COMPETING SOCIAL CONSTRUCTIONS OF WOMEN WORKERS IN *LOCHNER*-ERA JUDICIAL DECISION-MAKING

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ABSTRACT

Ronald Kahn has argued that the social construction process, which embeds social realities outside the court in legal doctrine, can lead to more rights-protective constitutional interpretations, even during conservative eras. However, especially when particular groups are the subject of multiple or competing social constructions, the social construction process may not always lead to rights-expansive outcomes for disadvantaged groups. From the late 1800s through 1937, state and federal courts struggled to fit women workers into changing legal conceptions of the "right to contract." Across numerous cases, courts vacillated between two competing social constructions of women workers: women as vulnerable victims in need of special state protections, and women as independent economic actors who were qualified to make their own workplace decisions. Ultimately, social constructions that provided important workplace protections for women workers before 1937 became embedded in legal doctrine in ways that limited their economic and civil equality for decades afterward.

KEYWORDS: *gender, women, Lochner era, New Deal, labor, employment, American political development*

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> [S]ex is no bar, under the constitution and the law, to the endowment to woman with the fundamental and inalienable rights of liberty and property.
>
> —*Ritchie v. People*, 155 Ill. 98 (1895)

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . 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.
>
> —*Muller v. Oregon*, 208 U.S. 412 (1908)

The *Lochner* era stretched from the late 1800s to 1937 and was characterized by intense conflict among legislatures, activists, and courts surrounding laws regulating working conditions and union activity. The period is named after the infamous *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a New York law providing labor protections for bakers. During this period, both the U.S. Supreme Court and state courts struck down a number of labor reforms as unconstitutional, typically citing a constitutionally protected liberty: the "right to contract." William Forbath writes that the judiciary played a uniquely combative role in blocking labor reforms and shaping the strategies of labor activists: "Nowhere else among industrial nations did the judiciary hold such sway over labor relations as in nineteenth- and early twentieth-century America. Nowhere else did trade unionists contend so constantly for so many decades with judge-made law" (Forbath 1989, 1114). Although courts during this period consistently ruled against unions, both state courts and the U.S. Supreme Court were sometimes, although not always, willing to accept legislative intrusions into the right to contract when done for the purpose of protecting workers, particularly when the laws in question concerned "vulnerable" populations, such as women, children, and individuals employed in occupations deemed to be unusually dangerous.[2]

This paper explores competing social constructions of women workers by the judiciary, especially in interpreting "protective" laws concerning such topics as minimum wages, maximum hours, and restrictions on night work. Throughout the *Lochner* era, courts struggled to fit women into the constitutional regime of the right

2. In her analysis of the role of gender in *Lochner*-era cases, Julie Novkov finds that both federal and state courts were more likely to strike down protective legislation if it covered all workers as opposed to targeting women workers specifically (Novkov 2001, 30–31); see also Urofsky (1985).

to contract. Across numerous cases, courts attempted to balance two competing social constructions of female workers: (1) women as vulnerable victims, entering the workplace in growing numbers and in need of state protection from exploitative employers; and (2) women as independent economic actors who could make decisions for themselves on the same basis as men.

Neither one of these ideas was new in the *Lochner* era. State courts and state legislatures developed both constructions throughout the 1800s as states passed and courts interpreted Married Women's Property Acts (MWPAs). These state laws expanded married women's economic rights but also often aimed to protect women from economic exploitation by both their husbands and third-party economic actors. Importantly, both of these constructions reflected women's lived reality in important ways—women increasingly played active roles in the economy and generally were as competent as men to make independent economic decisions, but female workers often were subjected to poorer working conditions and lower wages than their male counterparts. Throughout this period, courts struggled to balance these two social realities of women in the workplace—women as workers with a right to contract, and women as especially vulnerable and in need of state paternalism.

I first broadly consider the role of social constructions and the social construction process (SCP) in judicial decision-making (Kahn 2006) and argue that this process may not always lead to more rights-protective and rights-expansive outcomes (along various dimensions). I then provide a historical context for both married women's economic rights reform as well as later struggles over labor reforms for women in the workplace. I discuss the continuity and clashes between these two overlapping but distinct reform paths, including the legislative strategies of both women's groups and labor groups. I next turn to court rulings from the *Lochner* era. I argue that courts not only were willing to uphold protective legislation pertaining to women because of paternalistic social constructions of female workers but also were prepared to acknowledge a role for women in the economy that was dramatically more liberal than the one they had before the MWPA reforms. These two social realities clashed in the courtroom just as they did in the political arena, but now they were interacting with the doctrine of the right to contract. Finally, I conclude with some thoughts on how the SCP may embed certain social realities in court doctrine. Ronald Kahn has argued that this process leads courts in a conservative era to expand rights, but I argue here that these social constructions may, at other times, lead courts to be reluctant to expand rights.

I. THE SOCIAL CONSTRUCTION PROCESS AND COMPETING VISIONS OF SOCIAL REALITY

Kahn describes the SCP as "the continuous and mutually constructive relationship between internal legalistic and external factors . . . [in which] legal principles and the world outside the Court become symbiotic and mutually construct each other" (Kahn 2006, 67). Social facts and the reality of citizen's lived experiences outside the court gain legal weight and meaning through the SCP and, indeed, often become embedded in legal doctrine. Kahn argues that the SCP explains why a conservative court making rulings during conservative political times was nevertheless still willing to protect and even extend individual rights in areas such as abortion rights and gay rights (Kahn 2006, 2008).

For example, in the case of abortion rights, Kahn argues that the majority in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) carefully considered the lived reality of women when *Roe v. Wade*, 410 U.S. 113 (1973) was decided and over the ensuing decades, and the ways in which women had come to rely on abortion rights since that time. But the Court did not commission a survey and simply rule in line with public opinion; it considered these lived experiences in light of developing legal doctrine: "This expanded concept of personhood in *Casey* was a result of the mutual construction of legal precedents that increasingly recognized the active place of women in society, and rights principles that were extended as a reflection of that expanded role" (Kahn 2008, 178). Consequently, this process has the potential to become "a motor for social change," as the Court considers new groups and rights claims through a process of analogy (Kahn 2008, 201–202).

