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The paradox of protection: maximum hours legislation in the United States[1]

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The passage in the United States of Title VII of the 1964 Civil Rights Act rekindled an old controversy over the legitimacy of protective labour laws—i.e. special employment laws for women and children. Among these sex- and age-specific laws were those limiting the hours of work for women, specifying the maximum weights they could lift on the job, excluding them from "dangerous" work[2] in occupations such as underground mining, bartending and foundry work, and providing a floor below which their wages could not fall.

On one side of the controversy were women who contended that so-called protective labour laws introduced crippling *restrictions* on their ability to compete with men for higher-paying jobs: such laws were therefore discriminatory and exacerbated the concentration of females in occupational "ghettos". A second group of women was equally convinced that special employment laws offered women essential *protection* against exploitation in the labour market. They started from the assumption that the labour market was already rigidly segregated, and that most women workers would never have the resources, opportunity or perhaps even the desire to enter higher-paying, skilled occupations. Consequently, the loss of opportunity for a small minority of women workers was a trivial price to pay for the large gain in protection afforded the majority.

During the 1960s the new wave of the women's rights movement tilted the balance of the controversy—which dated back at least to the time of the First World War—decisively in favour of the former group. Numerous cases were cited to show that protective labour laws restricted the job opportunities and mobility of women workers, and some were taken to court. Ironically, after a little hesitation, the same court system that earlier

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had sustained and even fostered the openly separate and unequal treatment of women now invalidated protective labour laws which were not sex-neutral, and even former advocates of such laws urged that they be repealed. By 1973 most states had removed sex-specific employment legislation from their statute books.

In this article I will assess the positions adopted for and against protective laws by examining the development of *working hours* legislation—notably state maximum hours laws and the overtime provisions of the federal Fair Labour Standards Act. There are two main reasons for limiting the focus of the article to hours laws—admittedly among the least restrictive of all protective labour legislation. The first is that maximum hours laws were the most widespread of all the sex-specific employment laws:[3] legislation restricting the occupations open to women or regulating night work or the lifting of weights was confined to a small number of states. Second, by limiting the focus we are able to explore with precision the relationship between sets of laws regulating the same condition of work in different ways—i.e. maximum hours laws and overtime laws—and to see how earlier laws affect the rise and growth of later laws in the same domain.

In this review of key historical developments, I begin by investigating how the coverage of maximum hours laws became and remained restricted to women and children. Second, I discuss why male employees in most states failed to press for government-backed maximum hours standards following a 1917 Supreme Court decision sustaining a sex-neutral maximum hours law for manufacturing establishments. Third, I point to organised labour's renewed interest in maximum hours laws during the Depression, and to the compromise that led to the enactment of a sex-neutral, more easily enforceable overtime standard in the Fair Labour Standards Act. Finally, I look at the history of maximum hours laws from the Second World War until their invalidation in the late 1960s and early 1970s.

The major point to emerge from this historical review can be simply stated—*maximum hours laws were both protective and restrictive, but not simultaneously.* How laws that once were protective become restrictive can be explained by three hypotheses which will be elaborated upon below. These are that

— protective laws failed to keep pace with the profound modifications in working conditions that followed from technological change;

— the content of these laws is fundamentally shaped by the constellation of interest groups supporting or opposing legislative and judicial action at critical junctures in their development; and

— these sex-specific laws, themselves a reflection of conventional thinking about the sexual division of labour typical of the first half of the

twentieth century, were in fact essential preconditions for later sex-neutral legislation protecting all employees.

The battle for shorter hours: women and children first

The 1880s saw two major campaigns by organised labour to achieve the eight-hour day—the first between 1884 and 1886, the second between 1888 and 1891.[4] These culminated, in May 1890, in widespread strikes led by the Carpenters and Joiners—the largest national union in the American Federation of Labour (AFL). The workers achieved their goal of the eight-hour day in only 42 of the 141 strikes, but in *every* strike they secured some reduction in the average work week.[5]

In the legislative field employees sought the enactment of two types of laws: "legal day's work" laws, which defined the number of hours that constituted a working day, and maximum hours laws, which prohibited work beyond ten, and then eight, hours per day. However, state legislatures reduced the former to a mere statement of principle and severely restricted the coverage of the latter.

