

# WOMEN AT WORK: TOWARDS AN INCLUSIVE NARRATIVE OF THE RISE OF THE REGULATORY STATE

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Our aim is not to denounce the fictitiousness of other discourses but to induce them, so far as possible, to take into consideration what they have allowed themselves to overlook.

- Jacques Donzelot

*Abstract: This Article seeks to enrich what we know about the establishment of the regulatory state. It focuses on women's contribution to the rise of the American regulatory apparatus. By looking at historical sources and archival materials, this Article illustrates how women reformers were central to the development of the regulatory state and how they were guided by an ideology that called for government regulation to provide decent standards of living. Through the example of the establishment of the Women's Bureau in the U.S. Department of Labor, the Article expands our understanding of the purposes of administrative bodies, and it articulates the ideology of Standards of Decency as central to administrative regulation. It concludes by suggesting that this history should inform how we think about the administrative regulatory state and its obligations.*

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## I. INTRODUCTION

The usual story of the rise of the regulatory state<sup>1</sup> is one about curtailing big businesses, building railroads, and responding to the Great Depression. The following narrative seeks to extend and enrich this story. By focusing on a group of women reformers who established and ran regulatory agencies, the following narrative enhances our understanding of the reasons for regulation, the purposes of a bureaucratic apparatus, and the obligations of regulators.

Historians have already taught us a great deal about the establishment of the regulatory state. We know that young lawyers, fresh out of elite law schools, flocked to Washington to create Roosevelt’s New Deal. These lawyers believed that the newly established agencies were necessary to fix the economy after the market crash of 1929 and the subsequent Great Depression. New Deal lawyers argued that “[m]arket capitalism had broken down, and the task of regulation was to manage business or other sectors of the economy, to restore their economic health, and to protect the public.”<sup>2</sup> By contrast, this Article focuses on a group of working and middle class women reformers who were instrumental in regulating labor in the Progressive Era and throughout the New Deal. By expanding the scope of inquiry,

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<sup>1</sup> The common law itself is a regulatory system of sorts, but in using the term regulation in this article, I am referring to systematic, large-scale regulation, adopted by the legislature and supported by administrative bodies. Likewise, when I refer to the establishment of the regulatory state, I mean the systematic reworking of the relationship between government and citizens through legislation and the building of a regulatory apparatus to support regulation.

<sup>2</sup> Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441 (2003).

this Article argues in favor of an additional, richer account for the rise of regulation and administrative bodies.

This Article draws on existing historical accounts and expands them with original archival material to provide a more complete and inclusive narrative of the role of women in the rise of the regulatory state, specifically within the context of the regulation of labor. It explores the work of these women in establishing labor regulations and how they were guided by an ideology of the state, which the Article terms “Standards of Decency.” It tells the stories of women reformers who were affiliated with Hull House,<sup>3</sup> particularly the otherwise-neglected story of Mary Anderson, a factory worker and labor reformer turned administrator, who became the first Director of the Women’s Bureau in the Department of Labor. This Article demonstrates how women reformers at Hull House developed theories about the goals of regulation. Subsequently, women, like Anderson, who were affiliated with Hull House, became part of the federal bureaucracy and carried forward those theories into the New Deal. This Article further illustrates how the discourse of Standards of Decency and the government’s obligation to regulate permeated the New Deal labor regulation discourse.

Part II presents the standard, albeit incomplete, story of the rise of the regulatory state. The standard story holds that regulation was primarily the product of the Great Depression and, thereby, was a necessity for a properly functioning market. The aim of this Article is by no means to denounce this important history; rather I seek to demonstrate that the “market failures” justification is incomplete. A richer account suggests that regulation, and with it the regulatory apparatus built during the Progressive Era and New Deal, were intended to do more than assist in the proper function of markets. The regulatory state was also aimed at ensuring Standards of Decency.

Part III enriches the incomplete narrative by discussing the integral role of Hull House reformers in the development of the regulatory apparatus. This part shows how women reformers initiated investigations into the needs of workers, rallied for state responsibility for labor reform, drafted legislation, defended statutes in courts, and executed laws in the administrative bureaus they helped create. It claims that these reformers justified regulation to promote Standards of Decency. It is within this ideological background and cultural milieu that Mary Anderson was exposed to labor reform and provoked to act.

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<sup>3</sup>Hull House was one of the most famous settlement houses in the United States. The aims of the settlement house movement, started by middle class reformers, were to create educational and cultural interaction within poor and urban communities and improve the conditions of excluded members of society. The settlements tried to respond flexibly to neighborhood needs by offering educational lectures and cultural events. *See generally* MINA CARSON, *SETTLEMENT FOLK: SOCIAL THOUGHT AND THE AMERICAN SETTLEMENT MOVEMENT* (1990) (exploring how settlement workers thought they could be of service to their underprivileged neighbors).

Part IV bridges the Hull House Progressive Era reform and the New Deal through the story of Mary Anderson. This part offers ideological,<sup>4</sup> personal, and chronological continuity between labor reform efforts in both Hull House and the nation's capital by introducing the story of Mary Anderson into the scholarship of the regulatory state. It traces Anderson's labor reform activities and the establishment of the new federal agency, the Women's Bureau, which Anderson directed for a quarter century. The purposes of the agency's establishment, its methods of operation, and its support of labor legislation, all demonstrate a close connection to Hull House origins.

Part V carries the story into the New Deal. It continues to explore women's influence, including Anderson's, in shaping New Deal labor legislation aimed at providing citizens with a decent living. It shows how women reformers considered the New Deal to be a means to inscribe their vision into the regulatory state. It shows how these reformers' ideology of Standards of Decency discursively permeated New Deal Labor Regulation.

Part VI concludes that women's activities during the Progressive Era and New Deal inscribed the vision of Standards of Decency into the regulatory state. By tracing women's reform efforts, this Article demonstrates how the story of the rise of the regulatory state and the New Deal extends to events before the Great Depression. It suggests that this extended history should inform how we think about the obligations of the regulatory state. Part VI further suggests possible implications of including this history in the narrative of the rise of the regulatory state.

## II. AN INCOMPLETE STORY – OF HOTDOGS AND RAILROADS

The standard account of the rise of the American administrative state views the New Deal as the watershed moment of its development.<sup>5</sup> A significant first step in the development of administrative regulation took place in the second half of the nineteenth century and occurred at the state level with the regulation of railroads, grain elevators, and other natural monopolies.<sup>6</sup> States' regulations of interstate railroad operations led to the establishment of the first federal regulatory agency, the Interstate Commerce Commission, in 1887.<sup>7</sup> By the late nineteenth century, fueled by the Progressive movement,

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<sup>4</sup> For a more complete discussion of ideological continuity, see *infra* note 28.

<sup>5</sup> See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 21 (5th ed. 2002). See also PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 37 (2d ed. 2004).

<sup>6</sup> See BREYER ET AL., *supra* note 5, at 19; WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* 126-127 (1982). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 214 (1992) (discussing federal regulation).

<sup>7</sup> See ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 37-39 (1941). See also GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916* 49-50 (1965); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 428-29 (1989).

the United States had embarked on a “large-scale development of a national bureaucracy.”<sup>8</sup> But, despite growing regulatory activity in the Progressive Era, it was President Franklin Delano Roosevelt’s New Deal that marked the turning point for the development of American regulatory state.<sup>9</sup> The history of the American administrative state “[was] left unoccupied by courts and party-dominated legislatures until an economic catastrophe of unprecedented proportions [occurred] . . . [t]he stock market crash of 1929.”<sup>10</sup> The Great Depression “left nearly a quarter of the American workforce unemployed and elicited a wide range of proposals from reformers, universities, civic associations, private foundations, and government officials.”<sup>11</sup> During a time of “infrastructure disorganization, economic distortion and worker insecurity,”<sup>12</sup> many felt that the common law granted too much protection from government intervention in property rights and freedom of contract and too little protection for the basic rights of the individual to security.<sup>13</sup>

While Roosevelt was indeed the spirit behind the New Deal, he of course was not the man who wrote the laws, defended them in courts, or carried out the policies. All this was done by lawyers, “boys with their hair ablaze,”<sup>14</sup> who “flocked to Washington to do the spadework for the New Deal.”<sup>15</sup> Felix Frankfurter, one of these young lawyers, is considered to be the “intellectual sparkplug of many New Deal Programs.”<sup>16</sup> Frankfurter knew the graduates of the elite triad of law schools, and he found niches for many young and talented lawyers in Roosevelt’s administration.<sup>17</sup> These “Happy Hot Dogs,” as they were often called, shared Frankfurter’s adherence to industry, idealism, and effective lawyering.<sup>18</sup>

<sup>8</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 19 (1990).

<sup>9</sup> See BREYER ET AL., *supra* note 5, at 21. See also RONALD EDSFORTH, *THE NEW DEAL: AMERICA’S RESPONSE TO THE GREAT DEPRESSION* 100 (2000); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 31-32 (4th ed. 2004); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1243-52 (1986). See generally George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557 (1996).

<sup>10</sup> Daniel R. Ernst, *Law and State, 1920-2000*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher L. Tomlins, eds.) (forthcoming), available at <http://ssrn.com/abstract=599945>, at 14.

<sup>11</sup> *Id.*

<sup>12</sup> JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 111 (1997).

<sup>13</sup> BREYER ET AL., *supra* note 5, at 21.

<sup>14</sup> PETER H. IRONS, *THE NEW DEAL LAWYERS* 3 (1982).

<sup>15</sup> LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 152 (2002).

<sup>16</sup> BREYER ET AL., *supra* note 5, at 23. See also WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 12-14 (1982) (discussing Frankfurter’s role in the development of administrative law).

<sup>17</sup> BREYER ET AL., *supra* note 5, at 22; IRONS, *supra* note 14, at 8.

<sup>18</sup> IRONS, *supra* note 14, at 8. See also THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 153-209 (1984) (discussing the career of James Landis, a student of Frankfurter’s who played an integral role in the design and administration of the SEC).

The New Deal reformation consisted of dramatic institutional changes, representing “a fundamental rethinking of the preexisting constitutional structure.”<sup>19</sup> The New Dealers created a multitude of national administrative agencies. “New entities were necessary to restore the securities markets, to protect agriculture, and to safeguard the banking and financial system. . . .”<sup>20</sup> Scholars agree that the basic rationale for these and other administrative measures was to “‘save capitalism from itself’ by correcting the most obvious failures of the unregulated market while avoiding the socialist alternative of direct government ownership of business enterprise.”<sup>21</sup>

The New Deal, as a consequence of the Great Depression, symbolically marks the acceptance of theories of government that stressed the importance of the state as a regulatory presence. While the New Deal was not a total revolution, “something new had emerged, and was gaining general acceptance. This was the idea of strong, active government – government that could respond to the kind of crisis the Depression had brought on the country.”<sup>22</sup>

Still, some historical accounts stress that law in the nineteenth century took an active role in promoting and regulating the nation’s socioeconomic infrastructure through public works, subsidization, and the police power.<sup>23</sup> These narratives “have begun to weave a different pattern of generalizations about law and reform. Taking seriously the complexities of this era’s labor law, its opposition to class legislation, [they] have criticized . . . ‘laissez-faire constitutionalism’ and the ‘constitutional revolution of the New Deal.’”<sup>24</sup> Yet, key scholarly accounts of the development of the regulatory state and labor regulation have not focused on women’s reform efforts in their narratives.<sup>25</sup> On the other hand, feminist historians have pointed to the work middle class women did to promote social welfare policies in the Progressive Era and New Deal.<sup>26</sup> But these feminist accounts have not inter-

<sup>19</sup> BREYER ET AL., *supra* note 5, at 21.

<sup>20</sup> SUNSTEIN, *supra* note 8, at 22.

<sup>21</sup> BREYER ET AL., *supra* note 5, at 22-23.

<sup>22</sup> FRIEDMAN, *supra* note 15, at 162.

<sup>23</sup> William Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW’S CENTURY 261 (Austin Sarat et al. eds., 2002) (explaining the role of law in the rise of the modern American state).

<sup>24</sup> *Id.*

<sup>25</sup> See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 52-65 (1998) (examining doctrinal origins guiding the judiciary in court decisions regarding working hours and wage regulation); DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 87-89 (1995) (illustrating how lawyers and academics sought legislative regulation to respond to social needs in the labor context). See generally SUNSTEIN, *supra* note 21.

<sup>26</sup> See LINDA GORDON, PITIED BUT NOT ENTITLED, SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 1-5, 44-45 (1994) (tracing women’s roles in the development of child welfare). The use of women reformers’ actions in this article exemplifies how the emergence of the regulatory state started long before the economic catastrophe of the Great Depression. While this article chooses to focus on women reformers and on labor regulation, there were, of course, other influences on the development of regulation, which are beyond the scope of this article. See generally RICHARD HOFSTADTER, THE AGE

preted the story primarily through the framework of the rise of the regulatory state. The following narrative draws on these important feminist accounts,<sup>27</sup> expands them, and provides a legal framework – the rise of the regulatory state – with which to understand these women reformers’ efforts. It centers on women reformers’ building of a regulatory apparatus and the ideology that accompanied their efforts.<sup>28</sup>

### III. PROGRESSIVE ERA REFORM – STANDARDS OF DECENCY

The Progressive Era, which lasted from 1870 and 1920, was a period of robust social activism.<sup>29</sup> In the late nineteenth century, as the United States moved from an essentially agrarian society to an industrial one, more people moved into the cities, big business conglomerates threatened small entrepreneurs, and immigration and urbanization slashed working-class wages.<sup>30</sup> With the industrial revolution, factories mushroomed in American centers, changing the nature of labor, and women surged into the marketplace labor force.<sup>31</sup> Young and single recent émigrés were hired mainly in garment and food production industries where they earned meager pay.<sup>32</sup> Among the mil-

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OF REFORM: FROM BRYAN TO F.D.R. (1955). Also, while there is an increasingly growing literature on women reformers during the Progressive Era, it does not usually center on the rise of the administrative regulatory state as the following narrative does. Other accounts also usually focus on upper-middle class women, while Mary Anderson was a working-class reformer. This article attempts to be the next step stemming from this growing body of important feminist literature. *See generally* LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994) (discussing women’s reform activities); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001) (focusing on women’s labor reform).

