The Folly of *Bradwell v. Illinois*

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I. Introduction

Gender discrimination in the workplace is a salient issue in the United States, but it is more than simply a modern problem. In fact, gender discrimination first appeared on the Supreme Court’s docket in 1873 with the case of *Bradwell v. Illinois*. While the feminist movement emphasized employment equality for most of the 20th century, its fledgling 19th century counterpart dealt primarily with the right even to enter the workplace. Bradwell began her fight to be admitted to the state bar in the Illinois Supreme Court, and her case eventually reached the United States Supreme Court. Myra Bradwell’s decision to challenge the Illinois Supreme Court’s ruling to deny her a law license represents the first national scale challenge to gender discrimination in the United States.

Soon after marrying James Bradwell in 1852, Myra Bradwell began formal law training. She apprenticed in her husband’s law firm after he was admitted to the Illinois Bar and assisted with preparing legal documents and conducting research.\(^1\) After complications arose with Coverture laws which prohibited women from owning property, Bradwell stopped working in her husband’s firm. However, she refused to remove herself completely from the legal world. In 1868, she founded and served as editor for *The Chicago Legal News*, a widely-read publication that provided news about court rulings, new laws, and including a section exposing corruption.\(^2\) Galvanized by her work in both her husband’s law firm and as an editor, Bradwell petitioned the Illinois Supreme Court for a law license and was denied on the basis that she was a married woman unable to freely contract. She appealed to the United States Supreme Court soon after but

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\(^1\) Jane M. Friedman. *America’s First Woman Lawyer: The Biography of Myra Bradwell*, 54.

\(^2\) Friedman, *America’s First Woman Lawyer: The Biography of Myra Bradwell*, 75.
was denied once again because of her sex. This time, however, Justice Joseph Bradley found Bradwell’s sex so critical to his decision that he elected to draft a concurrence which focused on the fragility of the female sex. After this crushing defeat in the nation’s highest court, Bradwell made no further attempts to pursue a law license.  

Bradwell attempted to enter a field populated solely by men in an era when the prevailing social consensus relegated women to primarily domestic roles. Bradwell argued in the unsuccessful challenge that the Privileges and Immunities Clause of the Fourteenth Amendment protected her right to practice law. Modern day interpretations of the Court’s decision are critical of the Court’s refusal to grant Myra Bradwell a law license and the decision’s discriminatory implications. The Court’s decision in Bradwell presented an early and significant barrier to gender equality, as the decision obliterated the legal viability of the Privileges and Immunities Clause as a tool for fighting gender discrimination. Both the Illinois Supreme Court’s and United States Supreme Court’s decision to deny Myra Bradwell a license to practice temporarily halted the progress of the women’s rights movement by including plainly sexist language in their decisions, which is particularly evident in Justice Joseph Bradley’s concurrence.

II. Background and Context

Although scholars disagree on the extent to which sexism pervaded American society at the time, they do agree that women began to challenge stringent gender roles in some measure during the late 19th century. Gwen Hoerr Jordan asserts that “growing support for women holding political office and working in the [legal] profession” existed and that the justices in the Bradwell case were aware of such sentiments. On the contrary, Lori Johnson contends that the society in which Bradwell lived was not friendly to women entering traditionally male professions. Johnson argues that women faced two common prejudices, one being the “widely

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3 Friedman, America’s First Woman Lawyer: The Biography of Myra Bradwell, 107.
held belief that females lacked the intellect required by professional occupations that relied primarily on mental prowess.” The second prejudice stemmed from the Victorian-era belief that “respectable women did not work outside the home.”