That said, in other work, Kahn also makes it clear that the social construction of changing conditions outside the Court may not always lead to rights expansions for marginalized groups. He writes that *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which the Court struck down a minimum wage law for women on freedom of contract grounds, indeed, may be such a case (Kahn 1999, 44–45). In *Adkins*, the Court cited the passage of MWPAs in the states and the ratification of the Nineteenth Amendment as altering the social and economic position of women such that they were no longer in need of protective legislation—they were now legal equals of men and could compete in the marketplace as such. Yet, as I discuss below, the Court did not settle decisively on the social construction of women workers developed in *Adkins*. In cases both before and after *Adkins*, including in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) that overturned *Lochner* and signaled an end to the right of contract as a legal doctrine, the Court embraced social constructions of women workers that simultaneously provided women more protections as *laborers*

and also denied them equal economic status as *women*. These decisions often relied on gender stereotypes of women as physically inferior mothers whose presence in unregulated workplaces might lead to a breakdown of morals and family structures.

The competing social constructions developed by courts during the *Lochner* era all had some basis in women's real-life experiences. Women's economic, legal, and political rights were substantially expanded as a result of both MWPAs and suffrage, and women were entering the workforce in greater numbers in the early 1900s (Kessler-Harris 1982). At the same time, women were regularly paid lower wages than men and legitimately faced greater exploitation by employers, and so perhaps, they were relatively more in need of state protections and regulations (Kessler-Harris 1990). As I will discuss in more detail, judges at both the federal and state level grappled with these competing social constructions of women workers throughout the *Lochner* era.

II. THE HISTORICAL SETTING: TWO REFORM PATHS CONVERGE

Before the 1840s, married women's legal and economic identities more broadly were governed by the common law legal doctrine of *coverture*, which conceptualized married women as civically and legally "dead" after marriage. As far as the legal system was concerned, a husband and wife were united into one legal identity, one governed by the husband. Throughout the mid-1800s and early 1900s, every U.S. state passed laws that liberalized and expanded married women's economic rights, especially around property ownership and management. Although the content and timing of the laws varied, these MWPAs often included provisions that allowed women to sign legal contracts in their own names, without a husband's cosignature or involvement (this was especially true of MWPAs passed later in the period).

The political energy around MWPAs began to wind down in the early twentieth century, as most states had passed some version of the law by this point. The majority of states had laws that granted meaningful property and other economic rights by the 1870s, and all but six states passed these laws by 1900. Although states continued to pass additional laws clarifying and expanding rights, and although state courts continued to work out the practical details of how these laws would apply to real-world situations, reform efforts around the issue of married women's property rights were fading (Chatfield 2018). The political and legal arguments that were developed around the issue, however, did not disappear.

During this period, both state legislatures and state courts had tried to balance views of married women as independent economic actors and as vulnerable

potential victims in need of state protection. Early MWPAs typically included provisions meant to protect women from their husbands' economic misfortune and outside actors who might try to take economic advantage of them and their wealth. For example, in a provision common to many states, South Carolina's 1870 law stated that the separate property of a married woman "shall not be subject to levy and sale for her husband's debts."[3] In contrast, later laws often focused more on rights than protections, as in South Carolina's 1895 Constitution: "[A married woman] shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried" (Article XVII, Section 9).

Although state courts interpreted MWPAs throughout this era, the changing social facts around women's economic rights did not influence Supreme Court doctrine through much of the 1800s. The Court never heard a case interpreting an MWPA specifically, because married women's property rights were seen as exclusively state issues and were dealt with in state courts. When the Supreme Court did hear women's rights cases, as in *Bradwell v. Illinois,* 83 U.S. 130 (1873) (1872) and *Minor v. Happersett*, 88 U.S. 162 (1874), MWPAs and the expanding economic rights of women around the nation were not mentioned.[4]

This changed with the rise of judicial review of labor reforms. In this paper, I specifically examine struggles over protective legislation, which included such topics as maximum hours laws (e.g., limiting the number of hours in a legal day of work to eight or ten), minimum wage laws, laws prohibiting women (or other groups) from working in certain occupations, and night-work laws (limiting work during nighttime hours). Although labor reforms during the *Lochner* era covered a broad set of topics, protective legislation hit on the issue of gender most specifically, as many of these laws were written so as to apply only to women. Although some protective laws were more general, many applied only to certain groups; in addition to women, children and individuals working in especially dangerous jobs (such as miners) were often targeted.

Demands for maximum hours legislation first appeared in the United States in 1825, and initial policies were non–gender specific. The earliest laws were

3. "An Act to Carry into Effect the Provisions of the Constitution in Relation to the Rights of Married Women," *Acts and Joint Resolutions of the General Assembly of the State of South Carolina* (1869–1879), 325–26.

4. Both cases considered and rejected women's rights under the Fourteenth Amendment, with *Bradwell* focusing on the right to practice law and *Minor* on the right to vote. Both Illinois and Missouri (where Virginia Minor resided) had passed MWPAs before the Court hearing the cases, but the laws did not come up in the opinions.

championed by male tradeworkers who argued that these laws would both allow workers to use their leisure time to become "an educated and aware citizenry" and also "ensure that available jobs were shared" (Kessler-Harris 1982, 182). Thus, the justifications were neither inherently based in gender-specific rationales nor were they centered on the idea that workers were in need of paternalistic protection; instead, maximum hours laws were argued to have more general benefits for society as a whole.

