

*By submitting this essay, I attest that it is my own work, completed in accordance with University regulations. –David S. Wheelock*

Pressured Justice: Activating the Courts for the Protection of Female Laborers  
by David Wheelock

I. In 1905, the United States Supreme Court invalidated a ten-hour law for New York bakers in its notorious *Lochner v. New York* decision.<sup>1</sup> For many, this landmark case has come to represent a glaring lapse in American jurisprudence: a partisan endorsement of laissez-faire economics that sacrificed labor protections on the altar of contract rights.<sup>2</sup> Indeed, scholars commonly invoke *Lochner* as one of the last major efforts of a deeply conservative Court to thwart the rapidly-rising popular tide of Progressive reform.<sup>3</sup> Whether critics are entirely correct in suggesting that the *Lochner* ruling—a 5-4 decision—was simply an expression of the conservative political and economic views of the justices, and that those views somehow produced the Court’s legal doctrine, is contestable. For less than three years after *Lochner* was handed down, the very same justices ruled unanimously in *Muller v. Oregon* (1908) that the state of Oregon had the right to pass a law, nearly identical to New York’s Bakeshop Law, limiting the employment of female laborers to ten hours a day.<sup>4</sup> This ruling augured a dramatic readjustment in the Court’s understanding of contract liberties as construed under the Fourteenth Amendment. As American politics and jurisprudence evolved over the following three decades, protective socioeconomic measures for women gained greater legitimacy even as similar measures for men remained limited or outpaced, a trend that would culminate in the upholding of a minimum-wage statute for women in *West Coast Hotel Co. v. Parrish* in 1937.<sup>5</sup> An assessment of such jurisprudence must account for why the Court progressively expanded protection for female laborers, especially when similar protections for men were either thwarted or absent.

Various existing explanations contribute valuable insights toward answering this question, but many seem to fall short on their own. An analysis centered exclusively on the

Court's written doctrine, for instance, can offer an adequate description of the *manner* in which substantive differences between male and female laborers were used to justify different applications of the "police power of the state" in encroaching upon the Fourteenth Amendment and offering protective socioeconomic measures. But such an analysis simultaneously fails to answer conclusively *why* the Court made its substantive distinctions where it did: If women were indeed held to "have equal contractual and personal rights with men," as Justice Brewer acknowledged in *Muller*, then why could the state nevertheless infringe upon that right for the collective good in *Muller* but not in *Lochner*?<sup>6</sup> Bare doctrine cannot fully explain the Court's behavior on its own.

Similarly, an explanation centering on the discerned political attitudes of the individual justices is not entirely fruitful or precise. If, in Cass Sunstein's words, the *Lochner* Court indeed subscribed to the view that "governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements," then one could reasonably expect little variation in results between *Lochner* and *Muller*.<sup>7</sup> A majority that had struck down a ten-hour law for male bakers because of a supposed respect for the "existing distribution of wealth and entitlements," would presumably find little difficulty in doing the same for a women's ten-hour law. The actual outcome in *Muller*, however, was the opposite: the very same Court ruled 9-0 against the Oregon law. An attitudinal model of the Court's behavior does not fare especially well in the face of such inconsistency.

A better and more complete hypothesis for explaining the sudden expansion of women's socioeconomic rights gives consideration to the realities of the contemporary social and political landscape in which the Court's jurisprudence arose. The chapter of judicial history at whose close the *Lochner* ruling appeared was a period in which the Court expanded its own power drastically, and one in which "the federal judiciary molded its new powers into an aggressive discipline for ordering governmental affairs," as Owen Fiss has written.<sup>8</sup> In asserting that

discipline, the Court created a heavily substantive evaluative framework for adjudicating socioeconomic rights legislation. But the remarkably well-organized American women's groups of the time had been able to gain a legitimacy, a prominence, and a unity at the national level greater than any men's labor group ever had been able to achieve. Consequently, these groups were able to pressure the Court through institutional channels, advancing greater socioeconomic measures for women by engaging the substantive framework opened up by the *Lochner* ruling.<sup>9</sup> The adoption of such measures was by no means swift or easy—taking twenty-nine years and the overruling of *Adkins v. Children's Hospital* in 1923<sup>10</sup>—but it owed itself in great part to the remarkable ability of women's organizations to pressure the judiciary through a strategic manipulation of the Court's established doctrinal standards.