Scholarship surrounding the opinion in Bradwell acknowledges the unrestrained sexism present in Court’s reasoning, but many scholars overlook the extent to which Justice Bradley’s plainly sexist concurrence negatively impacted the broader women’s rights movement. Joan Hoff Wilson contends that the worst facet of the Bradwell decision was the prose found in Justice Bradley’s concurring opinion, as does this study. According to Wilson, Bradley “insist[s] that women had no legal existence separate from that of their husbands.” Though Wilson acknowledges Bradley’s problematic concurrence, he does not analyze its lasting legal implications. Emily Martin elucidates the profound effect that such prejudiced reasoning had on American jurisprudence, arguing that the “notion of women being fundamentally different and creatures of the home really survived in many ways for the century after Bradwell and until Reed v. Reed.” While Martin does recognize the lasting effects of the Bradwell decision, she does not link the decision’s enduring impact to Bradley’s virulent rhetoric.

Furthermore, many scholars note the impact that the Court’s decimation of the Privileges and Immunities Clause in the Slaughter-House Cases, a set of cases argued before the Court in the same year, had on the Court’s decision in Bradwell. This collection of cases represents the first legal challenge to employ the newly ratified Fourteenth Amendment’s Privileges and Immunities Clause, the same clause Myra Bradwell used in her challenge. Lori Jonhson asserts

5 Ibid.
7 Emily Martin, “Reed v. Reed at 40: Equal Protection and Women’s Rights” (presentation, held at the National Press Club, Washington, DC, November 21, 2001)
that “the Court relied on the recent Slaughter-House decision” when it decided that the Privileges and Immunities clause did not guarantee Bradwell the right to practice law. Joan Hoff Wilson contends that because the Court heard the two cases during the same term, the decision in Bradwell was probably influenced “by the Court’s realization that a broad interpretation [of the Privileges and Immunities Clause] would necessarily change the status of women.”

Similarly, Michael Kent Curtis notes that “The Slaughter-House majority, having deprived the Privileges and Immunities Clause of any significant meaning, quickly disposed of Mrs. Bradwell’s claim by a citation to Slaughter-House.” The Court’s interpretation of this clause is not what is problematic about Bradwell, but rather the Court’s glaring sexism.

Though literature on Bradwell is relatively thorough, scholars fail to mention a crucial aspect of the case and its journey to the Supreme Court. Bradwell’s two original petitions to the Illinois Supreme Court reveal astonishing levels of sexism as a result of their blatant disregard for Myra Bradwell’s legal arguments. Analysis of these documents reveals a deeper and more firmly ingrained version of the legally sanctioned sexism the Court included in its decision. However, this judicial sexism was not confined to an individual case, but rather reflected an institutionalized and nationwide prejudice. Variations of the Illinois Supreme Court and Justice Bradley’s sexist reasoning appear in state court decisions across the country, as well as in courtroom dialogue. In the wake of Bradwell and the Court’s blatant sexism, women struggled to find equal footing both outside of and within the legal profession.

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III. Bradwell’s Journey to the Supreme Court

Myra Bradwell encountered her first barrier to becoming a lawyer when the Illinois Supreme Court denied her petition for admittance to the state bar. She learned of her denial on February 5, 1870 in a letter from the Court.\(^\text{10}\) A notable aspect of the letter informing Bradwell of the Court’s decision is its unusual author— not one of the sitting justices, but rather the Court’s official reporter, Norman L. Freeman. This small detail has notable symbolic significance. Because the Court viewed Bradwell as less worthy than a male petitioner, the three justices of the Illinois Supreme Court did not feel obliged to respond directly and instead employed an intermediary. Freeman’s duties for the Supreme Court were usually clerical and included condensing opinions into short syllabi for publishing in the Illinois Supreme Court Reports. He was not responsible for responding to plaintiffs.\(^\text{11}\)

Freeman informed Bradwell that the Court felt compelled to deny her petition out of fear that “the disability imposed by her married condition” would preclude her from observing attorney-client privilege and other fiduciary duties of lawyers, as her marital status impeded her freedom to contract.\(^\text{12}\) This denial plainly assumed that Bradwell’s gender and marital status rendered her incompetent and did not include responses to any of Bradwell’s more complex legal arguments, which included a detailed analysis of the Revised Illinois Statutes. Bradwell cited the entirety of Chapter 90 to claim that the male pronoun is “used indefinitely for any person and may refer to either a man or a woman.”\(^\text{13}\) Bradwell’s reasoning in this petition is cogent and

\(^{10}\) Norman L. Freeman, *Reports of Cases at Common Law and in Chancery Argued and Determined in the Supreme Court of Illinois* (Springfield, 1894), XII.

