

***BRADWELL v. STATE (1873)***  
***MULLER v. OREGON (1908)***

**HISTORICAL BACKGROUND**

Women and the Constitution

Civil Rights

No constitutional right to vote until 1920 (exception: NJ 1776-1807)

No constitutional right to serve on state or Federal juries until 1975 (by 1942, only 28 states permitted women to serve on juries)

Legal and Property Rights

Coverture: unity of wife and husband (working for wages, inheritance, wills and estates).

**BACKGROUND TO *BRADWELL***

Myra Bradwell founded the Chicago Legal News in 1868

MB passed the Illinois law exam in 1869

Illinois Supreme Court denied MB's application for admission to the Illinois bar

No law specifically allowed women to practice law  
"Opening the floodgates"  
Brutal cases  
Pernicious effect on the administration of justice

**BACKGROUND TO *BRADWELL***

MB appealed this decision to the U.S. Supreme Court claiming that Illinois had violated her rights under Article IV, Section 2 ("Comity" Clause) and her rights under the "Privileges and Immunities" (PI) Clause of the 14th Amendment.

Comity Clause: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

PI Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

## MILLER ON THE COMITY CLAUSE

Comity Clause protects the citizens of one State against discrimination by another State.

“The protection designed by that clause...has no application to a citizen of the State whose laws are complained of.”

By the 14th Amendment, MB is a citizen of the State wherein she resides. So, notwithstanding the fact that she was born in Vermont, she is a citizen of Illinois. So the Comity Clause has no application to her case.

## PRECEDENT

*The Slaughter-House Cases* (1873)

Held that the PI Clause concerns rights held by citizens of the United States *qua* citizens of the United States (rather than *qua* citizens of the States in which they reside).

Rights held by citizens of the United States *qua* citizens of the United States are very limited: not much more than “the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts.” [See background to *Plessy*]

## MILLER ON THE PI CLAUSE

Straightforward application of precedent

“We agree [with MB] that there are privileges and immunities belonging to citizens of the United States...and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made...to depend on citizenship at all.”

## BRADLEY ON THE PI CLAUSE

The right to practice law is not “one of the privileges and immunities of women as citizens”

History of Civil Society (e.g., Coverture)

## General Constitution of Things (Nature)

“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”

Bradley responded to the charge that this argument did not apply to unmarried women

“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”

## **BACKGROUND TO *MULLER***

### Oregon Labor Law (1903)

“No female shall be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day.”

Curt Muller, the owner of the Grand Laundry in Portland, was convicted of violating this law in 1905, and fined \$10.

Muller appealed his conviction and fine to the Oregon Supreme Court, and lost. He then appealed to the U.S. Supreme Court.

### Muller’s Petition

Statute infringes his right to liberty of contract under the DP Clause

Statute “does not apply equally to all persons similarly situated”, and so infringes his right to equal protection under the EP Clause

Statute “is not a valid exercise of the police power”, for “there is no necessary or reasonable connection between the...act and the public health, safety, [morals,] or welfare.” Infringement -> violation.

## PRECEDENT

*Lochner v. New York* (1905)

Supreme Court struck down a NY Statute limiting the number of hours bakers could work in any one day or week.

Right to liberty of contract protected by DP Clause

Test: Does the law bear a substantial relation to a legitimate state interest?

Health: legitimate state interest

Limiting hours of work for bakers does not bear a substantial relation to promoting their health

## BREWER ON THE DP CLAUSE

Although the DP Clause protects the right to liberty of contract (*Lochner*), this right is not absolute (*Holden*) and is limited by the proper use of the State's police powers.

The State's interest in the health of working women and in the "strength and vigor of the [human] race" is legitimate.

Oregon Statute bears a substantial relation to the promotion of the health of women who work in factories and laundries

Impact of limiting hours of work

On Women's Health

"Continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body."

In this respect, women and men differ: "The two sexes differ in...the amount of physical strength, in the capacity for long-continued labor, particularly when done standing."

On the "strength and vigor of the race" (via health)

"As healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care."

In this respect, women and men differ: "The two sexes differ in...the influence of vigorous health upon the future well-being of the race."

## **BREWER ON THE EP CLAUSE**

The EP Clause requires similar treatment of those who are similarly situated. But women and men are not “similarly situated”. In particular, because of certain disabilities (in education, in physical strength, in the imperative of motherhood) women cannot compete with men equally “in the struggle for subsistence”. Thus, “some legislation to protect [women] seems necessary to secure a real equality of right”.

## **SEXIST PATERNALISM**

Brewer’s opinion was based on sexist stereotype

“It is impossible to close one’s eyes to the fact that [woman] still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection...”