A typical "legal day's work" law[6] declared that the working day for all labourers, workmen or mechanics consisted of eight to ten hours, but allowed employees to work beyond the normal hours in return for premium wages. Ostensibly sex-neutral, it actually applied mostly to traditionally male occupations. These laws, enacted in 17 states between 1847 and 1896, carried great potential but in practice had little or no effect in shortening hours—sometimes because they applied only in the absence of an employment contract (which usually specified much longer hours).

The demand for maximum hours laws was strongest in New England and the North Atlantic states, and in Massachusetts in particular. In 1842 textile manufacturing employees from the town of Lowell, Massachusetts, petitioned the state legislature for a law imposing explicit, enforceable limits on their work week. After a decade of agitation the move was blocked by the state senate, which would only pass a "legal day's work" Bill. Rather than soften their position on enforceable legislation, the workers chose to compromise over its scope. Originally they had sought legislation covering all employees, but now they lowered their sights and eventually accepted, in 1867, a maximum hours law that applied only to women and children. Male textile employees believed that hours restrictions for women would become, of necessity, hours ceilings for men as well, which has led to the claim that "in Massachusetts, as in England, the men employed in the textile industry decided to 'fight the battle from behind the women's petticoats'".[7] However that may be, the Massachusetts maximum hours law covering only females and children set a precedent for this category of legislation, and while many battles took place in state legislatures over which industries or occupations should be subject to the

regulation of working hours, restriction of the coverage to women and children was accepted without question. In this way did such legal rights go to "women and children first".

Why laws remained sex-differentiated

Several factors conjoined in the late nineteenth and early twentieth century to account for the age- and sex-specific basis of coverage under maximum hours laws.

First, the American Federation of Labour—which was generally distrustful of government—had become sceptical about what could be accomplished through legislative reform and preferred to rely on its industrial strength to win improvements at the negotiating table.

A second and related factor was the conditional (i.e. selective) nature of trade union support. Although the AFL continued to declare its support for general hours laws, once Massachusetts workers had compromised on this point organised labour almost never campaigned in support of hours laws for men. (The single exception was the eight-hours movement on the West Coast between 1911 and 1914, to which I revert below.) There were several reasons for this. In some instances, as in Massachusetts, the labour movement was simply too weak. Available evidence indicates that workers with little bargaining power would have welcomed universal hours legislation, which they saw as the only vehicle for attaining the shorter hours that stronger unions had secured through bargaining.[8] Many of the more powerful craft unions had negotiated standard work weeks that compared favourably with those specified in hours legislation, and if they initially supported hours laws for women it was as a gesture of solidarity with weaker, mainly unorganised groups. Sometimes, too, state federations of labour supported hours laws for women as a way of demonstrating their political muscle, as for instance in California in 1911.[9]

Consequently, by the turn of the twentieth century, the unions generally had lost interest in universal hours legislation. When they did back hours laws for women, they did so less on humanitarian grounds than out of economic and political self-interest. Their interests were shaped, in turn, by the composition of the labour movement at that time. The AFL was dominated by relatively strong craft unions with all-male memberships. But it also included textile workers who were mostly female and had little bargaining strength.

It is important to separate out the motives of different trade union groups because of the frequent charge that male unionists endorsed protective labour laws for women in order to limit the entrance of women into traditionally male jobs. For example:

> Legislation designed to limit female labour won wide support among the trade unions.... Reformers ... usually stressed the negative effects of industrial work upon the supposedly frail constitution of a woman, ... her moral fibre [and] the

family.... Labour leaders certainly accepted such arguments, but clearly their basic concern was the effect of women on the industrial system and not the impact of the factory upon women.[10]

No documentation to support these rather strong conclusions is offered. Indeed, there is very little evidence in general that fear of female encroachment on jobs held by men accounted for trade union support of the *first* female maximum hours law adopted in any state. Unions used other devices to keep women out of craft jobs, notably apprenticeship rules and equal pay clauses.[11]

