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Fighting Fires, Fighting Wars, and Raising Children:
Gender and the Constitutionalism of Social Spending in the Late Nineteenth and Early Twentieth Century

Susan Sterett†

INTRODUCTION

Much of the work addressing the legal treatment of women has focused on, well, women. That is, gender is taken to signify women and if we want to understand the engendering of law we need to understand how women were affected by law. Through this important work we have been able to respect women’s lives by telling women’s stories. More recent work on gender, however, has noted the importance of understanding how dominant social and legal frameworks limit and shape both men’s and women’s lives. Historically analyzing the limits of the dominant frameworks requires analyzing law’s concern with what it means to be independent—and generally masculine—in contrast with what it means to be dependent. I am engaged in a related project addressing this feminist question: how dominant legal frameworks have understood what it means to be dependent and independent, notions that in the American social welfare state have carried a heavy and often gendered weight. I am focusing on late nineteenth and early twentieth century social welfare law where, to best address what social welfare law has meant, I have found it necessary to address how law has constructed independence and dependence and to address masculinity as one way of understanding the contrasting notion of femininity.

† Assistant Professor of Political Science, University of Denver. Ph.D., University of California at Berkeley (1987). I am grateful to Kaaryn Gustafson and Tom Scanlon for their suggestions on earlier drafts of this article. I am also grateful to the Berkeley Women’s Law Journal for asking me to participate in this symposium.

In the nineteenth and early twentieth centuries, states enacted pensions for people who the courts sometimes understood to be public servants. These people included soldiers and firemen and, later, teachers and other civil servants. Early twentieth century activists tried to establish pensions for mothers and for the elderly based on a parallel argument: that mothers and the elderly had provided a public service. Governing the establishment of these pensions were constitutional provisions limiting taxing and spending for a public purpose; public purposes could include pensions for public service or payments to charity. By examining the cases decided under this bifurcated notion of public purpose, we come upon an excellent opportunity to contrast the cases tied to masculinity and independence with the cases associated with femininity and dependence. This examination contributes to a fuller understanding of the legal valuation of mothering in the early twentieth century where previous understandings have proved perplexing in analyses of labor legislation.

Through analysis of the legal categories used to represent women we can observe the ambivalent and difficult choices that reformers made in arguing for women’s interests through the terms supplied by the dominant legal frameworks. For example, in the early twentieth century, labor activists who supported labor legislation for both men and women found that the Supreme Court would strike down labor legislation for men under the Fourteenth Amendment.\(^2\) Maximum hours laws were held to be unconstitutional because they infringed upon the liberty of contract guaranteed to men.\(^3\) As a result, activists framed arguments specifically designed to emphasize a different legal and social status for women.

In *Muller v. Oregon*, the Supreme Court sustained a statute limiting the number of hours that women could work.\(^4\) The Supreme Court reasoned that women were intrinsically dependent, were incapable of independently forming contracts, and therefore could be regarded apart from liberty of contract.\(^5\) Furthermore, because women raised children and children were good for society as a whole, it was considered important to the public welfare that states be able to enact protective labor legislation for women. The Supreme Court thereby allowed states to regulate poor women’s labor in a way that was unconstitutional for ordinary working men.\(^6\) The legal frame-

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3 *Id.* at 61.
work that authorized hour protections for women exhibited two dimensions: first, women could be viewed as dependent; second, women could be viewed as mothers. This legal framework confounded the category ‘woman’ with the category ‘mother,’ leaving ambiguous whether motherhood could be identified with dependency or with public service. Muller v. Oregon provides important insights into the construction of gender in law. Gender, like all concepts signifying difference, is relational. Women are not the only bearers of gender and I want to suggest that a construction of femininity depends on a contrasting construction of masculinity.\(^7\) Examining the legal construction of masculinity can help to illuminate the contradictory concepts of femininity at work in Muller.

In addition to Muller, state cases concerning public spending provide further important sites for interpreting the intersection of law, gender, and public policy. Much existing analysis focuses on Muller, a case that arose under the federal constitution. But before 1935, the states were responsible for making much of the social welfare policy in the country. State constitutional law governed these programs and state courts articulated conceptions of gender at least as often as the federal courts did.