<sup>27</sup> *See, e.g.*, KESSLER-HARRIS, *supra* note 26; ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM 1890-1935* (1991) (focusing on the Children’s Bureau child welfare reform); ANNELESE ORLECK, *COMMON SENSE AND A LITTLE FIRE: WOMEN AND WORKING – CLASS POLITICS IN THE UNITED STATES, 1900-1965* (focusing on working-class women’s unionization and activism); KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATIONS’ WORK: THE RISE OF WOMEN’S POLITICAL CULTURE 1830-1900* (focusing on Florence Kelley’s early labor reform efforts).

<sup>28</sup> I mean ideology as an attitude that directed action. While the following narrative focuses on women reformers, it is equally important to consider the social and historical context of the time. Social and economic class played an important role in shaping parts of the women reformers’ ideology, especially with regard to their ideology of family. *See* Arianne Renan Barzilay, *Women at Work: The Rise of the Regulatory State Revisited* (forthcoming J.S.D. dissertation, New York University School of Law) (on file with author) at parts 3.6, 4.4.2.

<sup>29</sup> *See* MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870-1920* xiii- xiv (2003).

<sup>30</sup> *See generally id.*

<sup>31</sup> *See* LYNN Y. WEINER, *WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES 1820-1980* 13-30 (1985).

<sup>32</sup> *See* NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 5 (1996).

lions of women who entered the labor force during the turn of the century, many lived “adrift,” or apart from their families.<sup>33</sup>

The Progressive Era is characterized by an extraordinary surge of middle class activism amid these extremes of wealth and poverty in America.<sup>34</sup> One of the goals of middle class activists was to eradicate poverty so that families could produce contributing members of society.<sup>35</sup> The Progressives, the name given to these activists,<sup>36</sup> argued that families crippled with excessive poverty, unemployment, and dreadful work conditions “could not expect to produce contributing members of society. To restore opportunity first required identifying and correcting the social sources of poverty.”<sup>37</sup>

Women progressives were central to Progressive Era activism.<sup>38</sup> Two significant factors contributed to women’s work in the Progressive Era: first, women’s academic colleges like Vassar, Smith, Wellesley, and Bryn Mawr were founded, and, second, traditionally male colleges started to admit women.<sup>39</sup> Steady numbers of daughters from middle and upper-middle class families streamed through the doors of institutions of higher education, and graduation brought with it a quest for new endeavors. For many of these women, life after college offered limited occupational opportunities in the prevailing “separate spheres culture,”<sup>40</sup> and many graduates suffered a period of “disorientation and depression”<sup>41</sup> post-graduation.

In order to try to help uplift the poor, many college alumnae moved into settlement work, engaging in community activities that they believed would better their social environment.<sup>42</sup> These activities included teaching children, providing a center for civic life, and investigating neighborhood living conditions.<sup>43</sup> Women reformers wanted to alleviate the suffering of the poor,

<sup>33</sup> JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930* xvii (1988) (estimating that “from 1880 to 1930, the female labor force increased from 2.6 million to 10.8 million.” *Id.*).

<sup>34</sup> See McGERR, *supra* note 29, at 13.

<sup>35</sup> Other goals guided Progressives as well. Historian Richard Hofstadter notes that the leaders of Progressivism were middle class respectable men, who were appalled by the corruption and greed of industrialism, and who saw themselves as losing power in the new industrial society of big business and big cities. Progressives wanted to influence their environment and maintain their influential status. RICHARD HOFSTADTER, *THE AGE OF REFORM, FROM BRYAN TO F.D.R.* 135-137 (1955).

<sup>36</sup> See, e.g., WHO WERE THE PROGRESSIVES? 27 (Glenda Elizabeth Gilmore ed., 2002).

<sup>37</sup> ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* 115 (1982).

<sup>38</sup> See generally Kathryn Kish Sklar, *The Historical Foundations of Women’s Power in the Creation of the American Welfare State 1830-1930*, in *MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES* 43-93 (Seth Koven & Sonya Michel eds., 1993).

<sup>39</sup> See MUNCY, *supra* note 27, at 4.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Id.*

<sup>42</sup> See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 239-57 (1990). See also CARSON, *supra* note 3 at 52-53 (discussing the myriad educational, cultural, and political activities of the settlement workers).

<sup>43</sup> See JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE: WITH AUTOBIOGRAPHICAL NOTES* 70, 77 (1998) (hereinafter *ADDAMS, TWENTY YEARS AT HULL-HOUSE*).

and their social involvement was a response to the deplorable working and living conditions of urban industrial life.<sup>44</sup> Additionally, these women wanted to put their education to use “and have the solace of daily activity.”<sup>45</sup> For educated women, relocating into working-class neighborhood settlement houses provided them with both socially acceptable and meaningful work in public life.<sup>46</sup> Settlement house work promised women some independence from their families, unique employment possibilities, and a communal living arrangement. Settlement house residents “pledged to devote themselves to the duties of good citizenship and to the arousing of the social energies which too largely lie dormant in every neighborhood given over to industrialism.”<sup>47</sup> Thus, women settlement workers were motivated by personal development and a quest for social reform.

#### A. *The Establishment of Hull House*

One Progressive who forever changed the face of social welfare work and administrative regulation was Jane Addams, a visionary reformer. Addams was born in 1860 into one of Illinois’s wealthiest families,<sup>48</sup> and she attended Rockford Female Seminary.<sup>49</sup> After the Seminary, she visited Europe, where she witnessed extreme poverty in London.<sup>50</sup> Encouraged by her visit to the Toynbee Hall settlement house in the industrial district of London, Addams became increasingly convinced she could make a difference in the lives of those in need in the United States.<sup>51</sup> Like so many other female Progressives, Addams’ exposure to higher education, followed by a recognition of the widening gap between rich and poor, led her to reevaluate her role in American society and inspired her to demand social change.

In 1889, Addams founded the Hull House settlement in Chicago.<sup>52</sup> During the Progressive Era, Chicago was a growing urban and industrial center with significant poverty. Chicago’s population grew rapidly and factories proliferated, leading to foul smelling streets, insufficient water supply, inadequate numbers of schools, and horrific working conditions.<sup>53</sup> Hull House was located in a working-class neighborhood made up of immigrants from many nationalities. The purpose of Hull House was to “make social

<sup>44</sup> MUNCY, *supra* note 27, at 11.

<sup>45</sup> ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at 61. *See also* MUNCY, *supra* note 27, at 9.

<sup>46</sup> MUNCY, *supra* note 27, at 9.

<sup>47</sup> ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at 87.

<sup>48</sup> MUNCY, *supra* note 27, at 6.

<sup>49</sup> *Id.*

<sup>50</sup> *See* ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at 49.

<sup>51</sup> *Id.* at 57-61.

<sup>52</sup> Hull House was built for the homestead of one of Chicago’s pioneer citizens, Charles J. Hull, and then occupied by a factory until Addams, and her school-friend, Ellen Gates Starr, turned it into a settlement house. *See* MCGERR, *supra* note 30, at 53. *See also* MUNCY, *supra* note 27, at 12.

<sup>53</sup> *See* ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at xiv-xv.

intercourse express the growing sense of the economic unity of society and to add the social function to democracy.”<sup>54</sup> Addams hoped that Hull House would be a place where people of all classes and with all levels of education would rely on one another and improve conditions of industrial life.<sup>55</sup> Jane Addams “understood that individualism was an inadequate approach to life . . . she had needed the . . . [neighborhood’s poor] . . . to give her life purpose and form.”<sup>56</sup> Addams thus experienced a sense of fellowship towards members of her community.<sup>57</sup> Addams considered the settlement as an “experimental effort to aid in the solution of the social and industrial problems which are engendered by the modern conditions of life in a great city.”<sup>58</sup> Addams analyzed the early motivations for Hull House and other rapidly emerging settlement houses around the country, stating that “[t]hese young men and women, longing to socialize their democracy, are animated by certain hopes . . . that the good we secure for ourselves is precarious and uncertain, is floating in mid-air, until it is secured for all of us and incorporated into our common life.”<sup>59</sup> To Addams, the settlement movement was grounded in “the solidarity of the human race.”<sup>60</sup>

What mattered to Addams were the needs of the neighborhood, and Hull House experimented with meeting these needs, claiming that “we are passing from an age of individualism to one of association.”<sup>61</sup> Hull House organized a variety of activities: a day nursery, social events, and educational classes in literature, history, and theater.<sup>62</sup> In addition to these activities, Addams and her colleagues advocated for those who had difficulties navigating the legal and social institutions of urbanized life.<sup>63</sup> They helped injured workers collect compensation, investigated and publicized the existence of sweatshops, and provided counseling services.<sup>64</sup> Hull House also provided a framework in which women reformers could discuss legislative initiatives and drafting with elite, progressive lawyers.<sup>65</sup> Addams professed that one “cannot be too much directed from mutual relationships and respon-

<sup>54</sup> *Id.* at 64.

<sup>55</sup> *See id.* at 64, 77.

<sup>56</sup> MCGERR, *supra* note 30, at 54.

<sup>57</sup> ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, 64.

<sup>58</sup> *Id.* at 86.

<sup>59</sup> *Id.* at 80-81.

<sup>60</sup> *Id.* at 87. However, for the thought that settlement workers had a limited view of solidarity amongst different racial groups, see ELIZABETH LASCH-QUINN, BLACK NEIGHBORS: RACE AND THE LIMITS OF REFORM IN THE AMERICAN SETTLEMENT HOUSE MOVEMENT, 1890-1945 at 9-18, 153 (1993).

<sup>61</sup> JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS 137 (1964).

<sup>62</sup> *See* ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at 275-80.

<sup>63</sup> MUNCY, *supra* note 27, at 11-13, 26.

<sup>64</sup> ADDAMS, TWENTY YEARS AT HULL-HOUSE, *supra* note 43, at xvi.

<sup>65</sup> Kathryn Kish Sklar, *Hull House in the 1890s: A Community of Women Reformers*, 10 SIGNS 658, 670-71 (1985).

sibilities.”<sup>66</sup> And, importantly, Addams saw “agencies for social betterment” as the solution for the troubles of modern life.<sup>67</sup>

Early on, wealthy matrons provided fellowships to fund settlement activities.<sup>68</sup> But soon, Hull House workers began to lobby the state government for the establishment of publicly funded bureaus, which were more reliable than voluntary contributions as sources of steady support.<sup>69</sup> These lobbying efforts, coupled with Addams’ experience in the settlement, moved her towards political activity and regulatory government.

Addams publicly denounced the conditions under which immigrant unskilled workers lived, conditions that dragged them even below the level of their former European quality of life.<sup>70</sup> Addams claimed that “the very existence of the State depends upon the character of its citizens, therefore if certain industrial conditions are forcing the workers below the standard of decency, it becomes possible to deduce the right of State regulation.”<sup>71</sup> Standards of Decency stood at the heart of regulation, in part because settlement workers saw the terrible working conditions of their working-class neighbors.<sup>72</sup> Addams claimed that Hull House residents became convinced of the need for protective labor legislation.<sup>73</sup> One such resident who was motivated to act after witnessing these horrific working conditions was Florence Kelley.

#### B. *Regulating Labor I: Investigating, Lobbying, Enacting, and Enforcing*

Florence Kelley further shaped Hull House into an engine of social reform. Like Addams, Kelley received a challenging education, graduating from Cornell University in 1881.<sup>74</sup> Kelley continued her studies at the University of Zurich, where she translated into English Friedrich Engels’ *The Condition of the Working Class in England in 1844*.<sup>75</sup> Kelley left Zurich as a socialist.<sup>76</sup> When she came back to the United States, her marriage collapsed.<sup>77</sup> She moved to Hull House in 1891, as “a mother of three [who

<sup>66</sup> ADDAMS, *DEMOCRACY AND SOCIAL ETHICS*, *supra* note 61, at 275. See MCGERR, *supra* note 30, at 66.

<sup>67</sup> MCGERR, *supra* note 30, at 80. Addams believed that there ought to be “some-where in Church or State . . . a body of authoritative people who will put things to rights as soon as they really know what is wrong.” *Id.* at 57.

<sup>68</sup> See MUNCY, *supra* note 27, at 17-19.

<sup>69</sup> *Id.* at 24-25.

<sup>70</sup> ADDAMS, *TWENTY YEARS AT HULL-HOUSE*, *supra* note 43, at 151.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 132.

<sup>73</sup> *Id.* at 151.

<sup>74</sup> See SKLAR, *supra* note 27, at 51-62; MUNCY, *supra* note 27, at 25. Kelley came from a distinguished background: her father was a judge, and Kelley’s great aunt was an abolitionist who boycotted slave made goods. SKLAR, *supra* note 27, at 11, 22.

<sup>75</sup> FRIEDRICH ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND IN 1844* (Florence Kelley Wischnewetzky trans., 1926).

<sup>76</sup> MUNCY, *supra* note 27, at 25.