Beginning in the 1880s and continuing throughout the *Lochner* era, however, states began to see their hours laws that covered all adult workers struck down by courts. Advocates for these laws thus turned to hours laws that covered only certain groups, including women. The first gender-specific hours law was passed in Ohio in 1852, and these laws became common by the early 1900s, especially after the Supreme Court ruled in favor of hours legislation for women in 1908 (Kessler-Harris 1982, 186–87). Although these laws were beginning to gain traction in the legislative and judicial arenas, enforcement often was limited or ineffective in practice (Baer 1978, 31; Forbath 1989, 1142). Still, by 1917, thirty-nine states had some type of maximum hours legislation applying to women, and all but five had passed such laws by 1924 (Kessler-Harris 1982, 188). Furthermore, enforcement efforts increased as states began to treat these laws with higher priority (Baer 1978, 97).

As hours laws for women became more popular, state legislatures also began to pass other legislation placing limits on women's work, typically with protection as the justification. These included bans on work during nighttime hours and laws barring women from specific occupations that were deemed overly dangerous to either their health or morals. The first of these bans was a California law passed in 1881 that prohibited women from being employed in places selling alcohol. Although the California law was struck down, many similar laws were passed and upheld in other states throughout this period, including laws prohibiting women's work as bartenders, miners, letter carriers, and elevator operators (Kessler-Harris 1982, 185).

Finally, demands for a minimum wage grew out of success around hours legislation, because limited hours meant that workers needed to be paid a certain wage to make a living from eight- or ten-hour workdays. Women's groups began to work for a "living wage" in the early 1900s (Kessler-Harris 1982, 195). By 1915, twelve states had passed minimum wage laws, with most of these applying specifically to women and children. Minimum wage legislation for women, however, proved to be more controversial both in legislatures and in the courts than had maximum hours rules. Particularly after World War I, opposition from business interests increased and public approval for minimum wage restrictions decreased (Baer 1978, 92).

Minimum wages were the last type of protective legislation to receive Supreme Court approval, and only did so at the close of the *Lochner* era.

The judicial response to protective legislation for women workers involved a tension between a developing view of women as independent economic actors and a continued attachment to social constructions that viewed women as being in need of paternalistic state protection. Melvyn Dubofsky (1994) describes the Supreme Court's rulings during this period as decisions that "cripple[d] union power and . . . invariably decided against labor" (45). Yet, labor legislation affecting only women workers was treated differently by the courts, often with more deference to legislative judgment and an attitude that women's workplace right to contract was not as absolute as that of men's right (however undesirable this "right" might have been to many male workers). Although state courts did not always address these issues uniformly, most ruled that "broad, class-based legislative initiatives would not pass constitutional muster," whereas laws applying to only "dependent" or "vulnerable" workers typically would (Forbath 1989, 1144). Thus, even in a period of heightened conflict between the legislative and judicial branches, courts were more deferential and cooperative when it came to laws applying to women.

MWPAs provide an important backdrop to this judicial response. Although MWPAs were specific to married women and did not concern the legal rights of single women, in practice, this distinction concerned few women. Some 90 percent or more of women over the age of thirty-five were married during this period, meaning that the vast majority of women could expect to fall under the rules for married women at some point during their lives; after 1890, married women were employed in the labor force with increasing frequency (Kessler-Harris 1982, 184). By the 1920s, Nancy Cott (1987) writes that "single women made up only a little over half of those employed" (129). Thus, the fact that married women had a legal right to sign and enforce contracts after the passage of MWPAs was important for courts and had broader implications for the role of all women in the economy. Many rulings during this period cited state-level MWPAs as evidence that women now had a constitutional right to contract just as men did, a shift from earlier periods when MWPAs were not even mentioned.[5]

Despite acknowledging the changed legal environment in which female workers operated after the passage of MWPAs, many courts did not reach the conclusion that protective legislation must treat men and women equally. Both activists arguing in favor of protective legislation for women and judges analyzing these laws

5. See, for example, *Ritchie v. People*, 155 Ill. 98 (1895) and *New York v. Williams*, 51 Misc. 383 (1906).

borrowed arguments that had been marshaled in support of MWPAs and that were rooted in a tradition of state paternalism. Arguments that women required special attention and protection from the legislature had been used successfully in defense of MWPAs for decades, were often embedded in state judicial doctrine, and thus provided a ready option for defending protective legislation.

This approach was not uncontroversial. As I discuss next, women's groups were sharply divided on the best approach to labor reform. Although some groups argued that any departure from strict equality was ultimately dangerous, many took stock of the legal options available to them and strategically settled for gender-specific laws because more general laws clearly were not going to be successful in court. Although this approach was successful in obtaining improved working conditions for many women in the short run, it also had long-term implications for the way courts would approach women's work throughout the twentieth century. With gender-specific social constructions justifying differential treatment readily available, courts continued to approve laws that barred women from certain occupations and even from colleges and juries until the Equal Employment Opportunity Commission (EEOC) ruled state protective legislation illegal in 1969 (Baer 1978).

III. LEGISLATIVE STRATEGIES

Women's groups were among the primary drivers of changes when it came to protective labor legislation. Alice Kessler-Harris (2001) describes their role:

> As in many other Western industrial countries, in the United States women were key players in the debates over labor legislation. . . . [M]iddle-class women acting in their own individual and class interests, sometimes in alliance with trade unionists, succeeded to an unprecedented degree in providing state-based "maternalist" legislation designed to protect the roles of working-class and poor mothers. (15)

But women's groups were divided on the appropriate strategy for improving working conditions. The larger women's organizations, including the Women's Trade Union League, the National Consumer's League, and the League of Women Voters, all advocated for protective legislation for women. These groups made arguments in favor of such legislation that followed two broad themes—one based on economic competition and the other based on physical differences.

First, groups argued that women were unionized at lower rates than men and faced other disadvantages in market employment, such as significantly lower wages.