First, it is necessary to understand the backdrop against which such maneuvering took place. An examination of the *Lochner* decision reveals the particularly challenging position in which male laborers found themselves at the start of the twentieth century.

**II.** Out of all the relevant cases of socioeconomic rights jurisprudence, *Lochner v. New York* has perhaps attracted the most scholarship and criticism. Decided in 1905, the ruling struck down so-called New York Bakeshop Law, a law which had been passed without dissent by the New York state assembly and senate ten years earlier, in 1895.<sup>11</sup> The Bakeshop Law declared, among other things, that “No employee shall be required, permitted, or suffered to work in a biscuit, bread or cake bakery more than sixty hours in one week, or more than ten hours in one day.”<sup>12</sup> It is interesting to note, beside the fact that the law passed without a single “nay” vote, that the law was on the books for a full decade before being invalidated. It was thus not aberrant from public opinion, insofar as public opinion was reflected in the voting patterns of the New York state legislature.

Nevertheless, when the law came before the Supreme Court in 1905, it was overturned by a 5-4 majority. The Court's opinion, delivered by Justice Rufus W. Peckham, determined that

“The statute necessarily interferes with the right of contract between the employer and employees,” a right which was understood to be “part of the liberty of the individual protected by the 14<sup>th</sup> Amendment of the Federal Constitution.”<sup>13</sup> The Court granted the existence of certain legitimate “police powers,” and granted that “the state...has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection,” but it averred that at the end of the day these police powers could not be sufficient justification for preventing bakery employees from defining the limits of their own employment through free contract.<sup>14</sup> If bakers could be construed to represent a group of people in need of government intervention, the Court ruled, “the 14<sup>th</sup> 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.” And there was absolutely no reason to believe 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.”<sup>15</sup> The Bakeshop Law, the Court concluded, could not be classified as a legitimate exercise of police power and was therefore unconstitutional.

The Court’s ruling in *Lochner* established a distinctly substantive metric for determining the constitutionality of protective socioeconomic legislation. “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 person and in his power to contract in relation to his own labor.”<sup>16</sup> Such language created, in Matthew Bewig’s words, “an exacting test whereby statutes limiting liberty of contract would be evaluated according to the propriety of their ends and the efficacy of their means.”<sup>17</sup> It was not the Court’s job, per the logic of *Lochner*, merely to interpret the text of the Constitution; the Court was now in the position of arbitrating, for each specific new law that came before it, whether that law was a legitimate means whose discerned end was “appropriate and legitimate.”

This doctrine was a bold assumption by the judiciary of the deliberative duties normally assigned to the legislative branch.

Justice Oliver Wendell Holmes, Jr. expressed dismay in his now-famous dissent, arguing that the judiciary ought not to be applying its own particular substantive prejudices to democratically-produced law. “A constitution,” Holmes wrote, “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. It is made for people of fundamentally differing views.”<sup>18</sup> Whether individual justices on the Court disagreed with certain views as manifested in state law ought not to determine the constitutionality of that law, he argued. Holmes’s dissent was a discordant note struck in favor of procedural jurisprudence—the general notion that so long as a legislature does not baldly or unreasonably encroach upon the fundamental rights of the people, its judgment ought to be deferred to in weighing matters of the public good.

Holmes himself was probably the most heterodox member of the Court at this time, having been appointed by President Roosevelt in 1902 to replace the aging Horace Gray; the Court, in fact, was only now beginning to emerge from a lengthy period of unparalleled ideological uniformity.<sup>19</sup> Chief Justice Melville Fuller had been appointed by President Cleveland in 1888, and Justices Brewer, White, and Peckham had also been appointed either by Cleveland or by Benjamin Harrison. “Cleveland was a Democrat and Harrison a Republican,” writes Fiss, “but their politics were virtually indistinguishable—business-oriented and conservative.”<sup>20</sup> Justice McKenna was appointed by McKinley, a Republican, and both Justice Day and Justice Moody were selected by the Republican President Roosevelt to replace justices who had come out of the Cleveland-Harrison era. The final member of the bench was Justice Harlan, the longest-serving justice who was also known as something of an independent.<sup>21</sup> Running up until the *Lochner* decision, most of the Fuller Court’s justices had been influenced in their judicial thinking largely by social contract theory, a theory which patterned their mediation of the growing tensions between the state and the private sector. As Fiss writes in reference to

the “Cleveland-Harrison bloc” of justices, “Contractarianism ultimately shaped their conception of liberty as the summum bonum of the Constitution and as the value threatened by all that they saw around them.”<sup>22</sup>