Pensions for men and women provided important social spending programs; pensions legislation also represented an area of law that addressed both men and women. States offered soldiers’ pensions for veterans and their surviving family members. They also instituted pensions for firemen, teachers, and other civil servants. All of these workers were understood to have provided a public service that workers in the ordinary trades did not provide. After 1911, in addition to pensions for civil servants, states began enacting mothers’ pensions for women who were single mothers.\(^8\) Pensions for civil servants, soldiers, and eventually mothers were all challenged in state courts. States had various constitutional provisions under which people could challenge these programs. The most common were constitutional provisions that limited spending to a public purpose or that restricted gifts of state money to individuals or to corporations. The California Constitution of 1879 provides an excellent example of these provisions:

> The Legislature shall have no power to give or to lend, or to authorize the giving, or lending, of the credit of the State ... in aid of or to any person, association or corporation ... nor shall it have power to make any gift or authorize the making of any gift of any public money ... to any individual.\(^9\)

Despite these provisions, spending for people who had earned money through public service was judged to be constitutional, although the states elaborated the requirements differently. Charity, spending for people

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\(^8\) For recent analyses of these programs, see Theda Skocpol, *Protecting Soldiers and Mothers* 424 (1992); Molly Ladd-Taylor, *Mother-Work* 135 (1994).

\(^9\) Cal. Const. of 1879, art. IV, § 31 (1879).
understood to be utterly helpless, was also held constitutional under these provisions.

The question remained, therefore, whether women who received mothers’ pensions would be regarded as public servants or as recipients of the states’ charity. An enormous number of cases challenged pensions. For purposes of brevity, I will first address cases concerning pensions and the emerging legal notion of public service that implicated conceptions of masculinity. I will then discuss one case that evaluated the constitutionality of mothers’ pensions in Arizona. These cases are from different states and span many years. They do not represent all cases decided in the pensions field. As we shall see, the legal standards holding that women were intrinsically dependent profoundly shaped a gendered understanding of deserving and undeserving poor. Rather than valuing women as public servants, mothers’ pensions made poor women the objects of public charity.

INDEPENDENCE AND PUBLIC SERVICE

For most working men, the price of the legal presumption of independence was that they could not be recognized as the beneficiaries of social welfare payments when they had not directly served the state. To give them payments would be to assume a humiliating dependency inappropriate to masculine citizenship. In 1875, the Kansas Supreme Court explicitly addressed independence and the ordinary trades. As part of a drought relief program, Kansas had issued bonds to try to buy grain for farmers. This program was challenged in court as violating the requirement that states could only spend for a public purpose. The court held that the farmers had not earned payment for a public service. Farmers were also not intrinsically dependent and consequently not objects of charity. Justice David Brewer, later of the United States Supreme Court, explained:

We have no thought of asserting that because a man is not rich, or even because he has nothing but the proceeds of his daily labor, therefore taxation may be upheld in his behalf. We speak of those whom society must aid, as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend.

Working in an ordinary trade did not warrant governmental protection.

In contrast, firefighting and soldiering were not ordinary trades; firemen and soldiers could receive public payment and retain their independent legal status. Throughout the nineteenth century, cities depended on volunteer firemen. By virtue of their work, volunteers could earn a variety of

10 State ex rel. Griffin v. Osawkee Township, 14 Kan. 418 (1875).
11 Id. at 420.
12 Id. at 421.
13 Id. at 422.
14 See ROBIN EINHORN, PROPERTY RULES 149-50 (1991) (discussing volunteer firefighting companies in Chicago).
benefits, such as exemption from military service. In New York in 1883 the system of spending for firemen’s pensions was challenged as unconstitutional spending for a private purpose.\textsuperscript{15}

It was argued that pensions did not serve the public but only the particular firefighters. The New York Court of Appeals held the pensions to be valid.\textsuperscript{16} The court stated that:

With the growth of the city, the number of the firemen increased and the amount and danger of their service. The old engines moved with difficulty and cumbersome and rude in construction, gave place to better machines, and the service improved as the demands upon it grew. The dangers of the work were obvious, and a courage and daring which has gone into history began to leave behind it men who were maimed and crippled in the public service, and widows and orphans deprived of their natural protectors and reduced to poverty and want.\textsuperscript{17}

Because of the dangers of their public service, firemen in some states earned pensions. States did not have to enact pensions, but if a state chose to do so, it could. These programs were not deemed unconstitutional as a special privilege or a gift to a private enterprise. This recognition from the court was significant, particularly since in this era courts were concerned with battling what they perceived as illegitimate privileges being granted to corporations and individuals. But in establishing this precedent, the court suggested that a deserving recipient of a pension would display “courage and daring,” descriptive words more often applied to men’s work than women’s. Indeed, the value of the men’s work is then understood by virtue of women and children’s dependence on men for protection. Men were hurt at work in service to the state, and women and children were left “deprived of their natural protectors.”