Because women were blocked from being employed in certain jobs, either by law or custom, they also often faced more intense competition for available jobs. As such, they required protective legislation to avoid being exploited by employers. According to these types of arguments, nothing specific about women as a gender made them more vulnerable or in need of protection, but instead economic, societal, and cultural forces placed them at a disadvantage in finding quality employment; legislation could help correct this imbalance. Second, many women's groups argued that inherent physical differences between the sexes, and specifically women's role as mothers, required the paternalistic hand of the state to step in (Kessler-Harris 1982). Arguments based on the eugenics movement fueled concern that "race suicide" would occur if women were overworked in occupations dangerous to their health. Proponents of Oregon's maximum hours law for women amassed evidence from the medical community regarding women's special health concerns that placed them in need of state protection: "Neurasthenia, back troubles, pyrosis, constipation, vertigo, and headaches . . . [as well as] edema, varicose veins, displacement of the uterus, throat and lung diseases were said to follow from excessive work" (Kessler-Harris 1982, 187). Some female reformers argued that feminine qualities like "compassion, nurturance, [and] a better-developed sense of morality . . . unfitted [women] for the competitive economic struggle," thus necessitating state protection to ensure that women were not taken advantage of (Kessler-Harris 1982, 185). Married women, in particular, argued that limitations on hours were needed to provide them the necessary time for household chores and child rearing (Kessler-Harris 1982, 189). Women's groups formed coalitions with each other and with unions to pursue a strategy of "state-by-state efforts to improve the conditions of women workers" (Mettler 1994, 640).

In contrast, the more radical National Woman's Party argued for strict equality under the law and the elimination of all legal distinctions between men and women; the NWP did not argue against labor legislation in general, but rather that this legislation should be applied equally to all workers, regardless of gender (Kessler Harris 1982, 206). The debate over protective labor legislation led to a sharp divide in the women's movement between the NWP, which supported a constitutional equal rights amendment in the 1920s and 1930s, and most other women's groups, which testified against such an amendment on the grounds that it would outlaw the protective legislation for which they had fought so hard (Cott 1987, 126; Sklar 2003). The NWP argued that limitations on women's right to contract hurt both poor and upper-class women by limiting their economic opportunities and giving the competitive advantage to male workers who did not face such restrictions. For example, Fannia Cohn, a leading female unionist, believed that unionization and

organization of female workers was a surer path to success than protective legislation (Kessler-Harris 1982, 205).

Given the animosity toward more general protective legislation in the courts, however, "most advocates of protection were not willing to risk hard-won legislation for an abstract commitment to equality" (Kessler-Harris 1982, 208). Indeed, the repeated failure of general protective legislation to pass judicial muster was clearly one important reason for seeking gender-specific protective laws, both among women's groups and unions. Even though many reformers might have preferred laws applying to both men and women, and indeed initially supported such laws, court rulings throughout the *Lochner* era narrowed the scope of their efforts to focus on legislation that stood a reasonable chance of surviving judicial scrutiny and being implemented and enforced (Forbath 1989).

Many reformers also believed that pursuing limited, gender-specific protective legislation would create a "wedge," leading to broader legislation and other benefits for workers. This was particularly true for early laws. For example, Florence Kelly and the Chicago Foundations pushed for and won an hours law in Illinois in 1983, and both "envisioned the 1893 law bill strategically, as an entering wedge for broader hours legislation that would ultimately cover men as well as women" (Forbath 1989, 1137). Melvin Urofsky (1985) describes this strategy in similar terms, writing that "[by] emphasizing the special restraints on women, as well as their unique status as 'mothers of the race,' Progressives were able to establish a bridgehead, as it were, before striking out in pursuit of their larger goal, an eight-hour day for all workers" (71).

In addition to the potential that sex-based protective legislation might open the door to more general legislation, some reformers saw these laws as having immediate benefits for workers of both genders and the economy as a whole. For example, reformers in the National Women's Trade Union League argued that "male workers, too, benefited from limits on women's hours in factories where men and women worked at interdependent tasks" (Cott 1987, 127). Similarly, the major cotton trade association, the Cotton Textile Institute, fought to end night work for women in Southern mills in the hopes that it would reduce or eliminate the operation of mills at night and "[break] a cycle of over production and price-cutting that had beset the industry through the 1920s" (Storrs 1998, 179).[6]

Women's groups like the National Consumer's League saw protective labor legislation as a first step not only to more general labor legislation but also to furthering broader feminist goals. Higher wages and shorter hours would provide

6. Simply replacing female night workers with male workers was thought to be too expensive.

women with greater opportunities to unionize or pursue further education and training (Storrs 2000, 42). Whether based in a strategic desire to use women's hours laws to open the door to more general laws and goals or in paternalistic concern for women specifically, the arguments around women's hours legislation often centered on physical differences between the sexes and women's role in childbearing and child-rearing. It was this focus that often caused more radical feminist groups to be wary of gender-specific protective legislation.

The National Woman's Party argued that that limiting women's right to contract hurt female workers at both ends of the class structure. For women living on the economic margins, protective laws made them less competitive in the labor market and prevented them from working enough hours to support themselves (Kessler-Harris 1982, 189–90). White collar workers were hurt as well: Harriot Stanton Blatch, a reformer in the NWP, argued that protective legislation had the ultimate impact of limiting women's potential rather than shielding them from exploitation. Blatch argued that "in many highly paid trades women have been pushed into the lower grades of work, limited in earning capacity, if not shut out of the trade entirely by these so-called protective laws" (Cott 1987, 121).

Some women reformers tried to split the difference. Mabel Raef Putnam, for instance, worked to pass an equal rights bill in Wisconsin that "grant[ed] women the same rights and privileges as men *except for* 'the special protection and privileges which they now enjoy for the general welfare'" (Cott 1987, 120–21). This approach proved problematic as well. The Wisconsin bill was used in 1905 to justify a ban on female state legislators, on the grounds that "legislative service required 'very long and often unreasonable hours'" (Cott 1987, 124–25). Although the state legislature was clearly not the sort of exploitative working environment that reformers had in mind when advocating for protective legislation, the logic was easily extended by male elites seeking to exclude women from elected office.