Is it fair to characterize the *Lochner* decision as a product of this attitude of contractarianism? The temptation of an attitudinalist approach is eminent here. Of the four justices who dissented—Holmes, Harlan, Day, and White—only Holmes disagreed with the fundamental assumptions on which the Court based its ends-means evaluation; the other justices did not contest that the judiciary was fit to be the final judge of a law’s substantive content.<sup>23</sup> In this light, *Lochner* could easily be understood as a product of the Court’s particular ideological predispositions: the majority of justices, determined to keep the government out of the private sector unless absolutely necessary, struck down the Bakeshop Law as an unconstitutional violation of contractual liberties. According to such logic, the Court was confident enough in its own ideological rectitude and in its own power that it had no qualms about adjudicating future laws as well—hence the substantive framework upon which the majority and three of the dissenters agreed.

But such an explanation is less than compelling for a number of reasons. First, determining for certain the exhaustive personal beliefs of each individual justice is exceptionally difficult. It may be possible to extract certain ideological proclivities from a justice’s votes on the bench, or to detect the outlines of a judicial philosophy from his decisions, but to characterize a justice, bluntly, as a social-contract theorist or a pro-business conservative seems both crude and presumptive. Second, this attitudinalist explanation would not really yield any genuine understanding of judicial behavior except to announce that justices vote their views, and that those views are reflected in the way the justices vote. That observation yields no fresh insights. Most importantly, to assume that the *Lochner* ruling reflects some deep-seated ideological bias within the Court fails to explain why the same Court, only three years later, upheld a ten-hour law for women in *Muller v. Oregon*.

The *Lochner* decision may or may not have been motivated by the ideological prejudices of the individuals on the bench. For the purposes of this analysis, it does not really matter. What matters is that in adopting the substantive ends-means test as its baseline for future socioeconomic rights cases, the Court did not entirely close the question of whether states could create socioeconomic rights through distributive legislation. As a short study of *Muller* reveals, advocates of protective measures for women were able to maneuver within the confines of the substantive framework in order to place pressure on the Court and to force recognition of a right denied to men.

**III.** Substantive due process, which the Court endorsed in *Lochner*, amounted to a radical expansion in the power of the federal judiciary to evaluate and influence state legislation and state courts. If that conception led to “conservative” results in *Lochner*, limiting the state’s discretion in suspending private rights for the collective good, it did not necessarily annihilate the possibility of securing collective rights along certain lines in the future. Edward Purcell, Jr. characterizes the Court’s expansion of powers thusly: “The constitutional point was not the assertion of limits on government but the assertion of the judiciary’s power to pronounce what those limits were....Substantive due process meant that the ultimate power to judge the ‘reasonableness’ of...legislative actions lay with the federal judiciary.”<sup>24</sup>

The actual text of the Court’s decision in *Muller v. Oregon* is relatively short—perhaps because most of the lexical content of the means-ends analysis had already been articulated in the *Lochner* ruling. The case concerned an Oregon law which stipulated that “No female [shall] be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day.”<sup>25</sup> The statute, of course, was almost a carbon copy of the New York Bakeshop Law, but for the difference in the sex to whom it applied. That difference, Justice Brewer ruled in the unanimous opinion, was enough to warrant different treatment under the law and different considerations before the Court. Women could be afforded protections like the

Oregon law even though men could not, specifically because of “the inherent difference between the two sexes, and in the different functions in life which they perform.”<sup>26</sup> According to the majority, women were not only physiologically frailer than men, but their health also constituted a direct interest to the public good because of their role as mothers—both of which distinctions were sufficient to warrant the state’s intervention on their behalf, even if it meant abridging their right to contract under the Fourteenth Amendment. And so the Court maintained: “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.”<sup>27</sup>