Better evidence of discrimination against women surfaces in the first two decades of the twentieth century with the use of maximum hours laws by male unionists to remove women from certain positions. Yet even these instances have been cited out of all proportion to the numbers of women affected. In New York State, in particular, women in the printing trades and those working as messengers and elevator operators lost their jobs because employers did not want to be subject to government hours regulations. In a more clear-cut case of male employee collusion with employers, women streetcar conductors who had replaced men in these jobs during the First World War were displaced when the men came home.[12] In the case of the women printers in New York State, the controversy was resolved in 1924 in favour of the women when, after an eight-year battle, they were exempted from coverage under night work legislation.[13] An as-yet unpublished study of the motivations underlying union attitudes to occupational restrictions and minimum wage laws between the two world wars reports that unions were more concerned with protecting the jobs of their male members than with protecting women workers.[14] It would be unwise to argue, however, that what was true for 1920-40 was true for 1870-1900, or that what was true for one state was necessarily true for others.

Neither trade union preference for collective bargaining nor the conditional support of trade unionists for protective laws is sufficient, however, to explain why maximum hours laws remained sex- and age-specific. If organised labour was disillusioned with the legislative approach, why didn't the demand for these laws simply dissipate rather than continue to focus on women? Alternatively, if male unionists lacked the power to obtain universal coverage, why did their efforts on behalf of maximum hours laws for women succeed?

A third factor which contributed to the maintenance of restricted coverage under these laws was the growing influence of women's groups such as the Women's Trade Union League (WTUL) and the National Consumers' League (NCL). These groups placed protective laws at the centre of their political agenda and enjoyed the popular support necessary to secure their enactment. In addition, the women's groups presented arguments which were persuasive precisely because they differentiated between men and women, and therefore were consistent with conventional

thinking about the division of labour between the sexes. The WTUL and the NCL approach focused on a number of key differences between men and women, including their physical and emotional characteristics. They then argued that these differences justified special protection for women. The fact that women held a subordinate position in society because of their position within the family was used, however misguidedly from today's perspective, to gain for them legal rights denied to male workers.

This approach was never more effectively argued than in the 113-page brief that Louis D. Brandeis filed on behalf of the NCL in the landmark Muller v. Oregon case in 1908. Even though some of the evidence presented there about female employment would not stand up to modern scientific scrutiny, it proved sufficient to convince the Supreme Court Justices of the legitimacy of special protection for women. The Court unanimously upheld the Oregon maximum hours law, stating that:

> The limitations which this statute places upon [a woman's] contractual powers, upon her right to agree with her employer as to the time she shall labour, are imposed not only for her benefit, but also largely for the benefit of all.... The two sexes differ in structure of the body, in the amount of physical strength, in the capacity for long-continued labour, the influences of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation.[15]

These arguments fortified NCL lobbyists in state legislatures, as well as WTUL delegates to AFL Conventions who were seeking general trade union endorsement of labour laws for women.

Consequently, at the very time when the vast majority of unions lost interest in legislative reform of the labour contract, women's groups deepened their commitment to the enactment of such reforms. The forces favouring maximum hours laws had changed markedly over the 40-year period between the Massachusetts compromise and the Muller decision, yet it was precisely this shift and the rationale developed by women's rights organisations that led to the pervasive association of maximum hours legislation with the inferior position of women in the labour market.