<sup>77</sup> *Id.*

moved] to Illinois because of its relatively lenient divorce laws.”<sup>78</sup> Because of Kelley’s interest in industrial workers’ plight, she established a “Labor Bureau” at Hull House: the Bureau trained young immigrant women in domestic work at Hull House and then placed them in well-to-do Chicago homes where they could earn livings.<sup>79</sup> She also began to systematically collect information on working conditions in the neighborhood’s factories and sweatshops.<sup>80</sup> Hull House thus became one of the first centers of social research.<sup>81</sup> Kelley wrote to Engels of her work in 1891, “I am . . . conducting a bureau of women’s labor and learning more in a week of the actual conditions of the proletarian life in America, than in any previous year.”<sup>82</sup>

In 1892, Kelley convinced the Illinois Bureau of Labor Statistics to investigate labor conditions in Chicago’s sweatshops, and it hired Kelley to study the sweatshop system in the Chicago garment industry.<sup>83</sup> Kelley, along with other Hull House residents, was especially moved by the terrible working conditions of women and children in sweatshops.<sup>84</sup> In the mostly female garment industry workers often labored ten to fourteen hour days, and earned meager pay.<sup>85</sup> Kelley generally believed that a society could not go on “with increasing masses of people unable by honest work to live in health and frugal decency.”<sup>86</sup> Kelley’s report recommended legislation requiring the regulation of working hours for women and children as well as an inspection service to enforce regulation.<sup>87</sup> Responding to Kelley’s report, the legislature appointed an investigative committee.<sup>88</sup> Kelley testified about the damaging effects of sweatshops on health and about wages being too low to sustain a decent life, and she guided the investigative committee through the city’s sweatshops.<sup>89</sup> Kelley also proposed a bill to regulate labor and establish an inspection mechanism to support the regulation.<sup>90</sup>

Women reformers like Addams and Kelley had become increasingly active in “public” life. And yet, most of them, including Addams and Kelley, justified their activism through arguments based on Victorian assumptions about women’s nature, insisting that women were natural nurturers and that American society in the age of the machine desperately needed nurtur-

<sup>78</sup> *Id.*

<sup>79</sup> SKLAR, *supra* note 27, at 177.

<sup>80</sup> JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER: FLORENCE KELLEY’S LIFE STORY* 28-33 (1953).

<sup>81</sup> *Id.* at 31.

<sup>82</sup> MUNCY, *supra* note 27, at 26.

<sup>83</sup> *Id.*

<sup>84</sup> SKLAR, *supra* note 27, at 206-07.

<sup>85</sup> Sklar, *Hull House in the 1890s*, *supra* note 65, at 675; *see also* WOLOCH, *supra* note 32, at 5.

<sup>86</sup> GOLDMARK, *supra* note 151, at 169. For an exploration of the complex moral meaning of Decency in reformers’ discourse, *see* Barzilay, *supra* note 28, at 2.3.1.

<sup>87</sup> SKLAR, *supra* note 27, at 232-33.

<sup>88</sup> *Id.* at 234.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 234-35.

ing.<sup>91</sup> Whether this was a shrewd rhetorical move or a deeply ingrained ideology is hard to know. Rhetorically, it was probably easier to convince the powerful men in the legislature of women's involvement in government by pointing to their natural nurturing elements; presenting their involvement in this way was likely far less threatening. However, this strategy may not have been only rhetorical. These reformers, called maternalists by some historians,<sup>92</sup> are often described as assuming a distinctive women's nature, exalting a capacity to mother, devising policy strategies to provide social protection for women's maternal responsibilities, and applying to society as a whole the values they attached to mothering, caring, nurturing, and morality.<sup>93</sup> Other historians emphasize that these reformers "generated searching critiques of state and society," observing that the maternal and child-welfare activities often became an entering wedge for the extension of state responsibility to other groups, including wage-earning men.<sup>94</sup> These historians emphasize that women's activism served as a surrogate for working-class social activism,<sup>95</sup> and their accounts stress that the gender-specific labor legislative efforts of the women of Hull House helped to advance working people's issues at large.<sup>96</sup>

Kelley indeed strongly advocated for a "right to leisure," to which she believed all workers were entitled.<sup>97</sup> Kelley's biographer insists that Kelley hoped labor laws would be extended to protect all workers.<sup>98</sup> Historians have named the strategy used by these reformers an "entering wedge" strategy in which labor regulation for women would become a precedent for establishing labor regulation for all workers.<sup>99</sup> Kelley advocated broadening labor regulation to all workers, but some of her affiliates espoused the narrower goal of protecting women from the evils of industrial work. Many in the women's reform network believed that women needed better working conditions because women who mothered healthy children were "worth more to society" than the "swiftest labeler of cans."<sup>100</sup> Other reformers,

<sup>91</sup> See MUNCY, *supra* note 27, at 36.

<sup>92</sup> See GORDON, *supra* note 26, at 55. See also Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in WOMEN, THE STATE, AND WELFARE 92-93 (Linda Gordon ed., 1990).

<sup>93</sup> Seth Koven & Sonya Michel, *Introduction*, in MOTHERS OF A NEW WORLD, MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES 1-2 (Seth Koven & Sonya Michel eds., 1993). Some feminist scholars, however, claim that settlement workers like Kelley promoted protective legislation for women to protect their maternal roles. See KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 26, at 33.

<sup>94</sup> Koven & Michel, *supra* note 93, at 2.

<sup>95</sup> Sklar, *The Historical Foundations of Women's Power in the Creation of the American Welfare State 1830-1930*, *supra* note 38, at 44.

<sup>96</sup> See Sklar, *Hull House in the 1890s*, *supra* note 65, at 659.

<sup>97</sup> WOLOCH, *supra* note 32, at 24; see also FLORENCE KELLEY, SOME ETHICAL GAINS THROUGH LEGISLATION 106-08, 168-70 (1969).

<sup>98</sup> See Sklar, *Hull House in the 1890s*, *supra* note 65, at 675.

<sup>99</sup> *Id.* See also WOLOCH, *supra* note 32, at 9; KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 26, at 69.

<sup>100</sup> WOLOCH, *supra* note 37, at 9.

predominately working-class activists, justified labor laws for women by pointing to women's unequal power in the marketplace labor force, rather than their maternal nature.<sup>101</sup> These working-class reformers often evoked what was later termed a "constructive equality" rationale,<sup>102</sup> arguing that because men and women had unequal power in the workforce, protective legislation for women would "compensate" the women for their inferior exploitable status.<sup>103</sup>

Despite these compelling rationales for regulating labor, the reformers met with employers' resistance.<sup>104</sup> By and large, employers and the business community resisted state intervention in their affairs and endorsed market-based wages, claiming that business worked best if left alone and that any restrictions were paternalistic.<sup>105</sup> They feared that shortening the hours of the workday for women would lead to state intervention of working conditions for all workers.<sup>106</sup>

To promote labor legislation for women, Kelley and other Hull House residents built coalitions with other women's groups. United, they set out to persuade the state legislature to regulate sweatshops.<sup>107</sup> Kelley, who was studying law at Northwestern University, took a leadership role in drafting the Illinois maximum hour law of 1893.<sup>108</sup> Kelley also led a campaign of women's groups to convince the legislature to enact the bill.<sup>109</sup> For several months, the lobbyists attended trade union meetings, benefits, and social clubs all over Chicago to publicize their findings on the plight of sweatshop laborers.<sup>110</sup> They then moved their efforts to Springfield, the state capital, to convince lawmakers to "pass a law prohibiting child labor, limiting work hours of work for women, and regulating conditions at the sweatshops."<sup>111</sup>

<sup>101</sup> ORLECK, *supra* note 28, at 124-25.

<sup>102</sup> This rationale was held by women reformers like Anderson, *see* Part IV, who has termed it "constructive equality" in an untitled document attached to a letter from Mary Anderson to Elizabeth Christman (Dec. 1, 1923) *microfilmed on* Mary Anderson Papers (1918-1960) in Papers of the Women's Trade Union League and its Principle Leaders [hereinafter Anderson Papers] (on file with author); *see also* ORLECK, *supra* note 28, at 124-25 (explaining that working-class women usually didn't justify protective labor laws on the basis of women's frailty or potential motherhood but rather on women's unequal bargaining power in the marketplace labor force).

<sup>103</sup> WOLOCH, *supra* note 32, at 10; *see also* ORLECK, *supra* note 28, at 125.

<sup>104</sup> WOLOCH, *supra* note 32, at 11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* *But see* JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918*, at 44-47 (1968) (claiming that some corporate moguls understood the need for social reform to conserve the capitalist system, while most small entrepreneurs supported wage protection in theory but lacked the resources to put it into practice).

<sup>107</sup> MUNCY, *supra* note 27, at 26; *see also* SKLAR, *supra* note 27, at 235.

<sup>108</sup> SKLAR, *supra* note 27, at 235, 248.

<sup>109</sup> MUNCY, *supra* note 27, at 26. Illinois law regulated garment manufacturing and provided for the appointment of State inspectors to enforce it. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> MUNCY, *supra* note 27, at 26. Many working-class men belonged to unions which negotiated better hours. Most women workers were not unionized and for them labor legislation became more pressing. *See* SKLAR, *supra* note 112, at 234-35.

Under pressure from Hull House, as well as from women laborers and wealthy matrons, the Illinois maximum hour law was enacted in 1893, and the Governor appointed Kelley to enforce the law as Illinois' first Chief Factory Inspector.<sup>112</sup>

Although now a state government employee, Kelley did not stray far from her settlement roots. During the years that Kelley served as chief factory inspector "her office and Hull House were institutionally so close as to be almost indistinguishable."<sup>113</sup> Kelley located the Inspection office in close vicinity to the settlement, and Kelley and her assistant, Mrs. Stevens, lived in Hull House.<sup>114</sup> Jane Addams wrote on these close connections between Hull House and Kelley's administrative bureau: "The inception of the law has already become associated with Hull House, and when its ministrations were also centered there, we inevitably received all the odium which these first efforts entailed."<sup>115</sup>

When an Illinois employer challenged the 1893 Illinois maximum hour law, Kelley and her colleagues wrote a brief to defend the legislation that the Settlement house workers and other female Progressives worked so hard to get passed.<sup>116</sup> However, in *Ritchie v. People*,<sup>117</sup> the Supreme Court of Illinois invalidated the state's maximum hour law for women in factories.<sup>118</sup> And by 1897, after the election of a new governor, Kelley lost her post as the chief factory inspector.<sup>119</sup>

### C. *Regulating Labor II: Defending Legislation in Court*

Soon after leaving state government, Kelley took on another leadership position. Kelley became general secretary of the National Consumers' League (NCL) in New York in 1899.<sup>120</sup> The NCL was established to guarantee that goods were produced and sold under proper working conditions,<sup>121</sup> and the NCL strove to improve labor conditions by investigating, recording, agitating, and legislating.<sup>122</sup> Under Kelley's leadership, NCL served as a training ground for many women who later entered into public affairs. Among them were Mary (Molly) Dewson, later head of the Democratic

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<sup>112</sup> MUNCY, *supra* note 27, at 26.

<sup>113</sup> Sklar, *Hull House in the 1890s*, *supra* note 65, at 671.

<sup>114</sup> SKLAR, *supra* note 27, at 238.

<sup>115</sup> *Id.*

<sup>116</sup> SKLAR, *supra* note 27, at 255-56.

<sup>117</sup> 155 Ill. 98, 40 N.E. 454 (1895).

<sup>118</sup> WOLOCH, *supra* note 32, at 22.

<sup>119</sup> SKLAR, *supra* note 27, at 286.

<sup>120</sup> WOLOCH, *supra* note 32, at 22.

<sup>121</sup> Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 271 (1957).

<sup>122</sup> Its motto was "Investigate, agitate, legislate." LONDON R.Y. STORRS, *CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA* 14-15 (2000).

Party's Women's Division and Frances Perkins, later Secretary of Labor.<sup>123</sup> Perkins claimed that one of Kelley's speeches "first opened my mind to the necessity for and the possibility of the work which became my vocation."<sup>124</sup> Kelley's main professional support at the NCL came from Josephine Goldmark, a Bryn Mawr graduate who became the chair of the NCL's Committee on the Legal Defense of Labor Laws.<sup>125</sup> Goldmark's sister, Pauline, was an officer of the New York Consumers' League, and her other sister, Alice, was married to lawyer Louis D. Brandeis.<sup>126</sup>

Under pressure from reformers, such as the NCL activists, state legislatures around the country continued to pass protective labor laws in the years that followed the turn of the century, especially for women. However, these laws did not go uncontested. In February 1903, Oregon's legislators prohibited employers from allowing women to work more than ten-hour days in places that operated mechanical equipment.<sup>127</sup> On Labor Day of 1905, Joe Haselbock, an overseer at the Grand Laundry in Portland, Oregon, required an employee, Emma Gotcher, to work overtime in violation of the law.<sup>128</sup> Two weeks later, the State of Oregon pressed criminal charges against the owner of the laundry, Curt Muller.<sup>129</sup> But between the time when Oregon passed its ten-hour workday cap for women and when Muller violated it, the Supreme Court issued its most famous ruling on labor laws. In *Lochner v. New York*, the Court invalidated a New York hour law for bakers on the ground that labor legislation interfered with a right of contract between employer and employee that was protected by the Fourteenth Amendment.<sup>130</sup> Muller argued, based on *Lochner*, that the Oregon law violated his right to contract and was an unconstitutional use of the state's police power.<sup>131</sup> When the law was upheld in the Oregon courts, and Muller decided to take his case to the Supreme Court,<sup>132</sup> Portland laundry owners joined together to finance Muller's appeal.<sup>133</sup> Progressive labor reformers feared that the Supreme Court might follow *Lochner* and cripple the movement for worker protection.<sup>134</sup> These reformers hoped that the women's ten-hour law in *Muller* could be distinguished from the general bakery law that was held unconstitutional in *Lochner*.

<sup>123</sup> WOLOCH, *supra* note 32, at 23.

<sup>124</sup> GEORGE MARTIN, MADAME SECRETARY FRANCES PERKINS 52 (1976).

<sup>125</sup> WOLOCH, *supra* note 32, at 23-24.