\(^{11}\) Ibid.


\(^{13}\) Ibid.
compelling and it is fair to infer that the Court neglected to respond to such an argument because of its compelling logic. However, attempting to dissect and criticize Bradwell’s argument might well have led to a ruling contrary to the plainly sexist judgment the Justices delivered.

Jurisprudence surrounding the Privileges and Immunities Clause during the time of the Court’s decision further reveals the extent to which the Bradwell justices employed gratuitous sexism. The text of the clause is plain enough: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Prior to the Civil War and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, courts generally construed the Privileges and Immunities Clause to have narrow implications for state governments. In 1833, Justice Joseph Story remarked that “the intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.” Story thus construed the clause to provide visitors to states the same rights afforded to citizens of that state during their stay and did not interpret the clause to have implications for voting rights or employment. Likewise, Chief Justice Roger Taney briefly mentioned the clause in the infamous Dred Scott v. Sanford decision. Taney, writing for the majority, contended that clause conferred upon citizens “the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased… and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak.” Taney echoes Story’s contention, similarly arguing that the clause conferred upon the citizens the right to enter states freely and enjoy the rights of a citizen upon entry. These two interpretations placed Bradwell’s challenge on uncertain footing. Prior to

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16 *Dred Scott v. Sanford*, 60 U.S. 393 (1856)
her legal challenge, the United States court system did not interpret the clause to offer protection of a citizen’s right to practice law or hold any occupation. Since the Court’s previous analysis of the Privileges and Immunities Clause left no room for gender discrimination, these interpretations of the clause provide an explanation for why the Illinois Supreme Court obliterated the clause in both Bradwell and the Slaughter-House Cases. However, it cannot explain Bradley’s concurrence.

Prior to hearing Bradwell’s case, the Court had already narrowly construed the Privileges and Immunities Clause in the *Slaughter-House Cases*, a decision which places the Court’s unrestrained sexism on uncertain legal footing. The facts of these two cases are wholly divergent. The *Slaughter-House* cases dealt with the state’s police power to regulate pollution from meat packing factories\(^{17}\). However, they deal with the same constitutional clause and received the same decision from Court. In fact, the *Bradwell* decision included a simple citation of the Court’s recent decision in *Slaughter-House*. In the *Slaughter-House* decision, Justice Miller wrote that “it is clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other and depend upon different characteristics or circumstances in the individual.”\(^{18}\) Justice Miller further dismissed the plaintiff’s argument on the grounds that it “rests wholly on the assumption that the citizenship [of nation and state] is the same and the privileges and immunities guaranteed by the clause are the same.”\(^{19}\) With this narrow application of the Privileges and Immunities Clause, the Court essentially rendered the clause moot. It is this aspect of the Court’s decision that makes *Bradwell* such an exemplary instance of gender bias in the American legal system. The Court had legal precedent for deciding

\(^{17}\) *Slaughter-House Cases*, 83 U.S. 36 (1873)
\(^{18}\) Ibid.
\(^{19}\) Ibid.
against Bradwell that had nothing to do with her gender yet elected to focus on this arbitrary characteristic.

While it did not form binding legal precedent, Justice Bradley’s concurrence did include gender bias that remained present in legal doctrine long after its publication. Though they do not carry the same legal weight as majority opinions, concurrences can often be persuasive to other jurists as they formulate and write opinions. Before beginning his argument, Justice Bradley stated that he concurred with the Court’s findings in the majority opinion, but not for the reasons expounded in the opinion. In his concurrence, Bradley claimed that “the domestic sphere as that which properly belongs to the domain and functions of womanhood” and the “idea of a woman adopting a distinct and independent career from that of her husband” was “repugnant.” He further asserted that Bradwell’s claims assumed that the Privileges and Immunities clause afforded women as citizens the right “to engage in any and every profession, occupation, or employment in civil life.” Bradley’s prose included no complex legal reasoning or precedent, nor did it provide compelling arguments relating to Myra Bradwell’s inability to practice law. Though Bradley’s words were contained in a concurrence, they provided legal validation and endorsement of sexism and, in some manner, allowed such sentiments to persist in the United States.