The debate over gender and protective legislation had an important class component. Cott (1987) writes that women favoring protective legislation tended to view the National Women's Party's fight for strict legal equality as ignorant of the practical concerns of working-class and middle-class women, as "rooted in the thoughtless outlook of rich women or at best relevant to the experience of exceptional skilled workers or professionals" (127). Indeed, poor women who worked long hours in factories or laundries for low wages did not necessarily have the luxury of debating legal equality and, instead, needed immediate solutions that addressed the exploitation they faced from employers regardless of the broader implications for gender equality; in fact, the majority of "wage-earning women wanted and valued sex-based labor legislation" (Cott 1987, 127). Because appeals

to paternalistic social constructions were often the only practical way to get protective legislation through the courts, it makes sense that so many women's groups pursued this strategy in approaching labor reforms.

Male-dominated unions had their own reasons for supporting gender-specific labor legislation. For many of the men involved in pushing for and passing protective legislation applying exclusively to women, motivations were a mix of economic self-interest and paternalism. Some labor organizers supported limited protective legislation in the hopes that these laws would be the "wedge" that encouraged more general protective legislation, whereas others supported these laws because they reduced competition for jobs from female workers. Kessler-Harris (1982) writes:

> Fear of competition from women and reluctance to invest in organizing them led [male] trade unionists to distinguish sharply between men and women when it came to legislation. . . . Regulatory legislation would limit women's access to jobs by discouraging employers from hiring them. Prohibitive or restrictive legislation would eliminate competition from women altogether. (201–202)[7]

Cott (1987) also argues that the American Federation of Labor (AFL) was largely motivated by a desire to exclude women from high-paying union jobs (126).[8]

Indeed, unions showed little interest in organizing female workers, who often were seen as being temporary members of the workforce rather than family breadwinners who could be reliable union members throughout their lives. Many occupations were highly segregated by gender, and unions had minimal footholds in female-dominated workplaces (Mettler 1994). Because women were unionized at lower rates, and because unions showed little interest in changing this situation, legislation seemed to be the main path forward to secure improved working conditions for women (Storrs 2000, 43). Beginning in the 1890s, the AFL fought for protective legislation for women, typically using the rationales of physical differences between the sexes necessitating different protections for women as well as the desire to reduce competition from women. Although women's groups were often skeptical of union motivations, groups like the Women's Trade Union League and the

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7. Kessler-Harris describes the ways in which union organizers used rhetoric around both competitive pressures and physical weakness and childbearing in forming an "uneasy agreement" with women's advocacy groups.

8. This opposition also led the AFL and other unions to oppose an Equal Rights Amendment in the 1920s and 1930s.

National Consumer's League worked with other unions to advocate for women's protective legislation (Kessler-Harris 1982, 202–203).

Ultimately, the choices made by the most prominent women's groups of the Progressive Era made a great deal of practical and strategic sense: gender-specific protective legislation was often the primary legal route forward for improving women's working conditions, and coalitions with labor unionists with questionable motivations often were the best way to achieve these goals. Yet, at the same time, the long-term implications of this strategy embedded in judicial doctrine the principle that gender differences justified labor laws that ultimately limited the employment opportunities of many women. As I discuss in the next section, when courts considered protective laws, judges struggled with whether women were the legal equal of male workers, as the National Women's Party claimed, or whether they had some justification—whether physical, societal, or economic—for considering women as belonging to a different category of workers.

IV. COURT RESPONSES: SOCIAL CONSTRUCTIONS OF WOMEN WORKERS AND STATE PATERNALISM AS A MAJOR EXCEPTION TO THE RIGHT TO CONTRACT

Three of the major categories of protective legislation were hours legislation, night-work prohibitions, and a minimum wage. Each of these types of legislation followed similar trajectories in the courts, but at different times. In all three cases, initial state rulings were scattered, with some states approving of the legislation and others disapproving. Eventually, the Supreme Court would approve of each type of protective legislation for women, using gender-specific justifications to uphold the law. The path for judicial approval, however, always involved a tension between social constructions that women had the same right to contract as did men, largely based on legal developments such as MWPAs, and the idea that despite being legally emancipated from coverture, women still needed special protections from the state in the labor market. The reasons for protection varied and included many of the justifications raised by women's groups and labor leaders: physical differences, bargaining disadvantages, and the social role women played as mothers and homemakers.

MWPAs affected the social constructions of women workers by changing their legal status. The fact that a married woman might possess a right to contract at all depended on her having the legal right to make and enforce contracts, which would not have existed before the period of MWPA reforms (Chatfield 2018). Before these reforms, married women were unable to make legal contracts without a cosignature

from their husbands, except in limited circumstances.[9] Courts during the *Lochner* era differed on whether women's right to contract their labor might be limited to a greater extent than men's right to the same, but all accepted that women possessed this right and thus that it must be carefully weighed against the reasons a legislature might have for limiting it.

These reasons fell into three broad categories. First were gender-neutral reasons, which sometimes were mentioned in cases concerning gender-specific laws but also were discussed in cases concerning labor laws that applied to workers of either gender in specific occupations. Second were reasons that focused on protecting the woman herself—often based on physical differences between the genders as well as on women's morals or relative economic bargaining power. Third, judges highlighted the broader consequences for society if female workers were exploited, such as unhealthy children or a reduced birth rate.