<sup>126</sup> 2 NOTABLE AMERICAN WOMEN, 1607-1950: A BIOGRAPHICAL DICTIONARY, 60 (Edward T. James, ed., 1971).

<sup>127</sup> WOLOCH, *supra* note 32, at 21.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 198 U.S. 45 (1905). *But see id.* at 75 (Holmes, J., dissenting) (noting that "a Constitution 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*.").

<sup>131</sup> WOLOCH, *supra* note 32, at 21.

<sup>132</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>133</sup> WOLOCH, *supra* note 32, at 21.

<sup>134</sup> *Id.* at 22.

The story of Curt Muller's appeal to the Court is not new to scholars of the regulatory state. But what is typically neglected from the story of *Muller v. Oregon* is the fact that the State of Oregon enlisted the help of Florence Kelley and Josephine Goldmark, officers of the NCL, to defend the state law.<sup>135</sup> When the NCL learned of Muller's appeal, Kelley and Goldmark asked Louis Brandeis to argue Oregon's case before the Supreme Court.<sup>136</sup> They agreed they would need data to support Oregon's case, and they decided to look for statistical evidence.<sup>137</sup> Instead of challenging *Lochner* directly, they sought "to win back one-half the loaf," by showing that women were a special class that needed the protection of the state.<sup>138</sup>

With less than a month to prepare the brief, Goldmark and Kelley enlisted the help of Goldmark's sister Pauline and ten researchers to scour sources at Columbia University and the New York Public Library, in search of data on the impact of women's working hours by "anyone with expert knowledge" such as "factory inspectors, physicians, trade unions, economists, [and] social workers."<sup>139</sup> After two weeks of researching, Goldmark returned to Boston to work with Brandeis to turn her research into the famous, albeit incompletely named "Brandeis Brief."<sup>140</sup> The Supreme Court followed the reasoning of the Brandeis Brief and upheld the Oregon law, stressing the inherent differences between men and women.<sup>141</sup> The achievement in *Muller* in advancing labor standards came at a price: it helped to reinforce gender distinctions that often worked to women's disadvantage.<sup>142</sup>

Encouraged by the *Muller* outcome, Kelley declared that "both men and women need only show a clear relation between their working hours and their good or bad health in order to get hours legislation sustained by the

<sup>135</sup> KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 26, at 30.

<sup>136</sup> See WOLOCH, *supra* note 32, at 25.

<sup>137</sup> *Id.* at 28.

<sup>138</sup> Ann Corinne Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUD. 246, 252 (1979).

<sup>139</sup> Vose, *supra* note 121, at 277-78.

<sup>140</sup> WOLOCH, *supra* note 32, at 29. When Kelley's ideal found its way into the law it had been somewhat altered as physical differences between men and women were stressed in the "Brandeis Brief" and in the Supreme Court decision in *Muller v. Oregon*. See Second Part of the Brief for Respondent *reprinted in* WOLOCH, *supra* note 32, at 112. For example, "women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury." *Id.*

<sup>141</sup> 208 U.S. at 421. See also "Brandeis Brief," *reprinted in* WOLOCH, *supra* note 32, at 114-26 (explaining the relative weakness of women, and the understanding that all working women as mothers or future mothers need to be protected to ensure the health of future generations). *But see id.* at 114 (citing reports as to the toll long hours of labor have on all workers, men and women).

<sup>142</sup> Important questions, some of which are beyond the scope of this article, arise: to what extent did protective legislation stem from an ideology of gender that viewed women's participation in the labor force as temporary? For the extent to which some reformers were guided by a male-breadwinner ideology, see Barzilay, *supra* note 28, at 2.3, 3.6, 4.4.

Supreme Court.”<sup>143</sup> Goldmark, likely echoing the “entering wedge” rationale, also remarked that: “[s]hortening the workday is something that legislation can effect [sic] for women and children today, for men doubtless in the future.”<sup>144</sup> When Brandeis, now even more famous after the *Muller* victory, was appointed to the Supreme Court, in 1916, his protégé Felix Frankfurter, then a professor at Harvard Law School, took his place as legal counsel to the NCL.<sup>145</sup> In 1917, in *Bunting v. Oregon*,<sup>146</sup> the Supreme Court upheld an Oregon maximum hour law for both male and female workers, and it seemed as though the “entering wedge” of women’s labor laws was advancing labor legislation for men and women.<sup>147</sup>

#### D. *Regulating Labor III: Toward a Federal Bureau*

At the same time that the NCL was defending labor legislation in the courts, Chicago settlement workers were working to form a federal agency to investigate women’s working conditions. Women reformers, inspired by Kelley’s investigative work in Chicago, formed the Women’s Trade Union League (“WTUL”). The WTUL was founded in Boston in 1903 by reformers who wanted to expand female opportunities, and it included representatives of the American Federation of Labor (“AFL”),<sup>148</sup> female labor activists, and settlement house workers.<sup>149</sup> The national WTUL strove to

<sup>143</sup> WOLOCH, *supra* note 32, at 43.

<sup>144</sup> *Id.* at 44. *But see* JOSEPHINE GOLDMARK, *FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY* 39 (1912) (noting the “special susceptibility to fatigue and disease which distinguishes the female sex.”).

<sup>145</sup> WOLOCH, *supra* note 32, at 44.

<sup>146</sup> 243 U.S. 426 (1917) (upholding an Oregon ten-hour law for all industrial workers that allowed employees to work overtime for extra pay). *See* WOLOCH, *supra* note 32, at 45-46; Elizabeth Brandeis, *Protective Legislation*, in *LABOR AND THE NEW DEAL* 197 (Milton Derber & Edwin Young, eds., 1957) (explaining the limited impact of this decision).

<sup>147</sup> *See* NELSON LLOYD DAWSON, *LOUIS BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL* 3 (1980) (noting that the case was successfully argued by Frankfurter, with help from Brandeis). It should be noted that by the time of the *Bunting* decision reformers had moved to argue for minimum wage legislation. WOLOCH, *supra* note 32, at 46. Famously, the 1923 Supreme Court decision in *Adkins v. Children’s Hospital* declared minimum wage for women unconstitutional; holding that, after the passage of the Nineteenth Amendment, in 1920, women no longer needed gender-specific protective legislation. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923). For Kelley’s reaction to the decision, see Susan D. Carle, *Gender in the Construction of the Lawyer’s Persona* 22 *HARV. WOMEN’S L.J.* 239, 259 (1999) (reviewing SUSAN WARE, *PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS* (1987)). For more on this decision, *see generally* Joan G. Zimmerman, *The Jurisprudence of Equality: The Women’s Minimum Wage, The First Equal Rights Amendment, and Adkins v. Children’s Hospital, 1905-1923*, 78 *J. AM. HIST.* 188 (1991); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947 (2002). For more on the debate surrounding the decision within reform circles, *see infra* Part IV.

<sup>148</sup> The American Federation of Labor was the largest labor organization at the turn of the century, and consisted almost exclusively of craft unions of male, skilled, and usually Anglo workers. MCGERR, *supra* note 30, at 32.

<sup>149</sup> *See id.* at 135.

spur unionism among women workers as well as to pass protective labor legislation as a substitute for unionization, an often delicate and difficult task.<sup>150</sup> The WTUL was a cross-class union: it accepted workers and “allies” who supported it both financially and politically.<sup>151</sup> With support from Jane Addams and funds from Margaret Dreier Robins, a well-to-do reformer, the WTUL opened a branch in Chicago.<sup>152</sup> Addams also served as vice president of the national WTUL.<sup>153</sup>

Addams had been among the first reformers to suggest forming a division of the federal government to look after the interests of women in industry.<sup>154</sup> In 1905, Mary McDowell, a leader of the University Settlement in Chicago,<sup>155</sup> and Addams started to work toward establishing this division. McDowell, along with her co-workers, Edith Abbott and Sophonisba Breckenridge, all Progressives connected with the Chicago settlement house movement, began to campaign for a federal agency to collect data on the national problems of working women.<sup>156</sup> They recruited the support of the WTUL and established a committee comprised of Addams, Mary McDowell, Margaret Dreier Robins, and Lillian Wald.<sup>157</sup> McDowell and Addams traveled to Washington to try to persuade President Roosevelt to establish a federal agency to systematically investigate problems of working women.<sup>158</sup> Roosevelt suggested to Addams and McDowell that they rally the support of other women’s clubs.<sup>159</sup> The NCL, led by Florence Kelley, joined in the campaign, which succeeded in 1910.<sup>160</sup> Charles Neill of the Department of Commerce and Labor directed the survey, which showed that women toiled as an exploited group, earning, on average, one third to one half of what men earned in horrible factory conditions.<sup>161</sup> The survey led to the establishment of the Women’s Division within the Bureau of Labor Statistics.<sup>162</sup> However, in 1915 the division closed when all the women employees in the division resigned citing unfair wages and sabotage of their work.<sup>163</sup>

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<sup>150</sup> See WOLOCH, *supra* note 32, at 8.

<sup>151</sup> MARY ANDERSON, *WOMAN AT WORK; THE AUTOBIOGRAPHY OF MARY ANDERSON, AS TOLD TO MARY WINSLOW* 34 (1951).

<sup>152</sup> MCGERR, *supra* note 30, at 136, ALICE HENRY, *THE TRADE UNION WOMAN* 63 (1973). For more background on the WTUL, see GLADYS BOONE, *THE WOMEN’S TRADE UNION LEAGUES IN GREAT BRITAIN AND THE UNITED STATES OF AMERICA* 57 (1942); ELIZABETH ANNE PAYNE, *REFORM, LABOR, AND FEMINISM: MARGARET DREIER ROBINS AND THE WOMEN’S TRADE UNION LEAGUE* 46-47 (1988).

<sup>153</sup> ALICE HENRY, *THE TRADE UNION WOMAN*, 62 (1973).

<sup>154</sup> See ANDERSON, *supra* note 151, at 91.

<sup>155</sup> *Id.* at 34.

<sup>156</sup> See JUDITH SEALANDER, *AS MINORITY BECOMES MAJORITY: FEDERAL REACTION TO THE PHENOMENON OF WOMEN IN THE WORK FORCE, 1920-1963* 15 (1983).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 16.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

Despite this failure, a coalition of women's groups continued to lobby for the creation of a permanent Women's Bureau in the Department of Labor.<sup>164</sup> The WTUL tried, albeit unsuccessfully, to gain the support of the AFL and sent Mary Anderson to its national convention for this purpose in 1916.<sup>165</sup> After World War I broke, and with it the rapid growth in women's employment, the Council of National Defense established a women's committee, chaired by suffragist Anna Howard Shaw.<sup>166</sup> The committee sent investigators to war plants to advise the government on how best to utilize women's work.<sup>167</sup> Other branches of government, established sections to deal with problems encountered by women workers, but Congress did not establish the Women in Industry Service until 1918.<sup>168</sup>

This Article next turns to the story of the founding of a permanent federal agency and to the story of its leader, Mary Anderson. Anderson developed her beliefs on social reform within the context of Hull House, the WTUL, and the NCL. Starting in the 1920s Anderson put her ideas to work within the federal government. The following part tells Anderson's story and demonstrates how ideas and methods developed by Hull House reformers made their way into the federal bureaucracy.

#### IV. A BRIDGE OF IDEAS AND METHODS — MARY ANDERSON AND THE ESTABLISHMENT OF THE WOMEN'S BUREAU

##### A. *The Beginning*

When sixteen-year-old Mary Anderson immigrated to the United States, she had little education, she did not understand English, and she was unaccustomed to urban life.<sup>169</sup> Born on a remote farm, in Sweden, Anderson was the youngest of seven children.<sup>170</sup> She first considered moving to the United States when her family lost its farm.<sup>171</sup> Following her elder sister, who had already immigrated, and accompanied by another sister, Anderson left for a place where she thought there might be something other than "household work that a person like [her] could do."<sup>172</sup> In 1889, the same year that Addams opened Hull House, Anderson and one of her sisters came

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 16-17. "Senator Wesley Jones, Republican from the state of Washington introduced a bill in 1916 calling for the creation of a Wom[e]n's Bureau in the Department of Labor," separate from the Bureau of Labor Statistics, but despite a vigorous letter writing campaign by the NCL, the bill was buried in committee. *Id.* at 17.

<sup>166</sup> *Id.* at 17.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 18.

<sup>169</sup> See ANDERSON, *supra* note 151, at 10.

<sup>170</sup> *Id.* at 3-4.

<sup>171</sup> *Id.* at 9.

<sup>172</sup> *Id.* at 13.

to America.<sup>173</sup> Anderson settled in Ludington, Michigan, where another sister lived.<sup>174</sup> After her sisters married, Anderson found work as a domestic servant. She washed dishes, did laundry, cleaned, and cooked,<sup>175</sup> and through her work, she began to understand and to speak English.<sup>176</sup> When her sister's family moved to Chicago in 1892 to assist with the building of the World's Fair, Anderson decided to join them.<sup>177</sup>

In Chicago, Anderson first worked in the garment industry and then at a shoe factory, stitching the lining of shoes.<sup>178</sup> She labored ten hours a day and earned eight dollars a week.<sup>179</sup> After one year, her sisters moved back to Michigan, and Anderson lived with one of her co-workers.<sup>180</sup> For two years, Anderson moved from one factory job to another, and her experience was like "any other girl who goes from one job to another looking for . . . decent wages and living conditions."<sup>181</sup> In late 1894, Anderson found employment at Schwab's factory in Chicago, where she worked for the next seven years making twelve dollars a week.<sup>182</sup>

At Schwab's, Anderson first experienced labor unions' power to change working conditions through negotiations with employers.<sup>183</sup> Anderson attended a union meeting and learned that union membership could lead to better wages and shorter hours.<sup>184</sup> Soon after she joined, she established herself as a leader among the union's members and collected workers' dues for the union.<sup>185</sup> In 1900, Anderson was elected president of the Stitchers Local 94 of the International Boot and Shoe Workers Union ("IBSWU").<sup>186</sup> In 1903, after Schwab's went out of business, Anderson deepened her involvement in union organizing.<sup>187</sup> In 1906, Anderson was elected member of the executive board of the IBSWU.<sup>188</sup> Anderson was the only member of the IBSWU board who was not on the union's payroll. Nevertheless, she continued her work for the union, because it was important to her "to keep a

<sup>173</sup> *Id.* at 11.