Now, Fiss has suggested that “the scope of the *Muller* statute allowed the state to pursue ends that were otherwise denied it, simply because women were not viewed as members of the community that constituted a state.”<sup>28</sup> This argument, while perhaps not entirely outlandish, is nevertheless unconvincing. Women did not yet have the franchise in Oregon, and Brewer’s decision made note of this; but Brewer also conceded that “It is the law of Oregon that women whether married or single, have equal contractual and personal rights with men”—a far cry from declaring women to be wards of the state.<sup>29</sup> The real animating force at the heart of the *Muller* case was the document that helped to convince the Court of the differences between male and female laborers, or at least to convince the Court of “a widespread belief” in these differences: the Brandeis Brief.<sup>30</sup>

The curiosities of the Brandeis Brief as a legal document have been noted before: more than a hundred pages long, it contains mountains of scientific data and little argument.<sup>31</sup> More significant than the brief’s content are its origins and its consequences. The consequences are well-known: the brief persuaded the Court to allow for expanded protective considerations for women within its already-established substantive framework, simply on the grounds that labor identifiably posed greater threats to women than to men. But it is important also to note that the brief did not arise in a vacuum. To the contrary: it originated in a much broader, unified national women’s movement that was now capable of gaining a foothold in civic processes—executive,

legislative, and judicial. In fact, the Brandeis Brief was one of many successful attempts by the American women's movement to legitimize their political agenda through the customary channels of government. In such attempts, perhaps, lies the best answer as to why the Supreme Court expanded women's rights in the early twentieth century: more than simply appealing to public sentiment, women seized political initiative and managed to place a crucial amount of strategic institutional pressure on the Court—pressure which was borne out in later rulings.

**IV.** Both Louis D. Brandeis, who authored the Brandeis Brief and who argued for the Oregon law before the Court, and his co-author Josephine Goldmark had been approached by the National Consumers' League in November of 1907 and asked to defend the ten-hour law on behalf of the Oregon State Industrial Commission. The National Consumers' League was a national women's organization whose geographic reach was somewhat limited but whose structural unity and whose intimacy with the national political process were nevertheless formidable assets.<sup>32</sup> Between 1905 and 1912, twenty-three states had Consumer Leagues.<sup>33</sup> In 1899-1900, Florence Kelley, the NCL's executive secretary, "reported travels to ten states and the District of Columbia to address fifty-four organizations, including a federal government commission, three national associations, eight state associations, six different colleges and universities, and thirty-six individual organizations."<sup>34</sup> Although the NCL did exert pressure as a lobbyist through legislative drives to support state laws, the League's chief focus was on the courts: by sponsoring briefs, like the Brandeis Brief, to defend women's legislation once the legislation had been passed, it took the lead in asserting the need for protective considerations based on substantive differences between women and men.

The NCL-sponsored Brandeis Brief was successful in opening up a new realm of substantive judicial and legislative considerations for women in *Muller* in 1908, but far more important was the fact that the NCL sustained its efforts at political mobilization for the next two and a half decades. "Into the mid-1930s," writes one author, "the NCL sponsored some fifteen

legal briefs in support of labor laws challenged before the courts.”<sup>35</sup> Between 1900 and 1920, Consumers’ Leagues at the state level were active in mounting campaigns to push for women’s legislation: of 74 laws passed by the states and the District of Columbia mandating greater protections for women, an estimated 34 were supported by state Consumers’ League movements.<sup>36</sup> In other words, this national organization was making its policy preferences known to the Court by activating institutional channels and by using the Court’s substantive evaluation of rights to force greater and broader concessions for women.

The National Consumers’ League was not the only influential women’s organization active at this time. Of those same 74 state laws, 30 were also supported by the General Federation of Women’s Clubs (GFWC), a larger national organization that arguably enjoyed more prominence in pressuring the legislature for women’s protection nationwide.<sup>37</sup> By the time of the *Muller* decision in 1908, every state in the union except Nevada and New Mexico had organized a Federation of Women’s Clubs, and those two states would do so, respectively, in 1910 and 1911.<sup>38</sup> The national Federation comprised a host of regional, state and local women’s groups, now harmonized by a unifying administrative structure.<sup>39</sup> Furthermore, the national Federation published an official journal and held Biennial Conventions, where delegates heard reports from committees on subjects ranging from “Civil Service Reform” to “Education to Industrial and Child Labor.” By 1910, membership in the General Federation of Women’s Clubs reached one million Americans.<sup>40</sup>

The Federation’s approach toward securing women’s protection was always to promote legislative efforts from within the system. Delegates to the 1906 Biennial Conference agreed “endorse the work of the Industrial Committee in its efforts to secure the passage of a bill to authorize the secretary of commerce and labor to investigate and report upon the industrial, social, moral, educational, and physical condition of the woman and child laborers in the United States.”<sup>41</sup> The emphasis was on lobbying through the prescribed avenues built into the American political system.