Labour loses its chance

In 1914 the Oregon Supreme Court upheld a sex-neutral maximum hours law for manufacturing employees. Writing of this decision two years later, Felix Frankfurter observed a profound shift in the *basis* upon which decisions concerning appropriate legislative intervention in the labour market were now being reached. He singled out the Muller case as the turning-point and argued that, from then on, the courts began to rely more on actual working conditions than on principles such as liberty of contract or equal protection. In turn, this change in the basis of their reasoning resulted, over time, in a modification of the *substance* of their decisions as

in the 1914 case of Bunting v. Oregon, where the ten-hour day, originally deemed legitimate only for women and children, was held to be appropriate for all employees regardless of age or sex.[16]

It was now up to labour to take advantage of this unprecedented opportunity for sex-neutral hours laws. Yet the majority of organised workers continued to lack interest in protective legislation. A group of trade unionists on the Pacific Coast carried on an active campaign in favour of a general eight-hours law between 1911 and 1914. They were responsible for the Oregon ten-hours law, which was to be sustained by the US Supreme Court in 1917, and were pressing (unsuccessfully) for universal eight-hours laws in California, Oregon and Washington.

The West Coast efforts received the perfunctory support of the national AFL until 1914 when, for the first time, a clear majority of the delegates adopted a resolution *opposing* eight-hours laws with universal coverage. Only the previous year the national AFL Convention had passed a resolution in support of special hours laws for women and children *and* a general eight-hours law. Yet by 1914, when several state legislatures appeared sympathetic to the extension of female hours laws to male employees, the powerful craft unions had second thoughts and overturned the long-standing AFL position on universal hours legislation. The new policy was confirmed by an overwhelming majority at the 1915 Convention. The line up of unions and state federations on this issue was more or less identical to the division among trade union groups supporting hours legislation for women during the first decade of the twentieth century. Weaker unions, industrial unions and West Coast state federations favoured the extension of these laws to male workers, whereas unions in a good bargaining position such as the printers and building tradesmen feared that government-based standards would undermine their strength. The dominant position of these craft unions within the AFL resulted in a rejection of universal hours legislation at the very moment when its enactment seemed a distinct possibility.[17]

The Black-Connery Bill and the overtime provisions of the Fair Labour Standards Act

Throughout the 1920s the AFL continued to oppose universal hours legislation, and even as late as 1931 its executive council opposed a constitutional amendment which would have established sex-neutral hours ceilings. As the Depression bit deeper, however, there emerged within labour's ranks a renewed interest in hours legislation as a way to decrease unemployment. Support was especially strong among the leadership of the textile unions.[18]

Without consulting organised labour, Senator Black of Alabama introduced a Maximum Hours Bill providing for a 30-hour week. Repre-

sentative Connery introduced a similar Bill in the House. The AFL not only endorsed the Bill but went so far as to claim credit for it. Many leaders of craft unions appeared at the Congressional hearings to testify in its favour.

While the Black-Connery Bill passed in the Senate in 1933, it never came to a vote in the House. Frances Perkins, Secretary of Labour in the Roosevelt administration and former NCL lobbyist for maximum hours laws in New York State, opposed the Bill because the hours limits were so rigid and because she feared the effect on earnings. She proposed, instead, the more flexible approach of overtime standards and premium pay. After several vicissitudes, her ideas were incorporated in the Fair Labour Standards Act (FLSA) of 1938. The FLSA permitted an employee to work up to 44 hours a week (which would be lowered, after several years, to 40 hours a week), and to work beyond this limit as long as he or she was then paid at the rate of time-and-a-half.

The AFL leadership never wavered in its preference for the Black-Connery Bill but its support for this type of standard had come 15 years too late. The AFL's two major political demands were for a federal law sanctioning collective bargaining and a federal law establishing a universal ceiling of 30 hours a week. While the Wagner Act met the first demand, the FLSA proved a disappointment, despite considerable revisions made in response to union criticisms during the legislative process.

The fact remains that male employees were now covered by government-set hours standards, the protection that textile workers in Massachusetts had compromised away 70 years before. There was no compromise over the coverage of the new hours law. Rather, there was *a modification in the type of hours standard obtained.* The FLSA incorporated, first, a flexible for an inflexible hours law and, second, a 40-hour for a 30-hour standard work week.

The overtime provisions of the FLSA rendered state maximum hours laws for women superfluous, at least for those females employed in manufacturing.[19] First, not only was the approach taken in maximum hours laws regarded by many as archaic, but they were also very difficult to enforce.[20] Second, the FLSA threshold of 40 hours was much closer to the actual average work week in manufacturing in the late 1930s than were the 48- to 54-hour ceilings found in most state maximum hours laws.