<sup>174</sup> *Id.* at 10-12.

<sup>175</sup> *Id.* at 13-14. Anderson first felt the need for community and daily leisure time, as she tellingly wrote: "I had nobody to talk to. It seemed to me that there was nothing in my life but dirty dishes to wash and a kitchen to clean up." *Id.*

<sup>176</sup> *Id.* at 14-15.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 16-17.

<sup>180</sup> *Id.* at 17.

<sup>181</sup> *Id.* at 16.

<sup>182</sup> *Id.* at 19-21.

<sup>183</sup> *Id.* at 20-21.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 21.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 21-27.

<sup>188</sup> Mary Anderson: Chronology *microfilmed on Anderson Papers*, *supra* note 102 (on file with author).

toehold for women” on a board that negotiated contracts and wage standards and administered strike and sick benefits.<sup>189</sup>

From 1905, Anderson increasingly made contacts with others interested in the problems of labor through Hull House and the WTUL.<sup>190</sup> Jane Addams herself had “recruited” Anderson to join the WTUL.<sup>191</sup> And while Anderson continued working in a factory, this time at Smith’s, she became increasingly involved in WTUL meetings and events at Hull House.<sup>192</sup> At Hull House, Jane Addams often held Sunday afternoon tea with prominent people from all over the country.<sup>193</sup> Anderson recalled: “For me, and I think for many others too, Hull House and Jane Addams opened a door to a larger life.”<sup>194</sup> With the support of Hull House, Anderson began to make her own speeches about hazards in industry, and made “friendships that . . . lasted throughout the years.”<sup>195</sup>

In 1910, during a strike of Chicago garment workers, Anderson and her fellow Trade Unionists tried to relieve the distress of the strikers and their families by supplying food, clothing, coal, and medical attention for the ill.<sup>196</sup> As the 1910 garment workers strike continued, Anderson made a variety of connections, including those with news reporters and labor leaders.<sup>197</sup> When the strikers reached an agreement with the employers, Margaret Dreier Robins, president of the WTUL, invited Anderson to be the WTUL’s representative to the United Garment Workers Union and to help carry out the terms of the agreement.<sup>198</sup> Anderson did not return to factory work, and, in 1911, after settling the strike, she worked as a full time general organizer of women factory workers for the Chicago WTUL.<sup>199</sup>

After spending eighteen years in the industry,<sup>200</sup> Anderson knew firsthand the problems of factory workers: long hours, low wages, malfunctioning machinery that led to reduced pay, resentment among workers, and mandatory overtime and night-work.<sup>201</sup> Anderson described industrial wo-

<sup>189</sup> ANDERSON, *supra* note 151, at 28.

<sup>190</sup> *Id.* at 27. The WTUL was referred to as “the women’s movement within the Labor movement.” See Letter from Mary Anderson, Dir. of the U.S. Women’s Bureau, to Dr. Thomas, Dean of Bryn Mawr (Aug. 4, 1932) *microfilmed on* Mary Anderson Papers (1918-1960) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1, frames 461-461A. ANDERSON, *supra* note 151, at 27.

<sup>191</sup> Mary Anderson Oral History, Taped Interview by Ester Peterson with Mary Anderson (1964), Schlesinger Library (transcript on file with author).

<sup>192</sup> ANDERSON, *supra* note 151, at 27.

<sup>193</sup> See *id.* at 32.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 35.

<sup>196</sup> *Id.* at 39.

<sup>197</sup> *Id.* at 39-40.

<sup>198</sup> *Id.* at 42.

<sup>199</sup> *Id.* at 50. Mary Anderson: Chronology *microfilmed on* Anderson Papers, *supra* note 102 (on file with author).

<sup>200</sup> Anderson was a factory worker from 1892 until she became a salaried organizer for the WTUL in 1911. Mary Anderson: Chronology *microfilmed on* Anderson Papers, *supra* note 102 (on file with author).

<sup>201</sup> ANDERSON, *supra* note 151, at 22-23.

men workers' jobs as "dull, monotonous toil, not stimulating to mind or body, and lacking almost entirely the creative interest . . . . The only compensation for a life of this kind is a work-day sufficiently short to permit of relaxation and self-development . . . ."202 Like Florence Kelley, Anderson believed that relaxation and self-development were vital to a proper living and deserving of government protection through adequate legislation.<sup>203</sup> Anderson believed that labor regulations would help workers achieve better lives because "[w]ages determine[d] life – the standards of living, the health of body as well as of mind."<sup>204</sup>

### B. *Toward a Federal Agency*

Anderson soon began to play an important role in national labor regulation. In early 1917, while Anderson was in the midst of negotiating a thousand-worker strike, Margaret Dreier Robins, still president of the Chicago WTUL, asked Anderson to "take the noon train to Washington" to attend a meeting of a labor committee set up by the AFL to advise on matters affecting women.<sup>205</sup> Robins promised to take over Anderson's work related to the strike, and Anderson found herself in Washington discussing women's working conditions during the war.<sup>206</sup> Concurrently, Mary Van Kleeck, a long time WTUL member,<sup>207</sup> organized a women's division in the Ordinance Department.<sup>208</sup> Perhaps because of Anderson's first-hand experience as a working woman or her air of "calm common sense,"<sup>209</sup> Mary Van Kleeck asked Anderson to be a member of that division.<sup>210</sup> The division recommended standards of employment for women in ordinance plants and enforced them.<sup>211</sup>

After a few months of leave from the Chicago WTUL, Anderson was ready to return to her post.<sup>212</sup> But Felix Frankfurter, who was organizing divisions in the Department of Labor, telephoned to inform Anderson that

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<sup>202</sup> Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 16, microfilmed on Anderson Papers, *supra* note 102, at reel 4 frame 732.

<sup>203</sup> *Id.*

<sup>204</sup> Mary Anderson, *Wages for Women Workers*, 81 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 129 (1919).

<sup>205</sup> ANDERSON, *supra* note 151, at 84.

<sup>206</sup> *See id.*

<sup>207</sup> ORLECK, *supra* note 28, at 138.

<sup>208</sup> ANDERSON, *supra* note 151, at 86-87.

<sup>209</sup> NOTABLE AMERICAN WOMEN, THE MODERN PERIOD: A BIOGRAPHICAL DICTIONARY 24 (Barbara Sicherman and Carol Hurd Green eds., 1980).

<sup>210</sup> ANDERSON, *supra* note 151, at 86-87.

<sup>211</sup> *Id.* at 88.

<sup>212</sup> *See id.* at 90. She recalled discovering both an anti-feminist and anti-labor sentiment among the staff members in Washington. *See* Sister John Marie Daly, Mary Anderson, Pioneer Labor Leader 83 (June 1968) (unpublished Ph.D. dissertation, Georgetown University) (on file with author).

the Department of Labor was creating a "Women in Industry Division."<sup>213</sup> Not only was the establishment of the Women in Industry Service a product of the women's reform network's agitation for years, but so was Anderson's appointment. Anderson was a member the WTUL, and the NCL,<sup>214</sup> and she was well connected with both women's and labor groups. A fellow Chicagoan explained: "[Anderson's] appointment was doubtless recommended by our Jane Addams and Julia Lathrop for she knew them well, and worked with them on various Illinois and Chicago social projects."<sup>215</sup> Frankfurter asked Anderson to lunch at the "House of Truth," where a half-dozen men interviewed her for the job.<sup>216</sup> The next day, Anderson recalled, the Secretary of Labor called to let her know she would be appointed, and the formal appointments were made in June of 1918.<sup>217</sup> Anderson became the Assistant Director to Mary Van Kleeck at the newly formed Women in Industry Service.<sup>218</sup>

### C. *The Women in Industry Service*

The Women in Industry Service was established in 1918.<sup>219</sup> Anderson wrote the mission statement of the Service for the Secretary of Labor's press release:

In recognition of the great importance to the nation of the work of women in industry, and the urgent necessity for a national policy in determining the conditions of their employment, I have urged and Congress has now granted, the necessary authority to establish a Women's Division in the Department of Labor. Its immediate task will [be] to develop in the industries of the country, policies and methods which will result in the most effective use of women's services in production for the war, while at the same time preventing their employment under injurious conditions. Its large and very necessary aim will be to focus attention on the national

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<sup>213</sup> See ANDERSON, *supra* note 151, at 90.

<sup>214</sup> Mary Anderson's application for the American Association of Social Workers, as attached to letter from Mary Anderson to Mary Van Kleeck (Dec. 15, 1925) *microfilmed on Anderson Papers, supra* note 102 (on file with author).

<sup>215</sup> Letter from Mrs. Catherine Waugh McCulloch, McCulloch, McCulloch & McLaren Chicago, Illinois, to Mary Anderson, Dir. of the U.S. Women's Bureau (Mar. 1939) *microfilmed on Anderson Papers, supra* note 102, at reel 1 frame 802. Anderson had significant personal connections from Hull House and the activities of the WTUL. For example, Anderson frequently vacationed with Robins, she lived with WTUL leader Elizabeth Christman, and she spent extensive periods of time in Julia Lathrop's, Washington apartment. See ANDERSON, *supra* note 151, at 108-09.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 90-91.

<sup>218</sup> *Id.* It was there that she worked closely with Frankfurter, then Chairman of the War Labor Policy Board, and Franklin D. Roosevelt, then the Assistant Secretary of the Navy. *Id.*

<sup>219</sup> SEALANDER, *supra* note 156, at 18.

importance of the conditions of women's work as influencing national standards and as affecting the welfare of the entire nation.<sup>220</sup>

Anderson believed that the Service's task was to develop policies and methods for the employment of women.<sup>221</sup> Providing labor standards, she claimed, was important for welfare. The Service started visiting factories and making suggestions to the women's employers for standard conditions of sanitation, hours of work, and safety. Anderson wrote of the experience of visiting filthy plants: it "taught us that the important thing for us to do was not so much to regulate *women's* employment as to regulate instead the *conditions* of employment for all workers . . . . It is the conditions that should be regulated and not the person."<sup>222</sup> The advised policy contained hours regulation, rest periods, a "minimum wage to cover the cost of living for dependents and not merely the individual," and safe and sanitary working conditions.<sup>223</sup>

In addition, Anderson made sure that the Service did not categorically limit the employment opportunities for women. Anderson advised the War Labor Policies Board on how women could be employed.<sup>224</sup> Frankfurter tried to persuade Anderson and Van Kleeck to make a list of appropriate occupations for women, but neither wanted to limit women's employment to a certain list of occupations, and they advocated for allowing women to work almost anywhere.<sup>225</sup> According to Anderson, Frankfurter threatened to take the issue out of the Service's authority, but eventually the three compromised and promulgated standards promoting increased regulations for any occupations employing women.<sup>226</sup>

The Service also continued its affiliation with reform organizations. The Service cooperated with a network of organizations in attempts to find solutions to labor problems, including the NCL, the national WTUL, the American Association for Labor Legislation, state industrial commissions, and departments of labor as well as suffrage leaders.<sup>227</sup>

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<sup>220</sup> Statement for Secretary Wilson for Publication in Tuesday Morning's Papers (July 1918) *microfilmed on Anderson Papers, supra* note 102, at reel 1 frame 5.

<sup>221</sup> *Id.*

<sup>222</sup> ANDERSON, *supra* note 151, at 96.

<sup>223</sup> *Id.* at 98.

<sup>224</sup> *See id.* at 102.

<sup>225</sup> *Id.* at 103.

<sup>226</sup> *Id.*

<sup>227</sup> *See* Application that Mary Van Kleeck wrote suggesting Anderson to the American Association of Social Workers (Dec. 15, 1925) *microfilmed on Anderson Papers, supra* note 102, at reel 1 frame 254.

D. *The Women's Bureau in the Department of Labor*

*Establishment, Purposes, and Methods*

The Women in Industry Service was a temporarily funded war agency, and its future existence was questioned at the end of World War I.<sup>228</sup> However, in 1919, Congress voted to extend the Service for one year to smooth the transition to peacetime industrial conditions.<sup>229</sup> In 1920, Senator William Kenyon of Iowa co-sponsored a bill to establish a permanent Women's Bureau with Congressman Phillip Campbell of Kansas.<sup>230</sup> Mary Van Kleeck wrote the bill and many women's organizations then in existence gave testimony advocating its passage.<sup>231</sup> The WTUL sent Ethel Smith as its legislative representative. She alerted WTUL members when the bill was coming up in each house so they could call friendly representatives and senators to ask them to be on the floor for the discussion and vote.<sup>232</sup>

During the 1920 hearings, there was debate over the goals of the Bureau regarding the nature of women's employment, fueled by growing concerns over the future of family. Congressman John Raker, a Democrat from California, spoke of the "delicate character" of women, which merited their protection by the state.<sup>233</sup> Congressman Raker stated that when women leave work "they must leave it with strong, healthy minds and bodies, so that they may do their functions . . . and contribute to the vitality of coming generations."<sup>234</sup> Congressman John MacCrate stated that the Bureau should benefit working women, not only because of their role as future mothers, but as workers.<sup>235</sup> Without resolving this debate, the bill establishing the Women's Bureau in the Department of Labor was passed in 1920.<sup>236</sup> With the establishment of the permanent agency, President Wilson appointed Mary Anderson as Director of the Women's Bureau.<sup>237</sup>

In June 1920, within weeks of the ratification of the Nineteenth Amendment granting suffrage to women, the Women's Bureau opened.<sup>238</sup> Anderson saw the establishment of the Bureau as a step in the federal government's assumption of public responsibility for the well-being of the nation. Anderson wrote in her autobiography that she felt:

[T]he establishment of the Women's Bureau as an agency of the federal government would do a great deal for every man and wo-

<sup>228</sup> SEALANDER, *supra* note 156, at 18.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> ANDERSON, *supra* note 151, at 113.