IV. Impact on Similar Gender Discrimination Cases

The sexism that pervaded other bodies’ decisions regarding women entering the legal profession following Bradley’s concurrence further demonstrates the detrimental impact of Bradley’s discriminatory pronouncement. In 1874, Belva Lockwood attempted to argue on her own behalf in a district court. It took Judge Nott an hour and a half to formulate his opinion, and

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20 Bradwell v. Illinois 83 U.S. 130 (1873)
21 Ibid.
22 Ibid.
he finally denied Lockwood the opportunity to act as her own legal counsel because “a woman is without legal capacity to take the office of attorney.”

Moreover, when Lockwood applied for membership to the Maryland bar, Judge Magruder reminded Lockwood of the status of women by asserting that “God has set a bound for women. Man was created first and woman afterwards, and a part of him.” When Lockwood attempted to argue on her own behalf, Judge Magruder threw her out of the courtroom. Belva Lockwood was once again denied the right to practice law by a New York circuit court in 1894 by male judges employing similarly sexist reasoning. Lockwood petitioned the lower court for a writ of mandamus—a court order requiring a public official to perform their duties—requiring the Supreme Court of Appeals of Virginia to allow her to practice in that court. However, the lower court cited Bradwell as precedent, concluding that the right to practice law was neither a privilege nor an immunity granted to citizens of the United States, and especially not to female citizens. Moreover, the Court ruled that the state of Virginia held the right to construe whether or not the word “person” included women.

Similarly, in 1876, The Wisconsin Supreme Court denied Lavania Goodwell admission to the Supreme Court bar because, in the words of Chief Justice R.J. Ryan, “Our profession has essentially to do with all that is selfish and extortionate…It would be revolting to all female sense of innocence and the sanctity of their sex.” These instances bear striking resemblance to the language Bradley employed in his concurrence and rely on similarly specious logic.

25 Ibid.
26 In re Lockwood, 154 U.S. 116 (1894)
27 Ibid.
28 Ibid.
The Court’s decision in *Muller v. Oregon* in 1908 further demonstrates the longevity of Bradley’s concurrence and the effects of his sexist reasoning on legal thought decades after the *Bradwell* decision. In *Muller*, the Court ruled unanimously that an Oregon law that restricted the number of hours women were legally permitted to work was constitutional under the Fourteenth Amendment because Oregon maintained a compelling state interest in protecting the health of the female sex.\(^{30}\) The aspect of the *Muller* decision which is most salient to this examination of *Bradwell* is the language David Josiah Brewer employed in the opinion of the Court. Brewer contended that the frailty of the female body and the inferiority of the female sex justified the Oregon law, as women’s maternal functions were of paramount importance to society.\(^{31}\) This sexist reasoning mirrored exactly the ideology expounded in Bradley’s concurrence, which laid the groundwork for the advancement and legal codification of the separate spheres doctrine. In his concurrence, Bradley wrote that “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.”\(^{32}\) The *Muller* decision expressly ratified the separate spheres doctrine Bradley first mentioned in his concurrence. Justice Brewer tailored Bradley’s original conclusions about women’s role in society to justify upholding legislation that served no purpose other than encouraging discrimination, simply because the Court deemed the “proper discharge of her maternal functions” as vital to the success of American society.\(^{33}\) Brewer cited the “inherent difference between the two sexes and in the functions which they perform” as evidence for the necessity of the Oregon law.\(^{34}\) Similarly, Bradley cited the “natural and proper timidity” of women to justify

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\(^{30}\) *Muller v. Oregon*, 208 U.S. 412 (1908)  
\(^{31}\) Ibid.  
\(^{32}\) *Bradwell v. Illinois*, 83 U.S. 130 (1873)  
\(^{33}\) *Muller v. Oregon*, 208 U.S. 412 (1908)  
\(^{34}\) Ibid.
their exclusion from “the occupations of civil life.”\textsuperscript{35} Thus, both men relied on fallacious claims regarding the differences between men and women to justify their advocacy for separate spheres, and, by extension, legally sanctioned gender discrimination. While Brewer does not cite \textit{Bradwell} as precedent in the majority opinion, the numerous decisions that followed Bradley’s lead gave the Oregon court a legal foundation on which to base their claims.

