); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[48] *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969).

[49] Attorneys for persons born out of wedlock ("illegitimates") met with mixed success during this period in asserting claims that "illegitimacy" should be a suspect classification. See *Levy v. Louisiana*, 391 U.S. 68 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); and *Weber v. Aetna*, 406 U.S. 164 (1972).

[50] 411 U.S. 677.

[51] *McLaughlin v. Florida*, 379 U.S. 184 (1964).

[52] *Loving v. Virginia*, 388 U.S. 1 (1967).

[53] *Korematsu v. United States*, 323 U.S. 214 (1944). Three unusually bitter dissents were recorded for that case, and the majority opinion upholding the incarceration remains controversial to this day.

[54] *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971).

[55] *Id.*

[56] See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[57] The ERA was "proposed" by well over the minimum two-thirds of both houses of Congress on March 22, 1972. Congress set a seven-year limit for ratification. On October 6, 1978, Congress, by majority vote, extended the ratification deadline to June 30, 1982. By this deadline, the proposed amendment had attained ratification in only 35 of the needed 38 states (70 percent instead of 75 percent). After that, the ERA became bogged down in politics around abortion and could not attain the needed two-thirds of Congress for re-proposal.

[58] *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[59] *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885).

[60] *Lindsley v. Natural Carbonic Gas*, 220 U.S. 61, 78 (1911).

[61] *Royster Guano v. Virginia,* 253 U.S. 412, 415 (1920).

[62] *Heath and Milligan v. Worst*, 207 U.S. 338, 354 (1907).

[63] In discussions of the due process clause, where fundamental rights are at stake, the terms "strict scrutiny" and "rigid scrutiny" are also used, and where no such right is involved, "ordinary" or "minimal scrutiny" is used.

[64] See, for example, Judith Baer, *The Chains of Protection* (Westport, CT: Greenwood Press, 1978).

[65] He was a permanent resident of the USA and was of Chinese descent. No person born in China was permitted to become a naturalized American citizen until 1943, when China was our wartime ally. Natives of India, the Philippines, and Japan were barred from citizenship until even later. See discussion in *Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948).

[66] *Quong Wing v. Kirkendall,* 223 U.S. 59, 63 (1912).

[67] *Id.*, at 63.

[68] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[69] *Breedlove v. Suttles, Tax Collector*, 302 U.S. 277, 282 (1937).

[70] 335 U.S. 464.