The work that most clearly addressed men’s public service and women’s protection was soldiering. At the same time that the courts evaluated payments to firemen they also evaluated payments to soldiers. Soldiers’ pensions were challenged as unconstitutional spending from the 1860s onward. Massachusetts, like many Northeastern states, held soldiers’ pensions to be unconstitutional as early as 1885.\textsuperscript{18} Some Northeastern states saw the pensions as unearned.\textsuperscript{19} Constitutional interpretation that saw soldiers’ pensions as unearned promised very little for new pensions for the elderly and for mothers. In 1910 a Massachusetts Commission reported on the poor in the state and on mothers’ and old age pensions.\textsuperscript{20} The report said that existing constitutional questions would hinder the

\begin{footnotes}
\item[16] Id. at 330.
\item[17] Id. at 327.
\item[18] Mead v. Acton, 139 Mass. 341, 344 (1885).
\item[19] Id.; Beach v. Bradstreet, 85 Conn. 344 (1912); Kelly v. Marshall, 69 Pa. 319 (1871).
\end{footnotes}
enactment of pensions, especially pensions for the elderly who had not served the state and were not intrinsically dependent.

The relationship between men and women, between masculinity and femininity, in the area of public service is most clearly elaborated in Bosworth v. Harp.\textsuperscript{21} In this 1913 case, the Kentucky Supreme Court upheld soldiers' pensions. Almost fifty years after the end of the Civil War, the court found that Kentucky citizens had justifiably feared the North during the Civil War. Clearly, when the Kentucky Supreme Court in Bosworth spoke of alarmed Kentucky citizens, it was referring to white Kentucky citizens. The North had criticized the South and had criticized Dred Scott,\textsuperscript{22} the notorious Supreme Court decision that held Blacks could never be American citizens. John Brown's raid on Harper's Ferry was described by the court as an attempt to "massacre . . . the women and children of the State."\textsuperscript{23} The decision described women and children of Harper's Ferry as "defenseless" and as in need of protection by Confederate soldiers.\textsuperscript{24} In addition to its unspoken assumption that slavery was a fine institution, the court engendered the notions of independence and dependence. Defense of the defenseless, standing up for principles, and risking life constituted public service that states could legitimately compensate with social welfare payments. The Kentucky Supreme Court added:

So long as the courage of the battlefield or the risking of one's life for his country is honored and it is the policy of the State to promote the loyalty and patriotism of the people by fostering the martial spirit, such service constitutes a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle.\textsuperscript{25}

The majority held that the courage of the battlefield can be rewarded whether or not the soldier served on the side that eventually won.\textsuperscript{26}

The courts associated soldiering and firefighting with intrinsically masculine work. Advocates for new social spending programs, particularly mothers' pensions, tried to justify the constitutionality of new pensions by arguing that mothers served the state by raising children just as men served by fighting wars. The elderly had also served the public by working productively. However, legal reasoning of the time made it unlikely for courts to recognize the analogies of public service that were being extended to mothers and the elderly.

\textsuperscript{21} Bosworth v. Harp, 154 Ky. 559 (1913).
\textsuperscript{22} Dred Scott v. Sandford, 60 U.S. 393 (1857).
\textsuperscript{23} Bosworth, 154 Ky. at 569.
\textsuperscript{24} Id. at 565.
\textsuperscript{25} Id. at 569.
\textsuperscript{26} As the dissent pointed out, these soldiers had fought for a losing side in a war, making it unclear in what sense their service in war constituted service to the state as opposed to service to rebels. Id. at 570.
DEPENDENCE AND CHARITY

After the White House held a conference on mothers' pensions in 1909, states soon began to enact mothers' pension legislation. Between 1911 and 1920, forty states enacted mothers' pensions.27 States also began to debate pensions for the elderly, though this legislation was slower in coming. Underlying most justifications for mothers' pensions was the argument that mothers served the state by raising children. Mothers should be paid for that service just as soldiers were paid for their service in war.