<sup>232</sup> *Id.* at 114.

<sup>233</sup> SEALANDER, *supra* note 156, at 18.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 19.

<sup>236</sup> 29 U.S.C. § 11 (1920); SEALANDER, *supra* note 156, at 18.

<sup>237</sup> Daly, *supra* note 212, at 128.

<sup>238</sup> See SEALANDER, *supra* note 156, at 20.

man in the United States, because at last it was a matter of public record that women in industry were an important asset to the nation and that the federal government was ready to assume responsibility for their well-being.<sup>239</sup>

The Women's Bureau was mandated "to formulate standards and policies which shall promote the welfare of wage earning women, improve their working conditions, increase their efficiency and advance their opportunities for profitable employment."<sup>240</sup>

When the Bureau began its work in 1920, it had fewer than twenty employees. When Anderson left the Bureau in 1944, that number had nearly tripled.<sup>241</sup> Anderson had always tried to keep a closely knit organization, and she kept in touch with everyone out of respect for the work they did to promote women's welfare.<sup>242</sup> Anderson felt strongly that women should play a prominent role in government, and she consistently congratulated female appointees to government positions.<sup>243</sup>

Most of the Bureau employees were single, white women who held degrees in economics and lived in a settlement house.<sup>244</sup> The Bureau employed women who were knowledgeable about government regulation and fiscal issues, had previously served as factory investigators, and had contacts with state labor departments.<sup>245</sup> Other Bureau staff had administrative experience as national or regional executives of women's organizations.<sup>246</sup> Anderson believed that the Bureau's administrators needed a profound understanding of the individual worker, workers' group relations, and also of the relations between employers and employees, so that standards and policies formulated and advocated by the Women's Bureau would be authoritative and practical.<sup>247</sup>

<sup>239</sup> ANDERSON, *supra* note 151, at 114-15.

<sup>240</sup> *Id.* at 136.

<sup>241</sup> *Id.* at 134.

<sup>242</sup> *Id.* at 135.

<sup>243</sup> See, e.g., telegram from Mary Anderson, Dir. Women's Bureau, to Frances Perkins, Indus. Comm'r of the N.Y. Dep't of Lab. (Mar. 1, 1933) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1 frame 500 (congratulating Perkins on her appointment as Secretary of Labor); Letter from Mary Anderson, Dir. Women's Bureau, to Judge Florence Allen (Mar. 7, 1934) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1 frame 552 (congratulating Allen on her appointment to the Sixth Circuit).

<sup>244</sup> See SEALANDER, *supra* note 156, at 28.

<sup>245</sup> Bureau employees included Arcadia Near Phillips, who received a master's degree in Statistics from Columbia University and worked as a statistical economist before joining the Bureau as chief of the Statistical Division; Caroline Manning, who received a master's degree in English from Radcliffe and then worked in the Minnesota Bureau of Women and Children and later as investigator for the Federal Children's Bureau; Ethel Best who worked for the New York Woman in Industry Service before coming to Washington; and Mary Robinson, chief of the Division of Public Information, who also came from the Children's Bureau. See SEALANDER, *supra* note 156, at 42-43.

<sup>246</sup> See generally ANDERSON, *supra* note 151, at 42-43, 110-11, 215-16.

<sup>247</sup> Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Mary Van Kleeck, Dir. of Dep't of Indus. Studies, Russell Sage Found. (Oct. 3, 1924) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1 frame 165.

The Bureau primarily conducted two types of investigations: interviews regarding working conditions in plants in the various states<sup>248</sup> and review of protective labor laws on women's employment opportunities.<sup>249</sup> The Women's Bureau utilized many of the techniques of investigation used by the Women in Industry Service and initiated by the Hull House reformers.<sup>250</sup> Bureau workers visited factories to investigate standards of employment and paid visits to workers' homes. Bureau workers also conducted personal interviews with employers and detailed collection of payroll data.<sup>251</sup> State governments asked the federal government to investigate working conditions of women's employment, and the facts collected were reported in surveys that became the basis for state legislation,<sup>252</sup> and later federal legislation.<sup>253</sup>

The Bureau's work also generated publicity that was believed to be important for later advocacy.<sup>254</sup> The Women's Bureau employees conducted educational programs through public exhibits that were instrumental in rallying interested organizations to support the improvement of women's employment. The Bureau's staff often conducted educational campaigns about labor standards with women's organizations and labor unions.<sup>255</sup> Thus, the Bureau maintained Hull House's commitments to the combination of research, publicity, and advocacy.

Other factors diminished the Bureau's power, however. The Bureau was not well financed; annual appropriations remained a subject of much disappointment;<sup>256</sup> and women statisticians within the Bureau received lower salaries than their male counterparts in other bureaus.<sup>257</sup> In addition, the coalition between the "radical" Equal Rights Feminists and the more moderate women's groups dissolved during the 1920s after they achieved their common goal of women's suffrage.<sup>258</sup>

Anderson, like Addams and Kelley before her, supported protective labor legislation,<sup>259</sup> and the Women's Bureau endorsed her position.<sup>260</sup> In the

<sup>248</sup> See Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Mary Winslow (July 26, 1926) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1 frame 292.

<sup>249</sup> See Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Margit Malmsten (Sept. 24, 1926) *microfilmed on* Anderson Papers, *supra* note 102, at reel 1 frames 297-98.

<sup>250</sup> See ANDERSON, *supra* note 151, at 135.

<sup>251</sup> *Id.* at 136-37.

<sup>252</sup> *Id.* at 112, 136.

<sup>253</sup> FRANCES PERKINS, *THE ROOSEVELT I KNEW* 209 (1946).

<sup>254</sup> See ANDERSON, *supra* note 151, at 111-12.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 253. See also SEALANDER, *supra* note 156, at 37-38.

<sup>257</sup> See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NO. 53, *THE STATUS OF WOMEN IN GOVERNMENT SERVICE IN 1925* (1926).

<sup>258</sup> See SEALANDER, *supra* note 156, at 29-30. The Equal Rights Feminists headed by Alice Paul's National Women's Party opposed protective labor legislation for women on the ground that it was sex discrimination. See NANCY COTT, *THE GROUNDING OF MODERN FEMINISM* 120-24 (1987).

<sup>259</sup> COTT, *THE GROUNDING OF MODERN FEMINISM*, *supra* note 258, at 124.

<sup>260</sup> See *FOURTH ANNUAL REPORT OF THE DIR. OF THE WOMEN'S BUREAU* (1922), at 17-20.

1920s, contention between the Equal Rights Feminists and the women who supported protective legislation grew.<sup>261</sup> In response to the criticisms of Equal Rights Feminists, the Bureau conducted studies that examined the effects of protective labor legislation on women's employment.<sup>262</sup>

*Rationales for Regulation and The Obligations of Government*

In the context of these debates in the 1920s, Anderson publicly defended labor regulation for women as a means to guarantee decent standards of living. Anderson claimed that labor laws "maintain more satisfactory standards of living."<sup>263</sup> Anderson did not see labor regulation as necessary only for women, but believed it was more easily obtainable for women:

All these kinds of regulatory laws have been obtainable for women because women's special needs were more evident to the public than were the needs of other workers, and there was widespread appreciation of the importance of conserving the health of the actual and potential mothers of future generations.<sup>264</sup>

In the Bureau reports she contended that labor conditions should be "corrected for both sexes."<sup>265</sup> But Anderson stressed the "compensatory" rationale for women's labor regulation. Anderson believed that women's unequal position in the labor market and their limited organization in unions were grounds for providing labor regulation for women.<sup>266</sup> Anderson thought

<sup>261</sup> COTT, THE GROUNDING OF MODERN FEMINISM, *supra* note 258, at 123-24. Contention grew especially surrounding the *Adkins* decision, which held minimum wage for women unconstitutional. See STORRS, *supra* note 122, 46-49.

<sup>262</sup> See, e.g., ANNUAL REPORT OF THE DIR. OF THE WOMEN'S BUREAU (1921), at 16; TENTH ANNUAL REPORT OF THE DIR. OF THE WOMEN'S BUREAU (1928), at 5.

<sup>263</sup> Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 16, *microfilmed on* Anderson Papers, *supra* note 102, at reel 4 frame 734. There is no doubt that protective legislation curtailed opportunities for some women and may have helped to reinforce an understanding of gender roles in the family that is traditional. For more on the connections between the family and labor legislation, see Barzilay, *supra* note 28. For more on marriage and family culture, see generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

<sup>264</sup> Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 16, *microfilmed on* Anderson Papers, *supra* note 102, at reel 4 frame 730. See also Letter from M. Carey Thomas, Dean of the Bryn Mawr College, to Mary Anderson, U.S Dept. of Labor, Women's Bureau (Feb. 6, 1925) *microfilmed on* Anderson Papers, *supra* note 102, reel 1 frames 202 (arguing that protective labor legislation should not be abolished for women until it can "be replaced by protective legislation for both men and women." *Id.*); Letter from Mary Anderson to Dr. Thomas, Dean of the Bryn Mawr College (Feb. 7, 1925) *microfilmed on* Anderson Papers, *supra* note 102, reel 1 frame 204 (claiming that it is necessary to maintain safeguards for women until legislation for men and women is secured).

<sup>265</sup> See, e.g., ANNUAL REPORT OF THE DIR. OF THE WOMEN'S BUREAU (1921), at 17.

<sup>266</sup> Anderson claimed women were not equally well unionized as men, that men surrender their legal freedom of contract for economic freedom by joining trade unions, and that they gained leisure, and better health and self development, as a result. Because women were unequally organized, labor laws for women granted these benefits to them:

waiting to have women organized in unions would not do enough to advance the goal of earning a decent living.<sup>267</sup> Additionally, she claimed that laws that regulate women's employment would also benefit men as they "serve[ ] to bring the whole industry up to the standard required for the women working in it."<sup>268</sup> Anderson insisted that women would stay in the workforce and that their presence would improve working conditions for all workers.<sup>269</sup> Anderson thus hoped that improving labor conditions for women would later lead to better working conditions for all workers.

As she became a more experienced federal administrator, Anderson refined her beliefs on the obligations of government. While in her administrative post in the federal bureaucracy, Anderson saw as her obligation "in a small way to serve the cause of humanity,"<sup>270</sup> and she saw it as the obligation of government to work towards that pursuit of happiness and well being. In 1933, over a decade into the work of the Bureau, Anderson wrote to her longtime friend Margaret Dreier Robins:

You see I am coming to believe in . . . government functioning for the well-being of the people . . . . This may be socialism. It really doesn't make much difference to me what it is called as long as we

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That is the essential principle of a trade union – the collective bargain as a substitute for individual freedom of contract. An 8-hour law, though it takes away the worker's freedom to contract for more than 8 hours of work per day, gives in exchange the economic freedom that the additional leisure brings, with its additional possibilities of health and recreation and self-development. [An 8-hour law] is a substitute for the voluntary limitation through the trade union, thus a sort of collective bargain made through the machinery of the state.

Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 16, microfilmed on Anderson Papers, *supra* note 102, at reel 4 frame 731.  
<sup>267</sup> She wrote,

I agree that it is above all things desirable for working women to organize, and I have testified to my belief in trade unionism by working for years as an organizer for the National Women's Trade Union League and the American Federation of Labor. . . . But there are still millions of women outside the trade unions, and those millions whose hours are disastrously long and whose wages are less than enough to live on are dragging constantly at the standards of the women better situated, and actually impeding organization as well as better standards. It is not always recognized that the farther down the worker is in the economic scale, the harder it is to organize – yet this is proved by the lack of organization among the lowest paid *men* workers all over the world. It is the dreadful vicious circle – the groups at the bottom cannot improve their conditions because they are not organized, and they cannot organize because their poverty is so great that they dare not risk the loss of the miserable jobs they have.

*Id.*

<sup>268</sup> *Id.* at frame 734.

<sup>269</sup> See ANDERSON, *supra* note 151, at 141. See also Mary Anderson, *Women's Future Position in Industry*, AM. INDUSTRIES 27, 28-29 (1920) microfilmed on Anderson Papers, *supra* note 102, at reel 4 frames 724-25.

<sup>270</sup> Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Margaret Dreier Robins (June 1922) microfilmed on Anderson Papers, *supra* note 102, at reel 3 frame 459.

can function as a nation without this tremendous poverty and opportunity for exploiting one another as we have been doing.<sup>271</sup>

Anderson believed that there needed to be a system of social responsibility, fostered by the State, which would protect the interests of all citizens. In 1933, Anderson stated that the modern industrial reality,

[s]purs one on to want to do something for the good of all people. The rugged individualism and the private initiative is a very fine thing if it had not been for the minority using it for their own gains. I believe that we have to devise another system that will take into consideration the good of all the citizens.<sup>272</sup>

Anderson hoped that government would provide liberty and economic security to all people.<sup>273</sup> Through the Bureau, Anderson worked to increase the standard of living and working conditions of the nation. In 1933, she claimed that focusing solely on regulation of the economy inhibited the quest for well being, writing to her friend that “[t]he recovery program is not going [as] fast as the administration would like . . . . The deputies . . . are mostly financial men and see the situation from the financial point of view rather than the humanitarian and the labor point of view.”<sup>274</sup>

Anderson continued her work at the Women’s Bureau during the Roosevelt Administration.<sup>275</sup> During the Roosevelt years she felt closer than ever before to the White House because of Eleanor Roosevelt’s “interest and friendship.”<sup>276</sup> As the next Part demonstrates, Anderson played a key role in establishing an equal wage provision in the New Deal’s Fair Labor Standards Act.