Perhaps the clearest sign that women's groups had succeeded in creating for themselves a niche in that system was the relative cordiality of their relations with the executive branch. The National Congress of Mothers, which would later become the PTA, enjoyed a meteoric rise in prominence, holding national conventions in Washington, D.C. and seeing their membership increase from 50,000 to 190,000 between 1910 and 1920.<sup>42</sup> It also enjoyed a warm reception from the White House: its inaugural banquet was held there in 1897, and President Roosevelt spoke frequently at its national conventions during his tenure of office and afterwards—including in 1908, the very same year *Muller* was decided.<sup>43</sup> In Roosevelt the labor and women's movements had a formidable ally: in his 1908 State of the Union Address, he leveled fierce criticism at the Courts for their intolerance of protective socioeconomic legislation, declaring that "There are certain decisions by various courts which have been exceedingly detrimental to the rights of wageworkers....Decisions such as those alluded to above nullify the legislative effort to protect the wage-workers who most need protection from those employers who take advantage of their grinding need."<sup>44</sup>

It would be naïve and simplistic to suggest that the Court expanded its understanding of women's socioeconomic rights at the behest of a President. Fifteen years after Roosevelt's speech, in *Adkins v. Children's Hospital*, the Court thwarted such expansion by overruling a District of Columbia law establishing minimum wage for female workers; and it would take a further fourteen years after that finally to accept minimum wage for women as constitutional. But it is neither naïve nor simplistic to posit that, in the interceding years, women's protective measures rode a robust undercurrent of institutional momentum in which socioeconomic considerations were upheld with greater and greater frequency.

Between 1873 and 1897, a total of 34 cases involving protective labor legislation had come before the state and federal courts. In 19 of those cases, or 56%, protective legislation was ruled unconstitutional.<sup>45</sup> In the years encompassing *Lochner* and *Muller*, between 1898 and 1910, only 18 of 50 cases, or 36%, resulted in the overruling of protective legislation.<sup>46</sup> And in the

years between 1911 and 1923, only 9 of 49 cases—just 18%—decided at the state and federal level ended in the striking-down of protective legislation.<sup>47</sup> These data indicate a trend toward greater tolerance of socioeconomic measures in this time. In those fifty years, from 1873 to 1923, protective legislation specifically for women was upheld in 42 out of 48 cases decided at the state and federal level—an 87.5% success rate. These numbers suggest that protective measures for women were at the vanguard of an expanding jurisprudential understanding of socioeconomic rights.

The success of women’s legislation in such cases was largely created by the ability of the women’s movement, through institutional avenues, to appeal to the Court’s substantive sensibilities. The substantive standard of due process created in *Lochner* had allowed women’s groups a far greater latitude in which to engage in strategic behavior, because such groups could now lobby and promote legislation predicated on inherent substantive differences between men and women, protecting such legislation from judicial override. Julie Novkov writes that *Lochner*, far from hamstringing the women’s labor movement, offered it a vital strategic opening: “The frameworks established in the initial debates now began to ground a mostly unguided and unintentional separation between the analysis of general legislation and laws regarding women’s terms and conditions of labor.”<sup>48</sup>

It is critical to note, moreover, that the men’s labor movement suffered from a lack of unified focus in precisely the same period when women’s groups were conducting their well-coordinated national campaigns. As a result, male-dominated organizations were not nearly as successful as women’s advocates in activating the appropriate institutional channels, and broader socioeconomic considerations for men in general remained much less likely to withstand judicial scrutiny.