As discussed previously, the earliest hours laws were non–gender specific and covered groups of workers including adult men. Early judicial rulings against these laws shaped the types of demands made by reformers and thus are important to examine for their influence over the eventual focus on women's work protections. State courts were initially unfriendly to hours legislation. In *Luske v. Hotchkiss*, 37 Conn. 219 (1870), for example, the Connecticut Supreme Court ruled that a general maximum hours law, applying to all workers, did not prevent an employee from working for more than eight hours, but instead meant that an employer was not required to pay for more than eight hours of work; any additional work done was considered to have been done "voluntarily" (221). Indiana's high court made a similar ruling in *Helphenstine v. Hartig*, 5 Ind. App. 172 (1892). Over time, courts began to strike down hours legislation all together on the grounds that it violated a worker's freedom to contract. For instance, in 1894, Nebraska's Supreme Court struck down an eight-hour law on the grounds that it arbitrarily limited the right to contract for those covered by the law, with the caveat that laws concerning only women or minors might be acceptable because those classifications were "reasonable and not arbitrary" (*Charles G. Low v. Rees Printing Co.*, 41 Neb. 127 [1894], 136–37).[10] For male workers, however, the standard was stricter. Courts tended

9. For example, some states had provisions that would allow women who had been abandoned by their husbands to operate businesses and sign enforceable contracts. But, these rights were often vague and not well enforced and did not apply to married women as a class; for more details see Salmon (1986).

10. An Ohio Circuit Court struck down a similar law in the same year, on similar grounds; see *Wheeling Bridge and Terminal Railway Co. v. Gilmore*, 4 Ohio Cir. Dec. 266 (1894).

to see general hours legislation as being a matter of personal decision-making between employer and employee, rather than a matter of public interest on which it was appropriate to legislate. Although state legislatures had broad police powers to make laws concerning public health, morals, safety, and general welfare, the number of hours worked by employees was seen by these courts as a private matter that had limited impact on health and safety. In an advisory opinion, the Colorado Supreme Court wrote: "In so far as the bill [an eight-hour law] attempts to abridge the right of contract between parties in regard to matters personal to themselves . . . it is clearly an infringement of . . . constitutional guarantees [contained in the Due Process Clause]" (*In Re Eight-Hour Law*, 21 Colo. 27 [1895]).

Despite this background, when an hours case covering male workers reached the U.S. Supreme Court, the outcome was different. *Holden v. Hardy*, 169 U.S. 366 (1898) dealt with a Utah hours law that applied to miners and smelters. The Court upheld the law, arguing that although workers did possess a constitutional right to contract, it could be limited under certain circumstances: "those engaged in dangerous or unhealthful employments . . . have been found to be in need of additional protection" (*Holden v. Hardy*, 169 U.S. 366 [1898], 385). The Court compared this hours law to laws covering women and minors, distinguishing it from more general laws covering hours restrictions for all employees. Although general hours laws might be unconstitutional (this was left unsettled), "vulnerable" groups like women, children, and those engaged in particularly dangerous occupations could be covered legally by maximum hours rules.

Indeed, when the Court considered a more general hours law in *Lochner v. New York* (1905), it ruled the restriction unconstitutional. *Lochner* dealt with a maximum hours law covering bakers, and the Court argued that because work in bakeries was not unusually dangerous or unhealthy (like work in mines), and because bakers as a class were not unusually unintelligent or incapable of asserting their own rights and negotiating contracts, the restriction was an unlawful infringement on their liberty. With *Lochner*, the two-tiered approach to labor law was reinforced: everyone had a right to contract; however, for women and other groups seen as particularly in need of protection, this right was more easily infringed. On one hand, this system may have brought important protections to some working women; on the other, it made it more difficult to employ women and treated them as legally less competent and independent than male workers.

Court cases concerning protective legislation governing women only (or women and children only) also referenced the right to contract. Because the case law in this area was not fully developed, outcomes depended dramatically on which social constructions of women workers justices used. For example, although few courts

followed its precedent, the Illinois Supreme Court did strike down an hours law applying to women only. In *Ritchie v. People*, 155 Ill. 98 (1895), the Illinois Court considered an eight-hour law for women working in manufacturing jobs. The decision was made on the same right to contract grounds that decisions concerning general hours legislation were made, and here the Court found no reason to treat women differently with respect to this "right"—married women's economic rights reform had changed the social and economic reality of women such that laws treating them differently than men could no longer be justified. Citing the state's MWPA, Justice Benjamin Magruder wrote:

> The Married Woman's Act of 1874 authorizes a married woman to sue and be sued without joining her husband, and provides that contracts may be made and liabilities incurred by her and enforced against her to the same extent and in the same manner as if she were unmarried . . . Section 5 of the Act of 1893 [the hours legislation under consideration] is broad enough to include married women and adult single women, as well as minors . . . But inasmuch as sex is no bar, under the constitution and the law, to the endowment of woman with the fundamental and inalienable rights of liberty and property which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the State for the purpose of limiting her exercise of those rights. (113)

More common than cases like *Ritchie* were cases that upheld hours legislation covering women's work, tapping into a different side of women's social reality—that they truly had or were perceived to have special characteristics that placed them in greater need of protection than male workers. These differences put women in a separate class that could be legitimately treated differently by legislatures with regard to their legal rights. For instance, in *Commonwealth v. Beatty*, 15 Pa. Super. 5 (1900), a Pennsylvania court wrote that "[a]dult females are a class as distinct as minors, separated by natural conditions from all other laborers, and are so constituted as to be unable to endure physical exertion and exposure to the extent and degree that is not harmful to males" (19).

The Supreme Court weighed in on hours legislation for women in 1908 and upheld an Oregon hours law applying to women in factories and laundries in *Muller v. Oregon*, 208 U.S. 412 (1908). After 1908, state courts were consistent in following *Muller* and upholding similar hours restrictions (Urofsky 1985, 75). Justice David Brewer's opinion in *Muller* acknowledged that women in Oregon had "equal contractual and personal rights with men," noting the passage of that state's MWPAs

had emancipated married women from common law disabilities (418). Nonetheless, physical differences between the sexes permitted the legislature to make different rules as to their working conditions. The Court noted both a woman's personal health as well as her social role as a mother:

> That woman's physical structure and the performance of maternal functions places 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. (421)

The Court then argued that these inherent physical differences between the sexes meant that women were in an inherently unequal bargaining position with employers regardless of whether they were the legal equals of men.