But since sex-specific protective labour laws remained on the statute books, they were available for use in situations in which men and women workers needed to be differentiated. Hence their relevance to the situation in the labour market following the Second World War when it was "necessary"—for the sake of war veterans—to remove women from higher-paying, skilled jobs traditionally performed by men. A look at this complex of circumstances, to which we now turn, will help us, inter alia, to understand the paradox of why seemingly progressive laws came to be used in ways other than those that were originally intended.

The Second World War and women workers

During the Second World War manufacturing firms engaged in war production needed employees capable of working extensive overtime, and since these firms relied heavily on female labour, maximum hours legislation constituted a potential barrier to meeting production goals. As a result, legislatures in most of the states where such firms were established temporarily suspended these laws.[21] The national War Manpower Commission issued guidelines providing for equal pay and prohibiting sex discrimination. While these guidelines proved effective in regulating wages in unionised industries, they did little to combat the wage discrimination suffered by most women workers; in manufacturing, for example, women's earnings were 65 per cent of men's both in 1940 and in 1945.[22]

When the war ended, maximum hours and other protective labour laws were brought back into force and were used to justify the removal of women from the better-paying positions they had filled during the hostilities. For example, Corning Glass Works reimposed a night work restriction that had been suspended during the war. Women were moved back onto the day shift, and as a result they lost their night work bonuses.[23] While there is no evidence to suggest that these laws served *systematically* to restrict the employment opportunities of women, there were many instances in which they were used explicitly to discriminate against women.

Yet the link between protective laws and the displacement of female labour is complicated by the fact that, with the return of war veterans, Black workers who had migrated from the South to assist in war production were also removed from the better-paying positions they filled. It does not seem that any legal mechanisms were required to accomplish this large-scale layoff of Black workers. If so, one wonders whether Blacks were so much less powerful than women in the late 1940s that they could be displaced without even the justification of protective labour laws. On the face of it this seems unlikely, especially given the influence of the civil rights movement during and following the Second World War. Or does the displacement of Blacks suggest that, even if there had been no protective laws, women would have been relegated to unskilled jobs in the same arbitrary way? In other words, were these laws the *central* mechanism for the displacement of women after the Second World War?

Since the war almost all court cases involving protective labour laws have been initiated by employees who were told, by an employer, that certain jobs could not lawfully be done by women. (By contrast, when protective labour laws were first enacted, crucial test cases were brought either by employers who wanted the restrictions removed or by employees working in firms violating the laws.) Indeed, the evidence suggests that after the Second World War these laws became weak, if not irrelevant, instruments for regulating the hours of female employees. Far from

affording women the protection intended by the legislator, they seem to have been used by some employers in the postwar period to justify their preference for male employees.[24] The statement made by a representative of the United Auto Workers to the Equal Employment Opportunity Commission is eloquent in this respect:

> The contracts we negotiate with employers provide equal pay, equal job opportunity, equal seniority, training, etc., but I couldn't begin to estimate the number of grievances we have taken all the way to arbitration in an effort to enforce a contract only to be stymied by one or another of the so-called state "protective" laws.... At the end of World War II and the Korean conflict we first encountered the management practice of invoking state laws in order to bypass women's job rights. During war periods [laws] were honoured only in the breach. Yet when men were again available the employers resorted to the technique of combining two jobs into one so that it was beyond the state maximum weight law, or scheduling hours of work beyond the statutory limit for women in order to avoid hiring women employees...:[25]

Title VII and the invalidation of maximum hours laws

The passage of Title VII of the 1964 Civil Rights Act, which prohibited discrimination on the basis of sex, did not automatically invalidate protective laws. In fact the Equal Employment Opportunity Commission (EEOC) which was set up under the Act originally held that these laws were legitimate in that they specified bona fide occupational qualifications; it only reversed its position over a five-year period, largely as a result of pressure from women's rights organisations, employers' associations and some but not all trade unions.[26] Finally, however, the EEOC issued new regulations in 1969 stating that the "bona fide occupational qualifications" argument could not be used to sustain these laws. Section *(b)* (2) of these regulations reads:

> The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect.[27]

Between 1967 and 1973 a plethora of cases, mostly class actions,[28] were brought to the courts challenging hours and weight restrictions and job prohibitions. After the pivotal Rosenfeld case the courts struck down most of these sex-specific laws, and state legislatures followed suit. For example, maximum hours laws have been struck down by the courts under Title VII in nine states, repealed by state legislatures in 21 and ruled against by attorney-generals in 23. The 18 laws that remain on the books are either not enforced, only enforced for those who request it, or apply only to women not covered under Title VII.[29]

As the regulations issued by the EEOC contend, very few women have benefited from the protection afforded through maximum hours laws, at least since the Second World War. While the conditions and terms of blue-collar and service work remain far from ideal, they have improved substantially since the turn of the century when most of these laws were enacted. Consider, for example, the reduction in the hours of work in manufacturing during the twentieth century.

In 1910, when the average work week in manufacturing was 57 hours, the ceiling for female employees under maximum hours laws ranged from 48 to 54 hours a week, depending on the state. This was substantially less than the hours worked by all except the most privileged of male manufacturing employees (who no doubt belonged to the few unions with political muscle), and represented—limited though it was—the successful culmination of almost half a century's effort to obtain a legally limited working day. By 1970 only the most exploited of manufacturing employees regularly worked a 48-hour week. Average weekly hours in manufacturing ranged from a low of approximately 35 in the manufacture of apparel and other textile products to a high of approximately 43 in the manufacture of petroleum and coal products, plus about three hours of overtime.[30] Maximum hours laws did not keep pace with these changes in the work week, since most of them maintained the 48-hour ceiling.

Consider as well the fact that when, during the Depression, the Roosevelt administration was searching for the best method of regulating hours of work, maximum hours laws served as the *negative* model against which new standards were developed. The overtime laws it introduced not only superseded rigid maximum hours laws with respect to the type of standard they encompassed, but they also transcended the basis of coverage provided by these earlier laws. The FLSA of 1938 rendered maximum hours laws obsolete for many employed females, and when it was amended in 1961 and 1965 to include a large group of employees in services and the retail trade, it was clear that maximum hours laws had outlived their usefulness.

Why were they not invalidated earlier? There appear to be several reasons. First, until 1965 they continued to cover female employees in retail trade and service occupations, which as we have just seen were previously excluded from coverage under the FLSA. Some of these women were unionised and their representatives stressed that maximum hours laws remained the only form of hours regulation in effect for many of them. Second and more important, until the late 1960s only a very small group of feminists associated with the National Women's Party demonstrated an interest in improving the job opportunities of women. On the other hand, many of the women who had devoted considerable energy to the enactment of protective labour laws held prominent positions both inside and outside government and remained strongly attached to these laws—whether or not they still made any useful contribution to the

regulation of hours. Finally, until the Second World War there was scant evidence that protective legislation was being used systematically to remove women from jobs they filled.

Even after the war the anger voiced by displaced women fell on deaf ears. It required a new feminist movement to arouse public opinion to the employment disadvantages suffered by women, and it was only when women's rights groups turned their attention to protective labour legislation—most of it enacted during the first two decades of the twentieth century—that it was finally evaluated in the light of 50 years of social and economic change, found wanting and repealed.

New legislation for a new society

Finally, it is important to understand that sex-specific employment laws were a precedent for sex-neutral laws. Maximum hours laws are not only protective laws; they are also part of a more general category of employment standards. These were initially regarded as providing legal protection to employees who were not otherwise able to defend their interests. Women and children, for instance, were not accorded a legal status in the labour market (right of contract etc.) equal to that of men, no doubt because employment in the industrial sector ran counter to the traditional view of their appropriate role in society. They were provided instead with an alternative set of rights in which the government, in effect, replaced the husband or father as the source of protection. Rather than give them the status of autonomous and independent individuals, the law offered them a new source of protection.[31] Thus the motives underlying the introduction of protective labour legislation were highly conservative.