## V. THE NEW DEAL AND THE PRINCIPLE OF DECENT STANDARDS

Ten years after the establishment of the Women’s Bureau, the United States entered the Great Depression. But in the face of economic downturn, Anderson, Addams, Molly Dewson, and others in the women’s reform network used the national crisis as the “golden moment to consolidate gains and go ahead” with their reform agenda.<sup>277</sup> The women reformers sought to

<sup>271</sup> *Id.* at frame 712.

<sup>272</sup> *Id.* at frames 712-713.

<sup>273</sup> *Id.* at frames 793-95.

<sup>274</sup> *Id.* at frames 749-51.

<sup>275</sup> Anderson had encountered the Roosevelts long before they came to Washington. She had known the President since the First World War, when she was working in the “Woman in Industry Service” and he was in the Navy. ANDERSON, *supra* note 151, at 102. Anderson was friendly with Eleanor Roosevelt through their involvement in the WTUL. *Id.* at 177-78, 243.

<sup>276</sup> *Id.* at 178.

<sup>277</sup> Letter from Mary Anderson, Dir. of the U.S. Women’s Bureau to Mary Dewson, Chairman of Labor Standards Committee, National Consumers’ League (Jan. 23, 1933) *microfilmed on* Anderson Papers, *supra* note 102 (on file with author).

make an impact on national politics. The WTUL mobilized the working-class vote during Roosevelt's presidential campaign in 1932.<sup>278</sup> Dewson directed the Women's Division in the Democratic National Campaign Committee and rallied women's support for Roosevelt.<sup>279</sup> When Roosevelt was elected that November,<sup>280</sup> Addams and Dewson lobbied to appoint Frances Perkins, NCL activist and New York State Department of Labor administrator, to serve as the new Secretary of Labor.<sup>281</sup>

Perkins had significant experience to bring to the job. A graduate of Columbia University, Perkins worked in a New York settlement house on a survey of neighborhood social conditions.<sup>282</sup> Perkins served as a public official in the New York Department of Labor from 1919 until 1924, when she became Chairman of the industrial board.<sup>283</sup> She took part in "proposals to use the legislative authority of the state to correct social abuses – long hours, low wages, bad housing, child labor, and unsanitary conditions."<sup>284</sup> Perkins also investigated factory conditions for the New York Factory Investigative Committee.<sup>285</sup>

Roosevelt appointed Perkins in February 1933.<sup>286</sup> However, Perkins conditioned her acceptance of the appointment: she wanted to be certain that she could carry through her agenda to promote decent standards of labor:

I said [to F.D.R.] that if I accepted the position of Secretary of Labor I should want to do a great deal. I outlined a program of labor legislation and economic improvement . . . I proposed . . . an approach to the establishment by federal law of minimum wages, maximum hours . . . . The program received Roosevelt's hearty endorsement, and he told me he wanted me to carry it out.<sup>287</sup>

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<sup>278</sup> ORLECK, *supra* note 28, at 150.

<sup>279</sup> SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS 162-76 (1987).

<sup>280</sup> WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 at 18 (1963).

<sup>281</sup> WARE, PARTNER AND I, *supra* note 279, at 176-77; MARTIN, *supra* note 124, at 233-37. Josephine Goldmark also supported Perkins' appointment. *Id.* at 236-37. Perkins had worked at Chicago Commons and Hull House settlements between 1905-1907. *Id.* at 57-65. Indeed, during the Roosevelt administration many women reformers were appointed to government positions. See generally SUSAN WARE, BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL (1981) (discussing the political prominence of the women's reform network in the 1930s).

<sup>282</sup> PERKINS, *supra* note 253, at 9-10.

<sup>283</sup> *Id.* at 54.

<sup>284</sup> *Id.* at 10.

<sup>285</sup> See LEON STEIN, THE TRIANGLE FIRE 208 (1962); MARTIN, *supra* note 124 at 103-04.

<sup>286</sup> MARTIN, *supra* note 124, at 242. See also WARE, BEYOND SUFFRAGE, *supra* note 281 9 (1981). Anderson also congratulated Perkins on her appointment. Telegram from Mary Anderson, Director, Women's Bureau to Frances Perkins, Industrial Commissioner of the State of New York Department of Labor (March 1, 1933), *supra* note 102, (on file with author).

<sup>287</sup> PERKINS, *supra* note 253, at 151-52.

Roosevelt agreed, and when Perkins assumed her new role, Anderson noted “we were all jubilant, because we thought that at last we would have someone who really understood our problems and what we were up against and would fight for us.”<sup>288</sup> The Roosevelts were not strangers to the women’s reform movement. Indeed, Perkins and Anderson were part of a network, now grouped around Eleanor Roosevelt, who had been active in women’s reform efforts since the 1920s.<sup>289</sup> Eleanor Roosevelt considered many of these women, including Anderson, her friends.<sup>290</sup>

Apart from their involvement in the federal political process, women reformers continued to be active advocates of labor reform in the states. In 1933, the NCL decided to renew its efforts to bring back a minimum wage law for women after the *Adkins* decision.<sup>291</sup> The NCL petitioned Frankfurter to draft a minimum wage bill to adhere to the requirement of the *Adkins* majority. The bill became law in New York in 1933.<sup>292</sup>

That same year, as Perkins came to Washington, Senator Hugo L. Black introduced a bill before Congress to limit the work week to thirty hours.<sup>293</sup> Still, Perkins felt the bill was incomplete – it did not provide for minimum wage based on the prevailing minimum standards of living in the community.<sup>294</sup> The Black bill did not pass, and instead, the Roosevelt administration passed the National Industrial Recovery Act (NIRA).<sup>295</sup> Title I of the NIRA outlined procedures for establishing codes of fair practice in industries.<sup>296</sup> And it was Anderson, as Director of the Women’s Bureau, who compiled surveys of working conditions in various industries to assist in establishing NIRA codes.<sup>297</sup>

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<sup>288</sup> ANDERSON, *supra* note 151, at 183. However, as Anderson and Perkins worked together they had some differences of opinion: Anderson became discouraged by the Secretary’s lack of interest in the Women’s Bureau, and by Perkins’ suggestion to merge the Women’s Bureau with other activities in the Dep’t of Labor. *Id.* at 183-84.

<sup>289</sup> WARE, *BEYOND SUFFRAGE*, *supra* note 281, at 7-10. Ware exposes a large network of mostly elite women and alumnae of the Settlement House movement who were involved in the New Deal administration. Some occupied important positions in the Department of Labor, the Children’s Bureau, the Women’s Bureau, the Social Security Administration, the Treasury, and the Consumers’ Advisory Board. Eleanor Roosevelt was closely involved with this network and was instrumental in positioning women in federal appointments. By 1935, over fifty women had been appointed to ranking national positions and hundreds to leadership positions in various state and local government agencies. *Id.* at 3-17.

<sup>290</sup> *Id.* at 66.

<sup>291</sup> STORRS, *supra* note 122, at 180.

<sup>292</sup> *Id.* at 178. The bill also became law in five other states. *Id.*

<sup>293</sup> See PERKINS, *supra* note 253, at 192.

<sup>294</sup> *Id.* at 192-95.

<sup>295</sup> *Id.* at 196. See also Deborah Malamud, *Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2235. (1998). On the Roosevelt’s administration’s drafting of the NIRA, see generally EDSFORTH, *supra* note 9, at 180-84 (discussing drafting of the NIRA).

<sup>296</sup> National Industrial Recovery Act of 1933, 15 U.S.C. §701 (1933), *invalidated* by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>297</sup> PERKINS, *supra* note 253, at 209.

However, uncertain of the NIRA's constitutionality, Perkins devised a plan to "save what was basic and important" – the limitation of hours and regulation of wages.<sup>298</sup> Perkins recalled that she persuaded the solicitor of the Department of Labor to draft a bill that called for general wage and hour standards.<sup>299</sup> When Perkins spoke with Roosevelt on the impending fate of the NIRA, she told him she was working on a bill "which will do everything you and I think important under NRA."<sup>300</sup> Perkins reminded Roosevelt of their agreement prior to her appointment to put a "floor under wages and a ceiling over hours,"<sup>301</sup> stating that providing labor standards was "essential and that it would be a wise and necessary program to [carry] out on the federal level."<sup>302</sup>

Perkins' concerns about NIRA's constitutionality were well-founded. In 1935, the Supreme Court struck down the NIRA.<sup>303</sup> Immediately following *Schechter Poultry*, Roosevelt told Perkins that he believed that the impact of NIRA would last despite the Court's decision and that wages would not return to previous levels even without new legislation.<sup>304</sup> But when Roosevelt won his reelection in 1936 by a significant margin, he asked Perkins "[w]hat happened to that nice unconstitutional bill you had tucked away?"<sup>305</sup>

At the state level, the NCL orchestrated a test case to test the constitutionality of the New York minimum wage bill.<sup>306</sup> In 1936, the Supreme Court declared invalid the minimum wage statute in *Morehead v. New York*.<sup>307</sup> The *Morehead* decision cited *Adkins* as precedent.<sup>308</sup> Now the Court's decisions in *Adkins* and *Morehead*, which held minimum wage labor legislation to be unconstitutional, posed additional barriers to the Administration's efforts to propose minimum wage legislation. In February 1937, just as Roosevelt announced his Court packing plan to reorganize the federal judiciary,<sup>309</sup> Perkins resumed work on the wage and hour bill in order to look for a legislative alternative to the Court's labor decisions.<sup>310</sup>

Anderson supported Perkins' efforts to enact a wage and hour bill, seeing this legislation as a means to ensure decent labor and living standards that she and other reformers had longed work to promote. In January 1937, as Perkins worked to refine her bill, Anderson wrote to Mary Van Kleeck

<sup>298</sup> *Id.* at 248.

<sup>299</sup> *Id.* at 248-49.

<sup>300</sup> *Id.* at 249.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Schechter*, 295 U.S. 495 (1935).

<sup>304</sup> See PERKINS, *supra* note 253, at 251-52.

<sup>305</sup> *Id.* at 255.

<sup>306</sup> STORRS, *supra* note 122, at 178.

<sup>307</sup> 298 U.S. 587, 618 (1936).

<sup>308</sup> *Id.*

<sup>309</sup> EDSFORTH, *supra* note 9, at 257-62 (discussing Roosevelt's Court packing plan).

<sup>310</sup> PERKINS, *supra* note 253, at 255-56.

that the entering wedge just might work – there was hope that labor legislation, which was once confined exclusively to women, could now be applied to society as a whole:

I think that the tide of public opinion in this country now supports the conception that there should be limitation of hours of labor for men and other regulation of basic working conditions for men as well as women, and in that line, I think in the future, once our constitutional problems are solved, much of the legislation of the country will move.<sup>311</sup>

Two months later, in March 1937, the Supreme Court upheld minimum wage legislation for women in *West Coast Hotel v. Parrish*.<sup>312</sup> The decision held that women's circumstances in the market and the public interest warranted accepting minimum wage regulation for women. *West Coast Hotel* cited *Muller* and *Bunting* as precedents, and the Court also held that there was no inherent barrier to the state's power under the Constitution to restrict individuals' freedom of contract.<sup>313</sup>

After *West Coast Hotel*, the prospects of a national wage and hour bill were promising. Despite Roosevelt's belief that wages would not go back to previous levels, he now needed a measure to reunite the party after the schism caused by his court-packing plan.<sup>314</sup> Roosevelt took Perkins' draft and consulted with many attorneys who suggested that the bill include the clause "affecting interstate commerce" as a new Constitutional approach.<sup>315</sup>

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<sup>311</sup> Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Mary van Kleeck, Dir., Dep't of Indus. Studies, Russell Sage Foundation (Jan. 8, 1937) *microfilmed on Anderson Papers, supra* note 102, at reel 1 frames 622-623. She continues by writing: "That does not, however, solve the special problems of women in industry, nor does it solve the problem of making the great women-employing industries particularly adapted to making good work, good wages, and good promotional opportunities for their women workers." *Id.* at 623. Anderson also corresponded with the Illinois Department of Labor Minimum Wage Division. She urged the Department to oppose the ERA and instead focus on a wage and hour bill that would include both men and women. *See* Letter from Mary Anderson, Dir. of the U.S. Women's Bureau, to Illinois Dep't of Labor Minimum Wage Div. (Feb. 8, 1938) *microfilmed on Anderson Papers, supra* note 102, at reel 1 frame 686.

<sup>312</sup> 300 U.S. 379 (1937). There are different accounts as to what led to this decision. *See, e.g.,* JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* 242-43 (2004) (claiming that jurisprudential developments and social transformations, rather than the court packing plan led to the Supreme Court decision).

<sup>313</sup> *West Coast Hotel*, 300 U.S. at 393-94 (1937). The Court overturned its 1923 *Adkins* decision. *Id.* 393.

<sup>314</sup> *See* EDSFORTH, *supra* note 9, at 257-62; PERKINS, *supra* note 253, at 252-56.

<sup>315</sup> *Id.* at 256. Among those involved in its drafting were Robert Jackson, Solicitor General, Felix Frankfurter, Joseph Chamberlain, Charles Burlington, John Lord O'Brian, Tom Corcoran, and Ben Cohen. *Id.* at 254, 256. In addition to covering employees engaged in interstate commerce, the bill also covered persons who produced goods for interstate commerce. *See* PERKINS, *supra* note 253, at 265.