In the years after *Muller*, state courts continued to uphold hours legislation that applied to women (and often children). The Illinois Supreme Court reversed its *Ritchie* decision, now arguing that women's right to contract could be abridged more easily than men's right on account of "(1) [t]he physical organization of woman; (2) her maternal functions; (3) the rearing and education of children; and (4) the maintenance of the home" (*Ritchie v. Wayman*, 244 Ill. 509 [1910], 530).[11] The California Supreme Court emphasized these latter two points in a similar decision upholding hours legislation, arguing that most women "have household or other domestic duties to perform which oblige them to continue at work each day for a much longer period than their time of service" (*Ex Parte Miller*, 162 Cal. 687 [1912], 697).

The Nebraska Supreme Court upheld a ten-hour law for women in *Wenham v. Nebraska*, 65 Neb. 394 (1902), and the justices' opinion in that case illustrates the tension courts saw between MWPAs and protective legislation. The Court wrote that, on the one hand, "[w]omen in recent years have been partly emancipated from their common-law disabilities. They now have a limited right to contract" (*Wenham v. Nebraska*, 65 Neb. 394 [1902], 405). At the same time, physical differences between the sexes limited women from performing the same roles in the labor market that men did: "Certain kinds of work which may be performed by men

11. For a similar ruling relying on *Muller*, also see *Riley v. Massachusetts*, 232 U.S. 671 (1914).

without injury to their health, would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home" (405). The Nebraska Supreme Court also considered women's unequal place in the economy, noting that because women were more limited in the types of jobs they were legally able to hold, there was more competition for the available positions. Thus, women approached employers from a more difficult bargaining position than did men, potentially inducing them to accept "hardships and exactions which they would not otherwise endure" (405). This unequal bargaining power as well as women's physical limitations led the Court to come down on the side of a social construction of women workers that allowed for the state to step in and protect them, despite their growing economic independence stemming from MWPAs.

Although the typical hours case was brought against an employer for violating the law by employing female workers for longer than the proscribed limit, and involved women working in industries like laundries and factories, women in more professional occupations also were affected by these laws. In these cases, the rules did seem to be more restrictive on female workers rather than protecting them from exploitative employers. For instance, in *Bosley v. McLaughlin*, 236 U.S. 385 (1915), a California pharmacist challenged California's hours law, arguing that the hospital was a clean, safe environment where she ought to be able to work as long as her male colleagues. The Court disagreed, arguing that because of the "extreme importance to the public that [pharmacists' duties] should not be performed by those who are suffering over-fatigue," the restriction was reasonable even though female pharmacists were limited to eight-hour days while male pharmacists were permitted to work ten hours (*Bosley v. McLaughlin*, 236 U.S. 385 [1915], 392). Because of the legitimate connection to the public welfare in both types of hours restrictions, the differing treatment of men and women was not addressed.

Prohibitions on night work presented courts with similar dilemmas. In this situation, however, women were not merely limited in how *long* they could work, but they were effectively excluded all together from certain occupations. A New York court struck down a prohibition on night work by women and children as unconstitutional, writing that it was inappropriate to group women and minors together into a group needing protection—their lived reality and social statuses were quite different: "That women have not yet been accorded equal liberty under the laws with men must be admitted. They never were, however, in the same class as to wardship with children, and the whole trend of modern legislation has been toward their emancipation from legal disabilities and a continued enlargement of their rights, particularly of property and of contract" (*New York v. Williams*, 51 Misc. 383

[1906], 390–91). Less than ten years later, New York's highest court reversed that decision in *People v. Charles Scwheinler Press*, 214 N.Y. 395 (1915), writing that medical research and other expert investigation into the impact of night work revealed that, indeed, women engaging in this type of work faced a significant health cost, thus making this an appropriate area for legislative regulation. The Court focused on the health of female workers, but also on their domestic role and their role as mothers, noting that women working at night would need to complete household work during the day, limiting the amount they could sleep. Furthermore, the Court wrote that the restriction on night work

> is not only for their [women's] own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers. (405)

The New York law from *Charles Scwheinler Press* was later amended to cover women in more occupations and again was challenged. This time, the case reached the Supreme Court and the night-work restriction was upheld in *Radice v. People*, 264 U.S. 292 (1924). The Court referenced similar social constructions of women's physical limitations (Wortman 1985, 333–34). The *Radice* Court wrote: "The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination" (294–95). Thus, the fact that women's physical characteristics made them different from men was still relevant, but here the Court would allow the legislature to make that decision rather than conducting an independent review.

Minimum wage laws presented a trickier problem for courts than did maximum hours and night-work laws. Because these regulations did not deal directly with the health and well-being of the employee on the job, but rather their more general economic welfare, courts were generally more reluctant to approve these laws. For example, although courts cited medical testimony that long hours at work were physically dangerous to women, the connection between low wages and health outcomes was less direct. The Oregon Supreme Court did find in favor of Oregon's minimum wage for women in 1914, with a particular concern for the corrupting influence of low wages on the morality of female employees. In *Stettler v. O'Hara*, 69 Ore. 519 (1914), the Court highlighted saleswomen in stores, for example, as being

particularly likely to turn to prostitution when their wages were not sufficient to support them, and they could easily meet potential clients through their work. The U.S. Supreme Court affirmed this case without a written opinion, with state courts largely following the ruling over the next decade (Baer 1978).

The U.S. Supreme Court reversed this trend in 1923, with *Adkins v. Children's Hospital*. The Court invalidated a Washington, D.C., minimum wage law for female workers, arguing that

> while the physical differences [between men and women] 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 . . . 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. (553)

Because a minimum wage law could not be justified by medically relevant physical differences between the genders, the restriction on women's right to contract was considered unconstitutional. Instead, the social construction of women as independent economic actors—bolstered by MWPAs and the Nineteenth Amendment—took precedence.