V. It would be inaccurate to say of the men’s labor movement that it was not a political movement of considerable size or relevance in American society. On a national scale, however,

that movement was both insufficiently politicized and insufficiently organized to effect the same forceful impact on the judiciary that more unified women's movements had managed. One may raise the objection that the *Lochner* decision placed men at an inherent disadvantage from the start, and that the Court's standards of substantive analysis were by default much less sympathetic to male laborers than to women. Yet the greatest distinction between men's and women's labor movements lay not in the terms of the substantive framework itself, but rather in the specific ways that each movement approached and manipulated that framework. For instance, Theda Skocpol suggests that the Brandeis Brief was in reality less gender-specific than many scholars have made it out to be, and that its contents could have been submitted just as easily in support of broader, general protective legislation for both men and women. "But in 1908 the only available opportunity seemed to be to persuade the Supreme Court that women workers were unusually vulnerable employees rather than regular workers," she writes. "Thus women's biological vulnerabilities were highlighted in the 'facts' and expert opinions...even though most of them were gleaned from European sources that had often advocated protection for workers in general."<sup>49</sup>

Nor was the information contained in the Brandeis Brief entirely new: most of the studies reported in the brief predated 1905, so the data would have almost certainly been available to the New York attorneys in *Lochner*.<sup>50</sup> That the *Muller* defense was able to produce and utilize the Brandeis Brief, whereas the *Lochner* defense had no such weapon on its side, is therefore indicative to the fact that the former was backed by a unified, coordinated national movement with an ample foothold in the political process while the latter was not. Women's organizations like the NCL, GFWC, and NCM were able to use measures like the Brandeis Brief and others already discussed in order to exert pressure on the judiciary from within the system; men's labor organizations, on the other hand, found themselves disorganized and consistently blocked out.

The labor movement that spawned New York's Bakeshop Act in 1895 is symbolic of the broader state of the national labor movement during this era. The Bakeshop Act was passed

almost solely because a very specific industrial union—the Journeyman Bakers’ and Confectioners’ International Union of America—managed to capitalize on the charisma of its leader Henry Weismann to create a localized groundswell of public opinion. The Bakers’ union enjoyed no widespread political coordination, no national support, no clout from any broader network of labor advocates. It was lucky even to mobilize as much local support as it did: “On its own,” writes Paul Kens, “organized labor in New York was unlikely to have been able to guide the [Bakeshop Act] through the 1895 legislative session, even if it had wanted to do so.”<sup>51</sup>

National labor advocates remained deliberately aloof from the entire eight-hour-day campaign in New York from the very beginning. Although the American Federation of Labor and its leader Samuel Gompers were supportive of eight-hour rules in principle, Gompers placed his faith in the ability of individual unions to agitate in the private sector on an ad hoc basis rather than in the possibility of mounting any sustained legislative or litigative effort from within the political system. Kens writes that Gompers was “notorious in his opposition of the legislative method,” and that he consistently resisted efforts to engage the conventional political avenues: “Organization added to labor’s strength, [Gompers] thought, whereas legislation tended to place the worker under the control of government bureaucrats.”<sup>52</sup> Placed in a judicial bind in the *Lochner* case, the Journeyman Bakers’ Union was all but entirely shunned by national organizations like the AFL, and the attorneys for the state of New York were left without any real means of pressuring the Supreme Court to rule in the desired fashion. Oregon attorneys in *Muller* could lean on the Brandeis Brief and a growing national movement whose organizing principle was the need for increased women’s labor protections; but the *Lochner* defense team could point to no such national movement. The Journeyman Bakers were an isolated union and little more.

As Skocpol’s research reveals, Samuel Gompers and his national AFL consistently expressed their distaste for legislative action in a variety of other venues. If the NCL and the GFWC pursued what might be termed the institutional option, then men’s labor movements nationwide placed themselves intransigently on the outside of the relevant institutions. Six years

before *Lochner* was even decided, Gompers was a public critic of legislation supposedly designed to serve the interests of the working class. At the 1899 AFL convention, he excoriated the Interstate Commerce Law and the Sherman Anti-trust Law for hindering union activity: “These two laws have been cunningly devised by our antagonists...[and] foolishly acquiesced in by men believing themselves reformers.”<sup>53</sup> Later, in 1914, Gompers voiced his flat opposition to passing eight-hour laws, and the 1914 national AFL convention passed a resolution stating that “the question of the regulation of wages and the hours of labor should be undertaken through trade union activity, and not made subjects of laws through legislative enactments.”<sup>54</sup> In 1916, Gompers testified in Congress against a proposal for national unemployment insurance, arguing that trade unions were better off fending for themselves through collective action in the private sector. Gompers declared that he would not support a scheme “to rivet the masses of labor to the juggernaut of government.”<sup>55</sup> Even further down the road, Gompers and the AFL would come out even more fervently against proposals for minimum-wage legislation.<sup>56</sup> Perhaps worst of all, the men’s labor movement suffered from a chronic pattern of internal dissonance: state AFL federations often deviated from the national federation’s positions on legislation,<sup>57</sup> and the national federation was more often than not directly at odds with the American Association for Labor Legislation (AALL), the most vocal proponent of protective socioeconomic legislation on a variety of fronts.<sup>58</sup>

Ultimately, the key difference between men’s and women’s movements for socioeconomic rights was the manner in which each respective movement attempted to project its interests on the polity. Men’s labor groups were crippled by a failure to exert pressure on the judiciary through the same institutional avenues that women had utilized so effectively.