The fact that the government intervened in the labour market to protect some workers, however, was the thin end of the wedge enabling it to intervene, if necessary, on behalf of most (or even all) workers. It constituted a *precedent.* When women and children entered the industrial labour market, it became necessary to introduce new legislation to regulate an employment relationship that was not covered by existing law. But by the late 1930s, law was no longer being used to regulate these special cases but to compensate all workers for the inequalities which underlie employer-employee relations in general. The concept of protection was completely severed from traditional notions of the appropriate distribution of roles and responsibility in the family. Instead, all employees (regardless of their age and sex, but to varying degrees according to their occupation) were held to be in need of government protection in the labour market.

So while the early labour laws rested on the legal assumptions of the old laissez-faire State, the coverage of more recent labour standards, such as overtime legislation, reflects more closely the legal realities operant in modern industrial society.

The lessons to be learned from reviewing the rise, expansion, and elimination of protective labour laws in the United States are not necessarily applicable elsewhere. Protective labour legislation remains in force in most countries. In some of these, such as the United Kingdom, it coexists uneasily with equal employment opportunity laws. By contrast, the Scandinavian countries are characterised by a long-standing and strong opposition to sex-specific legislation. Nevertheless, this type of legislation is sufficiently homogeneous for one to hope that the insights provided here into US experience may contribute to a better understanding of its functions and effects in other countries with differing historical conditions.

Notes

[1] This is a revised and expanded version of a paper prepared for a Conference on Protective and Restrictive Legislation held at Smith College in November 1977. Some of the conclusions reached are similar to those of Judith Baer in *The chains of protection: the judicial response to women's labor legislation* (Westport (Connecticut), Greenwood Press, 1978). But whereas Baer focuses on the development of judicial doctrine, this article explores the link between the changes in working hours *legislation* during the twentieth century and the constellation of interest groups supporting or opposing specific policies at different times. It benefited considerably from the comments and suggestions made on earlier drafts by Mary Jo Bane, Pamela Daniels, Carolyn M. Elliott, Brigid O'Farrell, Charles Perrow, Jonathan Ratner and Martha Tolpin.

[2] The concept of "dangerous occupation" is central to an understanding of the rise and growth of special employment laws for women. While such occupations as underground mining were obviously dangerous to all employees so engaged—regardless of sex—government regulations mirrored conventional wisdom in assuming that women were at greater risk than men: females were therefore prohibited from engaging in such work, while males were limited in the number of hours for which they were allowed to perform it.

[3] Ronnie Steinberg Ratner: *A modest Magna Charta: the rise and growth of wage and hour standards laws in the United States, 1900-1973. A social indicators approach* (New Brunswick (New Jersey), Rutgers University Press, forthcoming).

[4] Sidney Fine: "The eight-hour day movement in the United States, 1888-1891", in *Mississippi Valley Historical Review* (Bloomington (Indiana)), Dec. 1953, pp. 441-462; and Jeremy Brecher: *Strike!* (San Francisco, Straight Arrow Books, 1972).

[5] Fine, op. cit., p. 456.

[6] The best readily available description and historical overview of these laws is Elizabeth Brandeis: "Labor legislation", in *History of labor in the United States, 1896-1932*, Vol. III of John R. Commons and associates: *History of labor in the United States* (New York, Macmillan, 1935), pp. 540 ff.

[7] Ibid., p. 462.

[8] Clara Beyer: *History of labor legislation for women in three states*, US Department of Labor, Women's Bureau Bulletin No. 66 (Washington, 1929), p. 2.

[9] Ibid., p. 122.

[10] Irwin Yellowitz: *Industrialization and the American labor movement, 1850-1900* (Port Washington (New York), Kennikat Press, 1977), p. 107.

[11] Baer, op. cit., p. 32. Baer cites the example of the International Typographical Union which in 1869 amended its constitution to prohibit sex-based discrimination in local unions in support of her belief, shared here, that "men's unions which fought for such laws were not very vulnerable to the charge that their primary concern was to eliminate competition" (ibid., pp. 32-33).