Attorneys refined Perkins' draft, and the President then addressed Congress, urging favorable consideration of the bill:<sup>316</sup>

I believe that the country as a whole recognizes the need for immediate congressional action if we are to maintain wage increases and the purchasing power of the nation against recessive factors in the general industrial situation. The exploitation of child labor and the undercutting of wages and the stretching of hours of the poorest paid workers in periods of business recession has a serious effect on buying power. . . . I further believe that the country as a whole realizes the need of seeking a more uniformly adequate standard of living and purchasing power everywhere, if every part is to live happily with every other part. . . . Political and social harmony requires that every state and every country not only produce goods for the nation's markets but furnish markets for the nation's goods.<sup>317</sup>

Perkins draft became the basis for the Fair Labor Standards Act of 1938 (FLSA).<sup>318</sup> The NCL led lobbying efforts for FLSA. NCL activists contacted affiliates in Consumers' Leagues around the country to rally local support for the Act.<sup>319</sup> Indeed, the NCL had already initiated minimum wage labor legislation for women, and it perceived FLSA as an embodiment of its efforts.<sup>320</sup> During the Congressional Hearings, NCL member Lucy Randolph Mason stated on the record that the bill embodies work done by the NCL over the period of several decades:

I am very glad to speak on behalf of this bill, because it embodies principles in Federal labor legislation which the National Consumers' League has worked for in States for more than 35 years. The league has been a pioneer in the matter of minimum wage and was the first to sponsor this type of legislation in this country, in 1909, vigorously promoting it ever since. In the depth of the depression the Consumers' League revived the movement for minimum wage which had been checked for a decade by the Supreme Court decision of 1923. . . . After nearly a century of effort to secure maximum-hours laws, today only 11 States have established an 8-hour day . . . With exceptions too negligible to mention, all States have limited the application of hour laws to women . . . .<sup>321</sup>

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<sup>316</sup> PERKINS, *supra* note 253, at 256-57.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 256-66.

<sup>319</sup> STORRS, *supra* note 122, at 189-90.

<sup>320</sup> *See generally id.* at 175 (discussing various state minimum wage labor legislation).

<sup>321</sup> *Joint Hearings Fair Labor Standards Act of 1937: Hearing on S. 2475 and H.R. 7200 Before the Senate Committee on Education and Labor and the House Committee on*

In an effort to generate public support for FLSA, women reformers began to wage a public relations campaign. Mary Dublin, also from the NCL, took to the airwaves and told radio listeners that federal legislation was necessary because geographical regions without labor legislation would be “inadequate to produce a decent living.”<sup>322</sup> Grace Abbott, a former Hull House settlement worker, argued for the abolition of child labor.<sup>323</sup> Katherine Lenroot, another former settlement worker, wrote several sections of the draft legislation regarding enforcement of the child labor aspects of the Act.<sup>324</sup> And from behind the scenes, Anderson promoted the inclusion of the clause providing the same minimum wage for men and women in the federal legislation.<sup>325</sup> As a former factory worker it was vital for her to have women enjoy decent standards of labor and living.

Perkins stated during the Congressional debates that “the minimum wage should be fixed for the occupation and not according to the age or sex of the employee.” Senator La Follette [asked her]: “For the occupation?” Secretary Perkins replied “Yes.”<sup>326</sup> Years later, in her autobiography, Anderson claimed that the clause establishing no differential pay according to sex in establishing the minimum wage was nearly jeopardized. Anderson recalled the exchange between Perkins and Senator La Follette, and her recollection is telling:

Then came the federal Wage and Hour Law in which we really made some progress. This act set standards of minimum wages and maximum hours for workers employed in the manufacture of goods used in interstate commerce. I think I had a good deal to do with getting into that law the statement in connection with fixing wage orders that “No classification shall be made under this section on the basis of age or sex.” It was an anxious time for me while the hearings on the bill were going on. The secretary of labor was going to appear and the solicitor of the department, Gerard [Gerald] Reilly, was working up her testimony. I talked to him and said, “Well, Gerry, I think we had better put in something for her to say about the same minimum for men and women. . . . Unfortunately, when [Perkins] came to that part she left out the two lines. . . . When the hearing was over, I nearly died because not a word had been said about the same minimum for men and women. The newspaperwomen all rushed up to me and asked why

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*Labor*, 75th Cong. 403-04 (1937) [hereinafter *Hearings*] (statement of Lucy Randolph Mason, Nat’l Consumer League).

<sup>322</sup> See STORRS, *supra* note 122, at 188.

<sup>323</sup> WARE, *BEYOND SUFFRAGE*, *supra* note 281, at 103.

<sup>324</sup> *Id.*

<sup>325</sup> ANDERSON, *supra* note 151, at 147-49. Section 8(c) of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1938), in its relevant part reads: “No classification shall be made . . . on the basis of age or sex.”

<sup>326</sup> *Hearings*, *supra* note 321, at 187 (statement of Sec. of Labor, Frances Perkins)

she left that out. I answered "God Knows! Go up and ask her." But before they got a chance to, Senator Robert La Follette asked if she did not think that women should have the same minimum as men. She said, "Yes," and I heaved a sigh of relief. As she went out she said to me, "I fixed that all right, didn't I?"<sup>327</sup>

For Anderson, it was essential that FLSA prohibit sex classification so that when administrative committees met to set higher wages, they could not set lower, differential pay for women.<sup>328</sup> In her autobiography, Anderson reflected on the historical course that women reformers had taken to ensure decent standards of living. According to Anderson, she and other Progressive Era reformers worked for hour laws for women because they seemed like "the only way we could remedy a very bad situation for thousands of women . . . . Now, with the federal Fair Labor Standards Act, the general standard is less than eight hours a day and a forty-hour week for everyone."<sup>329</sup>

During the Congressional debates the reformers' discourse on "Standards of Decency" permeated the legislative history.<sup>330</sup> For example, when the Joint Committee of the Senate Committee on Education and Labor met on June 2, 1937 for hearings on FLSA, Lucy Mason of the NCL stated that "[w]hen a floor is put beneath wages and a ceiling to hours, decent employment practices will be protected."<sup>331</sup> Mason continued emphasizing the idea of decent living by saying: "there are too many instances of longer hours and wages not sufficient to yield decent living."<sup>332</sup> Additionally, John Lewis, from the Committee for Industrial Organization and United Mine Workers of America, stated that attempts to establish minimum wages are based on a "standard of living . . . embodying elements of decency and comfort."<sup>333</sup> Participants at the Congressional hearings wanted to establish

<sup>327</sup> ANDERSON, *supra* note 151, at 147-48.

<sup>328</sup> *Id.* at 147-49.

<sup>329</sup> ANDERSON, *supra* note 151, at 77.

<sup>330</sup> On the multiple goals of saving the economy and providing standards of labor and living, see generally Paul H. Douglass & Joseph Hackman, *The Fair Labor Standards Act of 1938: The Background and Legislative History of the Act* (pt. 1), 53 POL. SCI. Q. 491 (1938). See also *Hearings, supra* note 321, at 396 (statement of Courtenay Dinwiddie, National Child Labor Committee arguing that substandard wages and hours were both "indefensible from the humanitarian standpoint and economically destructive" *Id.*). For further exploration of the complex moral meaning of Decency in this discourse, *Barzilai, supra* note 28, at 4.4.

<sup>331</sup> *Hearings, supra* note 321, at 406 (statement of Lucy Randolph Mason).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 274-75 (statement of John Lewis). See also *id.* at 200 (statement of Secretary of Labor, Frances Perkins) ("There are sixteen States [sic] in this country where there are minimum wage laws for women. Where they have fixed the minimum wage, it has been in those industries where the women had the lowest pay in the industry, and the effect has been over a period of years to raise the average wage in that industry and to raise almost proportionately the wages of the more skilled groups in that industry who were making more than the minimum.").

wages that were “necessary to maintain a decent standard of living,”<sup>334</sup> achieve a “decent living,”<sup>335</sup> and create the “conditions . . . adequate to maintain even a rudimentary minimum standard of living.”<sup>336</sup> Addams’ vision had found its way into the legislative discourse. Undeniably, Standards of Decency permeated the New Deal legislative discourse.

After congressional debates, FLSA passed, and in 1938, the President signed into law a national minimum wage and maximum hour regulation.<sup>337</sup> FLSA established a national requirement for payment of minimum wages and limitation on hours for workers whose occupations were judged to be in the flow of interstate commerce.<sup>338</sup> Perkins claimed: “Its principal objectives were accepted . . . shorter hours have made a more humane schedule.”<sup>339</sup> Gerald D. Reilly, the Solicitor of the Department of Labor, stated that Perkins “was a good deal of the push behind [FLSA].”<sup>340</sup> Although Kelley died in 1932 and Addams had died in 1935, other women reformers, like Edith Abbott and Sophonisba Breckinridge, hailed the FLSA as in accord with their objectives.<sup>341</sup>

However, FLSA was not a triumph for everyone, particularly many female workers. FLSA excluded many of the lowest paid, most exploited workers,<sup>342</sup> and the new working standards applied only to those who were working in interstate commerce, leaving out many African Americans, immigrants, and women.<sup>343</sup> The Act excluded domestic and agricultural workers, and therefore was not a victory for all women.<sup>344</sup>

Despite its shortcomings, FLSA embodied the core vision of the women reformers: it limited working hours for both men and women and set a minimum wage.<sup>345</sup> Ultimately, FLSA represented a significant acknowledg-

<sup>334</sup> *Id.* at 92 (statement of Robert Johnson).

<sup>335</sup> *Id.* at 220 (statement of William Green).

<sup>336</sup> H.R. CONF. REP. NO. 2738, at 28 (1938).

<sup>337</sup> See PERKINS, *supra* note 253, at 257-66.

<sup>338</sup> See THE AMERICAN BAR ASSOC. SECTION OF LABOR AND EMPLOYMENT LAW, THE FAIR LABOR STANDARDS LEGISLATION COMMITTEE 11-16 (Ellen C. Kearns et al. eds., 1999); Paul H. Douglas and Joseph Hackman, *The Fair Labor Standards Act of 1938* (pt. 2), 54 POL. SCI. Q. 493 (1939).

<sup>339</sup> PERKINS, *supra* note 253, at 266 (stating that excess hours are not prohibited but require overtime pay).

<sup>340</sup> MARTIN, *supra* note 124, at 392.

<sup>341</sup> See MUNCY, *supra* note 27, at 153.

<sup>342</sup> See SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* 203-04 (1998).

<sup>343</sup> See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 100-01 (2001); METTLER, *supra* note 342, at 185, 198-99; Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

<sup>344</sup> See, e.g., METTLER, *supra* note 342, at 185-86; Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, 26 POLITY 635 (1994) (explaining how many women became excluded for FLSA coverage). Additionally, the minimum wage was considerably low. METTLER, *supra* note 342, at 195.

<sup>345</sup> See STORRS, *supra* note 122, at 177.

ment of the government's obligation to ensure decent standards of living and labor. Women reformers were not content to end their work after the passage of FLSA.<sup>346</sup> Anderson herself observed that there were "many things we had to leave undone."<sup>347</sup> In a speech from 1944, the year of her retirement from the Women's Bureau, she looked back and said:

From my own experience in the ranks of labor in Chicago for many years, and then as a Government official in Washington ever since the last war, I believe our workers must learn to achieve full industrial citizenship and industrial democracy . . . we must keep in action to promote the well-being of our workers and to achieve for them higher standards of living — and in general greater opportunity and security for the American people — in the enactment of adequate labor and social legislation . . . we shall go forward, without fail, until we have established . . . the kinds of standards we would like to think of as our inalienable rights as Americans.<sup>348</sup>

After her retirement from the Women's Bureau, Anderson continued to work for the establishment of labor standards. She served as Chairman of the National Equal Pay Committee, worked for equal pay legislation, and continued to lobby for the improvement of women's working conditions.<sup>349</sup> Anderson died in 1964, and at a memorial service held in her honor, Perkins noted that Anderson left as her legacy her work to establish decent labor and living standards.<sup>350</sup>

## VI. CONCLUSION

Tracing the actions and ideologies of particular reformers like Mary Anderson in the rise of the regulatory state not only promotes awareness of their often neglected roles; it also demonstrates that a concern for Standards of Decency links the work of women reformers during the Progressive and New Deal Eras that is crucial to informing our understanding of the rise of the regulatory state. Including this group of women reformers in the contextual narrative of the regulatory state demonstrates how they used the regulatory apparatus to further their vision of Standards of Decency, or a life enriched by leisure, civic participation, education and the arts, and, of course, decent food and shelter. Social regulation started long before the

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<sup>346</sup> See MUNCY, *supra* note 27, at 153.

<sup>347</sup> WOMEN OF VALOR: THE STRUGGLE AGAINST THE GREAT DEPRESSION AS TOLD IN THEIR OWN LIFE STORIES 134 (Bernard Sternsher & Judith Sealander, eds., 1990).

<sup>348</sup> Mary Anderson, *The Value of Swedish-Americans to the Nation* 13 (July 25, 1944) in BULLETIN OF THE AMERICAN INSTITUTE OF SWEDISH ARTS, LITERATURE AND SCIENCE *microfilmed on Anderson Papers*, *supra* note 102, at reel 4 frame 784.

<sup>349</sup> Daly, *supra* note 212, at 244.

<sup>350</sup> Mary Anderson Oral History, Remembrance Tape (1964) Schlesinger Library (transcript on file with author); see also Barzilay, *supra* note 28, at 203.

Great Depression, and though the New Deal certainly responded to this economic crisis, agencies were built to do more than fix the economy. In light of this history, we may understand the need for bureaucracy not only as a means to protect capitalism, but also as a means to support an ideal of decent standards of living. While it is beyond the scope of this article to flesh out the ramifications of introducing this inclusive narrative into the stories of the rise of the regulatory state, this Article suggests that the promotion of decent standards of living is one additional interpretive force to understand the rise of the administrative state.