In 1936, the Supreme Court struck down another minimum wage law for women on similar right to contract grounds in *Morehead v. New York* ex. rel. *Tipaldo* 298 U.S. 587 (1936). Here, unlike the night-work case *Radice v. People*, a legislative determination that women's health would be protected by a minimum wage law was not sufficient. Instead of focusing on physical differences between the sexes, the Court argued that men and women were on equal standing when it came to bargaining over wages and dealing with potentially "unscrupulous" employers. Instead, it was the minimum wage law itself that put women at a competitive disadvantage, by requiring employers to pay them a certain wage that was not required for male employees.

The *Tipaldo* decision resulted in significant public outcry, with opposition to the decision coming from both Republicans and Democrats as well as the vast majority of major newspapers. Generally, the tide of public opinion had turned substantially against the idea of a right to contract (Mettler 1998, 181). The following year, in 1937, the U.S. Supreme Court upheld a minimum wage law for women, in a case

that overturned *Adkins*, and rejected the idea of a constitutionally protected right to contract, thus ending the *Lochner* era. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), however, did not merely abandon the right to contract and argue that all minimum wage laws, for men and women, would be considered constitutional, although that would be the eventual impact of the ruling. The Court in *West Coast Hotel* did account for changed social constructions of the employer–employee relationship generally, specifically rejecting "the notion that employers and employees had equal bargaining power and could thus take care of their own interests by exercising their contractual freedom" (Kahn 1999, 46–47). It also socially constructed the role of *women* workers specifically. Justice Charles Hughes argued that the state had a "special interest" in women's working conditions because of both their physical limitations and their unequal bargaining power in economic interactions. Although the Court did address physical differences between the sexes, more attention was paid to economic inequality, noting "that [women] are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances" (*West Coast Hotel v. Parrish*, 300 U.S. 379 [1937], 398). Thus the social reality of women's disadvantaged economic position was emphasized by the Court.

As Julie Novkov highlights, the fact that *West Coast Hotel* concerned a protective law covering women specifically and used gender-based arguments in its analysis is important for understanding the significance of this case not only for the Court's stance toward labor laws in the twentieth century but also for judicial approaches to laws that kept women out of the workforce and negatively affected those in the workforce over the next several decades. Novkov writes:

> By centering the gender of regulated workers in the analysis of the legal battles, we see that the "constitutional revolution" of 1937 consisted of the extension and general application of a standard for judgment that had been meticulously constructed during the second and third decades of the century to apply principally to female workers. (2001, 2)

Thus, even though *West Coast Hotel* represented a significant constitutional moment in the Court's treatment of labor law, its treatment of female workers did not look so different from many earlier cases. Indeed, throughout the contentious *Lochner* era, courts had been willing to accept a variety of intrusions into the supposedly unassailable right to contract, as long as these intrusions could be justified with reference to women's physical differences and social roles. In these cases, courts were often much more deferential to legislatures, and this social construction of women

as a vulnerable group remained a part of legal doctrine long after the *Lochner* era was ended.

V. CONCLUSION: LONG-TERM IMPACTS OF SOCIAL CONSTRUCTIONS OF WOMEN WORKERS

Although the Supreme Court and other courts dramatically changed their stance toward labor legislation after 1937, largely removing themselves from these issues and deferring to legislative choices, their approach to women's role in the economy was much less altered. The social construction of women workers as vulnerable and in need to state protection remained embedded in judicial doctrine and limited individual women's economic choices even after battles over the right to contract had been settled in the courts. *Muller* was cited as precedent in a number of cases limiting women's full economic and civic equality. These included court rulings that upheld bans on women in public universities, differential treatment in occupational licensing, and the exclusion of women from juries (Freeman 1990; Wortman 1985). Suzanne Mettler (1998) writes that although protective legislation was "created to improve women's individual lives, [these laws] served to institutionalize women's marginal status in society and politics" well into the 1960s (14).

For example, in a 1948 case, the U.S. Supreme Court upheld a ban on bartending by most women, writing:

> 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 long 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. . . . [Bartending] by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventative measures. (*Goesaert v. Cleary*, 335 U.S. 464 [1948], 465–66)

These types of laws and court rulings that purported to shield and protect women from unsafe or unsavory employment by limiting their employment opportunities were commonplace until 1969, when the EEOC interpreted the Civil Rights Act of 1964 as outlawing gender-specific protective legislation.[12] At the time of the

12. *Civil Rights Act of 1964*, Pub.L. 88–352, 78 Stat. 241, enacted July 2, *1964*.

EEOC's ruling, these laws existed in some form in every state. The EEOC's ruling was upheld by federal and state courts, in rulings that struck down laws limiting women's hours, the amount of weight they could lift on the job, and specific jobs they could take (Baer 1978, 4–13).

Paternalistic social constructions concerning women's role in the economy had a long-lasting influence on how women were viewed by political and judicial actors and remained embedded in doctrine long after the *Lochner* era. Ultimately, although courts would eventually update their social constructions of women workers, initial action in this area came from legislators and bureaucrats. It would not be until cases in the late 1960s and 1970s that the social reality outside the Court had changed sufficiently that justices were willing to begin updating the social constructions of gender that placed women in a separate category when it came to employment. Thus, the social construction process—the embedding of social realities and lived experiences into judicial doctrine—can have both rights-expanding and rights-limiting implications.

Especially in the case of women workers during the *Lochner* era, courts had to consider women workers in terms of two crucial aspects of their identities—their gender and their status as employees. Protecting their rights on one dimension often meant limiting their rights along another dimension. *West Coast Hotel* provided clear benefits for women workers—and ultimately all workers—by endorsing legislative labor protections and ending the right to contract, but the case also validated long-lasting constructions of women as belonging to a legal category separate from men in the workplace.

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