Skocpol’s assessment agrees with this hypothesis:

Organized womanhood brought greater and more effective pressures to bear on behalf of such social policies than the AALL and the trade unions brought to bear on behalf of labor legislation focused on male breadwinners. ...For a time, women’s mode of politics—public education and lobbying through widespread associations—was ideally suited to pressuring legislatures to pass

bills along nonpartisan lines, to getting around obstacles from the courts, and to taking the place of absent administrative bureaucracies.<sup>59</sup>

Whatever the underlying causes, it is clear that the men's labor movement lacked the requisite organization and internal coherence that might have allowed them to gain the same political traction that women's groups managed at this time.

**VI.** Taking strategic considerations into account—considerations like legislative support, litigative pressure, and intangible personal relationships with the executive branch—makes up for much of the ground that doctrinal and attitudinal analyses have failed to cover. Once *Lochner* had established its substantive framework for socioeconomic rights, women's groups were able to exert pressure on the Court by maneuvering within that framework and by accessing the appropriate institutional channels. Men's labor groups plainly failed to make the same readjustment. Women laborers were more successful in winning protections before the Court, but it must be reiterated that their struggle for such protections was by no means facile. *Muller* was a giant step forward in opening up the substantive ground for further socioeconomic legislation; but *West Coast Hotel* was nearly thirty years distant.

It is not clear how well this strategic analysis fares when exported to other contexts. If interest groups are capable of appealing to Court doctrine by virtue of their organizational patterns and their political activity, then one might expect to find similar results when analyzing *Brown v. Board of Education* or the current jurisprudential debates over same-sex marriage. But the *Brown* decision was largely imposed upon a nation still deeply torn about civil rights; and advocates of same-sex marriage have had mixed results in the courtroom. It would be worthwhile, in the latter case, to investigate whether same-sex marriage advocates have managed to exercise the same sorts of institutional channels that women's groups exercised in the early twentieth century.

It would be worthwhile, furthermore, to analyze which of the aforementioned institutional channels is actually the most practical in placing strategic pressure upon the judiciary. Such an analysis would require more space than is available here. But our collective understanding of the Supreme Court and of the American political system in general would profit greatly from it; and with it would undoubtedly come a much clearer picture of the mechanisms by which judicial politics evolve in the United States.