[12] Elizabeth Faulkner Baker: *Protective labor legislation*, Columbia University Studies in History, Economics and Public Law, Vol. CXVI, No. 2 (New York, Columbia University Press, 1925); and Beyer, op. cit.

[13] Baer, op. cit., p. 87.

[14] Personal communication from the author, Patricia K. Brito, November 1977.

[15] 208 US 412, 421-23, as quoted in Baer, op. cit., p. 63.

[16] Felix Frankfurter: "Hours of labor and realism in constitutional law", in *Harvard Law Review* (Cambridge (Massachusetts)), Feb. 1916.

[17] For further details of this episode see Brandeis, op. cit., especially pp. 555-557.

[18] A full account of the events described below is given in Elizabeth Brandeis: "Organized labor and protective labor legislation", in Milton Derber and Edwin Young (eds.): *Labor and the New Deal* (Madison, University of Wisconsin Press, 1957), pp. 193-237.

[19] The original Fair Labour Standards Act restricted coverage to persons in industries engaged in interstate commerce. Most female occupations, such as those in personal services or the retail trade, were beyond the scope of these laws. Consequently, only a small proportion of female employees, mostly semi-skilled or unskilled manufacturing workers, were initially in a position to benefit from the Fair Labour Standards Act. (See Ratner, op. cit.)

[20] It is interesting to note that feminist critics of protective labour laws have argued simultaneously that these laws contributed to and sustained occupational segregation in the labour force *and* that they were largely unenforced.

[21] Where this happened, maximum hours laws were either simply declared null and void for the duration of the war or individual employers were granted exemption on application to the state Commissioner of Labour. The suspensions meant that an employer could engage women (and minors) for previously inappropriate types of work and require them to put in long hours that unionised men would most likely have worked only at much greater cost to the employer.

[22] William H. Chafe: *The American woman: her changing social, economic, and political roles, 1920-1970* (New York, Oxford University Press, 1972), Ch. 7.

[23] Barbara Allen Babcock et al.: *Sex discrimination and the law: causes and remedies* (Boston (Massachusetts), Little, Brown and Co., 1975), p. 260.

[24] We do not have studies showing whether, and if so to what extent, these laws have been used deliberately to limit women's job opportunities over the 70-year period during which they have been in existence. These missing studies, which would systematically assess the impact of this legislation in a way that cannot be done by examining individual court cases, are needed in order to evaluate the contention that women's occupational segregation is both principally caused by and exacerbated by protective labour laws. For example, we do not know whether job opportunities for women in Alabama and Iowa—two states which never enacted maximum hours laws for adult females—were greater than those in Pennsylvania, Ohio and Delaware—states with maximum hours laws that covered a majority of all working women. Systematic studies of the effect of protective labour laws on the types of jobs held by men and women would clearly be helpful in determining whether these laws helped or hindered women in the past or continue to do so today.

[25] Babcock et al., op. cit., pp. 263-264.

[26] In 1967 the EEOC scheduled public hearings and discovered that support for invalidating protective laws was widespread and growing. The following year, in Rosenfeld v. Southern Pacific Company (293 F. Supp. 1219 (C.D. Cal. 1968)), a district court upheld the contention—argued by the EEOC in an *amicus curiae* brief—that Title VII superseded maximum hours and night work laws.

[27] Babcock et al., op. cit.

[28] A class action is one brought by an individual or group on behalf of all other persons similarly situated.

[29] Some states fall into two or more of these categories. See Barbara A. Brown et al.: *Women's rights and the law: the impact of the ERA on state laws* (New York, Praeger, 1977), p. 211.

[30] Estimates of the US Bureau of Labour Statistics. See US Department of Labor, Employment and Training Administration: *Employment and training report of the President* (Washington, US Government Printing Office, 1976), pp. 303-305.

[31] Neil Smelser: *Social change in the Industrial Revolution: an application of theory to the British cotton industry* (Chicago, University Press, 1959).