Advocates for mothers' pensions met substantial resistance, particularly from existing charity workers who believed that charity should be distributed on a case-by-case basis. Case-work, unlike universal benefits, would allow a charity worker to closely evaluate the worthiness of a recipient: in the case of mothers' pensions, her moral character, her religious commitments, and her care for her children.28 Charity workers would support mothers' pension programs that included such evaluations but they would not support programs that represented pensions as universal entitlements. For example, a universal program was enacted in Illinois, but the charity-oriented Russell Sage Foundation challenged it as "too sentimental" and, in response, the state quickly changed the program.29

In addition to the arguments premised upon these notions of charity, constitutional arguments posed alternative bases for opposing the universal approaches to mothers' pensions. For example, California enacted mothers' pensions in 1913 before any court had ruled on their constitutionality. California's mothers' pension program restricted benefits on the basis of women's income and moral worth. Socialist women worked hard to establish a recognition of the work of motherhood as universal and valuable to the public to justify payments to all women. After losing the fight for a universal mothers' pension to those who supported pensions for only the indigent, Emma Wolfe, a socialist woman activist, ascribed the loss in part to the legal framework derived from constitutional law. She wrote bitterly that constitutionality was the "stone wall against which we are thrown when we attempt to do anything for the mothers. I suppose some day they will say the mothers are unconstitutional, at least they may well say many of them have no constitution."30 Women as mothers had no constitution in just the double sense Wolfe suggested: first, they were presumed to be weak; second, their work was not recognized as service to the state.

Mothers' pensions were not put to the test until 1916 in Arizona. In a single statute Arizona enacted old age pensions and mothers' pensions as

27 See Skocpol, supra note 8, at 424-79.
29 Ladd-Taylor, supra note 8, at 146.
30 Quoted in Sherry Katz et al., California Progressivism Revisited 127 (1994).
universal benefits and abolished all the poor houses in the state. Arizona limited the payments in old age pensions to those who had less than $3000 in assets, yet all single mothers were eligible for the mothers' benefits. That is a much more generous standard than limiting payments only to indigent people. In State Board of Control v. Buckstegge, the Arizona Supreme Court struck down the program on two grounds. First, in abolishing the poorhouses, Arizona was abolishing necessary support for the poor and therefore abrogating its obligation to care for the state's indigent people. Second, such a generous program was unconstitutional because it expanded payments to those who neither had earned them nor were indigent:

I think the theory upon which a pension system of this kind must be sustained is that the state owes a duty to take care of the unfortunate members of society who, by reason of age or mental or physical infirmity, are unable to care for themselves, and are not the owners and possessors of property sufficient to sustain them from want and beggary. Certainly a citizen and taxpayer ought not to be made or required to help pay pensions to those who have enough and to spare of this world's goods. I can think of no principle of law or justice that could be invoked to sustain a law that required him to do so.

According to the court, then, mothers' pensions were not justified by the argument that women served the state by raising children. Payments to them were not justified as payments the state could choose to make in return for services rendered. Instead, the pension programs could only be constitutional if based on utter dependency, a basis that restricted payments to only some mothers and some of the elderly.

That motherhood or being elderly after a lifetime of work meant that one had earned payments was, however, an argument that some activists continued to make. Indeed, the analogies drawn between mothers and soldiers were sometimes explicit in advocates' arguments. However, if the reasoning justifying soldiers' pensions as service depended on courage and daring, and if within soldiers' pensions women and children were the people for whom soldiers performed their services, then the mothers' pension analogy was, as a matter of logical consistency, impossible. Without attending to the different forms in which spending programs were enacted—that is, universal programs versus means-tested or morality-tested programs—it would be easy to assume that mothers' pensions were understood as advocates wanted them to be understood, namely, as rewards for service.

The legal construction of poor women's lives depended on an implicit comparison between masculine independence and feminine dependence. In order to understand the legal assumption that women were still a dependent

31 State Board of Control v. Buckstegge, 158 P. 837 (1916).
32 Id. at 841-42.
33 Id. at 842.
34 LADD-TAYLOR, supra note 8, at 143-52.
class and did not, according to courts, serve the state by raising children, we must analyze the cases concerning masculine forms of public service. Cases challenging pensions for male public service workers centered around constitutional issues. That there is only one case directly addressing mothers' pensions would suggest that constitutionality issues were not important for evaluating mothers' pensions. Analyzing both public service pensions and mothers' pensions encourages us to reflect on the gendered foundation of our welfare state.