The \textit{Bradwell} decision was not only used to deny women entry into the legal profession, but it also severely hindered the women’s suffrage movement during the nineteenth century. In fact, a federal circuit court in New York used the \textit{Bradwell} decision to deny Susan B. Anthony the right to vote in 1873. The previous year, Anthony had voted in the presidential election with the support of local election officials and was subsequently arrested, along with fourteen other women, and charged with illegal voting.\textsuperscript{36} Court proceedings during the trial further reveal the prevailing sexist attitudes of the legal system. During the hearing, Anthony was not permitted to testify on her own behalf,\textsuperscript{37} and when her legal counsel attempted to call her to the stand, the prosecuting attorney objected on the grounds that Anthony “[was] not competent as a witness in her own behalf.”\textsuperscript{38} At the conclusion of the trial, the judge ruled that Anthony voted illegally and ordered she pay a fine of one hundred dollars. In his ruling, Judge Crowley used the \textit{Bradwell} decision to support his claims that the Privileges and Immunities Clause did not protect Anthony’s right to vote because she was a woman.\textsuperscript{39} Thus, the \textit{Bradwell} decision was not limited to occupation in its power to deny women opportunity.

The judicial system employed the legal reasoning outlined in \textit{Bradwell} to deny a woman opportunity once more in \textit{Minor v. Happersett} in 1875. Virginia Minor brought suit against a

\textsuperscript{35} Ibid.
\textsuperscript{36} \textit{United States v. Susan B. Anthony} (1873)
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
Missouri country registrar, Reese Happersett, who denied her the opportunity to vote. Minor’s argument centered around the Privileges and Immunities Clause, like Anthony’s and Bradwell’s before her. Once again, the Court relied on its earlier interpretation of the clause contained in Bradwell to deny Minor the right to vote. Though Chief Justice Waite did not directly cite Bradwell as precedent, his argument exactly mirrored the majority opinion of the Court in that case. The Court determined that suffrage was not a privilege or immunity granted to citizens of a nation, and Missouri was able to deny her the right to vote on the grounds of her gender. In Bradwell, Justice Miller wrote that there are privileges and immunities granted to American citizens, but that “the right to admission to practice in the courts of a state is not one of them.” Similarly, Chief Justice Waite declared that the Privileges and Immunities Clause conferred a set of rights upon American women, but those rights did not include suffrage. Minor is but another example of the Supreme Court using a narrow interpretation of the Privileges and Immunities Clause to deny women equal citizenship. Thus, Bradwell remained an omnipresent barricade to women seeking equality under the law even in cases that did not center around access to employment.

The majority decision in Bradwell and Bradley’s concurrence played an integral role in barring numerous women from entering the legal profession, though these attitudes were certainly not ubiquitous. The prevailing national climate of progress towards gender equality at the time of Bradwell’s suit further reveals the extent to which the Court improperly employed sexist reasoning to reach its decision. In a second challenge submitted to the Illinois Supreme Court after her initial denial, Bradwell asserted that “the law schools of the nation have now

40 Minor v. Happersett, 88 U.S. 162 (1875)
41 Ibid.
42 Ibid.
43 Ibid.
many women in regular attendance, fitting themselves to perform the duties of the profession.” Moreover, in June of 1869, the Iowa Supreme Court ruled that the government could not deny Arabella Mansfield the opportunity to take the bar exam because of her gender. Certainly all states in the union did not support allowing women to practice law, but these instances reveal the beginnings of a gradual shift in national consciousness. In light of this shift in national attitude, it is fair to say that by denying Myra Bradwell admittance to the Illinois State Bar, the Supreme Court, and other lower courts defied widespread feminist sentiments.