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- <sup>1</sup> *Lochner v. People of State of New York*, 198 U.S. 45 (1905). [FindLaw for Legal Professionals](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=198&invol=45). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=198&invol=45> (10/30/06).
- <sup>2</sup> Sunstein, Cass R. "Lochner's Legacy." *Columbia Law Review*, Vol. 87, No. 5. (Jun., 1987), p. 874-5.
- <sup>3</sup> Fiss, Owen M. *History of the Supreme Court of the United States, Volume VIII: Troubled Beginnings of the Modern State, 1888-1910*, p. 155. Toronto: Cambridge University Press, 2006.
- <sup>4</sup> *Muller v. State of Oregon*, 208 U.S. 412 (1908). [FindLaw for Legal Professionals](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=208&invol=412). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=208&invol=412> (10/30/06).
- <sup>5</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). [FindLaw for Legal Professionals](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=300&invol=379). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=300&invol=379> (10/30/06).
- <sup>6</sup> *Muller*, p. 2.
- <sup>7</sup> Sunstein, p. 874.
- <sup>8</sup> Skowronek, Stephen. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, p. 41. New York: Cambridge University Press, 1982.
- <sup>9</sup> Skocpol, Theda. *Protecting Soldiers and Mothers*, p. 310, 372, 386. Cambridge, MA: Harvard University Press, 1992.
- <sup>10</sup> *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923). [FindLaw for Legal Professionals](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=261&invol=525). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=261&invol=525> (10/30/06).
- <sup>11</sup> Kens, Paul. *Lochner v. New York: Economic Regulation on Trial*, p. 66. University Press of Kansas, 1998.
- <sup>12</sup> *Ibid.* 65.
- <sup>13</sup> *Lochner*, p. 3.
- <sup>14</sup> *Ibid.* 4.
- <sup>15</sup> *Ibid.* 5.
- <sup>16</sup> *Ibid.* 6.
- <sup>17</sup> Bewig, Matthew S. "Lochner v. The Journeyman Bakers of New York: The Journeyman Bakers, Their Hours of Labor, and The Constitution: A Case Study in the Social History of Legal Thought." *The American Journal of Legal History*, Vol. 38, No. 4. (Oct., 1994), pp. 422.
- <sup>18</sup> *Lochner*, p. 14-15.
- <sup>19</sup> Fiss, p. 35.
- <sup>20</sup> *Ibid.* 31.
- <sup>21</sup> *Ibid.* 30-1, 34-5.
- <sup>22</sup> *Ibid.* 45-6.
- <sup>23</sup> *Ibid.* 165.
- <sup>24</sup> Purcell, Jr., Edward A. *Brandeis and the Progressive Constitution*, p. 40. New Haven: Yale University Press, 2000.
- <sup>25</sup> *Muller*, p. 1.
- <sup>26</sup> *Ibid.* 4.
- <sup>27</sup> *Ibid.* 3.

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- <sup>28</sup> Fiss, p. 176.
- <sup>29</sup> *Muller*, p. 2.
- <sup>30</sup> *Ibid.* 3.
- <sup>31</sup> Skocpol, p. 394.
- <sup>32</sup> *Ibid.* 393.
- <sup>33</sup> *Ibid.* 392.
- <sup>34</sup> *Ibid.* 383.
- <sup>35</sup> *Ibid.* 393.
- <sup>36</sup> *Ibid.* 387-9.
- <sup>37</sup> *Ibid.* 387-9, 393.
- <sup>38</sup> *Ibid.* 330.
- <sup>39</sup> Kelley, Florence. The Committee of the General Federation of Women's Clubs on the Industrial Problem as It Affects Women and Children. *The American Journal of Nursing*, Vol. 1, No. 11. (Aug., 1901), p. 813-815. Kelley's article describes how nurses' associations in New York and Maryland were placed in connection by virtue of their involvement in state Federations.
- <sup>40</sup> Skocpol, p. 329.
- <sup>41</sup> Pennybacker, Mrs. Percy V. "The Eighth Biennial Convention of the General Federation of Women's Clubs." *Annals of the American Academy of Political and Social Science*, Vol. 28, Woman's Work and Organizations. (Sep., 1906), p. 82.
- <sup>42</sup> Skocpol, p. 336.
- <sup>43</sup> *Ibid.* 337.
- <sup>44</sup> Roosevelt, Theodore. "State of the Union Message, December 8, 1908." *UCSB American Presidency Project*. <http://www.polsci.ucsb.edu/projects/presproject/idgrant/site/state.html> (10/30/06).
- <sup>45</sup> Novkov, Julie. *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years*, p. 43. Ann Arbor: The University of Michigan Press, 2001.
- <sup>46</sup> *Ibid.* 83.
- <sup>47</sup> *Ibid.* 135.
- <sup>48</sup> *Ibid.* 82.
- <sup>49</sup> Skocpol, p. 394.
- <sup>50</sup> Brandeis, Louis D. and Josephine Goldmark. Women in Industry. New York: Arno Press, 1969. This volume contains the full text of the Brandeis Brief, along with the Court's unanimous *Muller* decision.
- <sup>51</sup> *Kens*, p. 52.
- <sup>52</sup> *Ibid.* 24-5.
- <sup>53</sup> Skocpol, p. 229-30.
- <sup>54</sup> *Ibid.* 211.
- <sup>55</sup> *Ibid.* 207.
- <sup>56</sup> *Ibid.* 412.
- <sup>57</sup> *Ibid.* 233.
- <sup>58</sup> *Ibid.* 229-30. Gompers resigned from the AALL in protest in 1915 after a disagreement over the AALL's proposal for bureaucratic regulation of labor.
- <sup>59</sup> *Ibid.* 319.