The problematic precedent in Bradwell remained entrenched in American jurisprudence until 1971 when the Court first ruled in favor of a female petitioner in a gender discrimination case in Reed v. Reed. Sally Reed challenged the constitutionality of an Idaho probate law that directed courts to give preference to men over women in applications for administration of estates. However, this case did not include a reference to the Privileges and Immunities clause because of the Court’s prior destruction of its viability. Instead, Sally Reed relied on the Fourteenth Amendment’s Equal Protection Clause to form the basis of her argument. In Reed, the Court ruled that the Idaho law represented an “arbitrary legislative choice” that the Equal Protection Clause expressly prohibited. Reed’s victory does not represent a landmark victory for women, as its narrow impact served only to strike down the discriminatory Idaho law, but its timing reveals the extent to which Bradwell hindered women from formulating successful legal challenges to gender discrimination. The court heard arguments in Reed 98 years after it decided Bradwell, and though these two cases have dissimilar facts, their primary claims of gender discrimination are the same. Not only did the Court destroy the efficacy of the Privileges and

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46 Reed v. Reed, 404 U.S. 71 (1971)
47 Ibid.
Immunities Clause, but it also temporarily paralyzed the women’s rights movement in the United States.

V. The Court System’s Role in Social Change

Clearly, detailed analysis of Bradwell v. Illinois reveals its lasting pernicious effect on a nascent women’s rights movement. More broadly, however, the Court’s decision in Bradwell v. Illinois demonstrates the extent to which the Supreme Court decisions of the 19th and 20th centuries often reflected latent societal fears of change. When women such as Myra Bradwell petitioned state and federal courts for admittance to the bar or for the right to take entrance exams, they were effectively advocating radical change to previously immutable gender roles. Court decisions that looked upon female plaintiff’s cases unfavorably were, in essence, negative reactions to pending social change that would drastically restructure the cultural fabric of the United States. Courts granted small numbers of women law licenses, and some women attended law school and practiced law after the Bradwell decision. However, these cases exist as anomalies in the face of a society that largely rejected women working outside of the domestic sphere. Thus, in its era, Bradwell existed as a reflection of prevailing resistance to social change.

Bradwell v. Illinois did not halt the progress of the women’s rights movement permanently, however. Though the ruling dealt a substantial blow to the movement women eventually received the right to freely seek legal education and practice law nationwide. Almost a full century passed before a woman successfully challenged a discriminatory statute at the Supreme Court level. The Supreme Court finally ruled legally sanctioned gender discrimination unconstitutional in 1971 with its decision in Reed v. Reed, which came in the wake of powerful second wave feminism. Taken together, Bradwell and Reed serve as prime examples of the role
of the Supreme Court in either inhibiting or producing significant social change. The Court will generally resist acting as a catalyst for revolutionary ideas when faced with a social climate that seems predominantly apprehensive about the thought of social upheaval, as it was in *Bradwell*. However, the Burger Court faced a thoroughly different nation in the *Reed* case of 1971, when feminist sentiments had diffused nationally. In both cases, the Court’s decision was reflective of contemporary society and not revolutionary. While early feminist advocates met the *Bradwell* decision with disgust and attempted to defy the ruling, widespread outrage was not present in the wake of the ruling.\(^{48}\) Similarly, American society viewed *Reed* as an overdue destruction of archaic ideas regarding gender.\(^{49}\) In spite of the extraordinary progress the feminist movement achieved in the United States, *Bradwell* still stands as legal precedent. Moreover, though national opinions surrounding a woman’s ability to practice law continue to positively evolve, *Bradwell* remains a stain on the legal approach to defending the rights of women.

\(^{48}\) Martin, “*Reed v. Reed* at 40: Equal Protection and Women’s Rights.”

\(^{49}\) Ibid.


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