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Employment Practices and Sex Discrimination Judicial Extension of Beneficial Female Protective Labor Laws

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EMPLOYMENT PRACTICES AND SEX DISCRIMINATION: JUDICIAL EXTENSION OF BENEFICIAL FEMALE PROTECTIVE LABOR LAWS

During the first half of this century, a substantial majority of states enacted legislation designed to shield the growing number of women entering the work force from certain employment hazards and from potential abuse by employers.[1] Although widely believed to be desirable social legislation recognizing the physiological and functional differences between the sexes,[2] such laws are increasingly being

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[1] Exemplary of these laws are: (*1*) statutes regulating the maximum hours per day and per week that a woman may be employed (*see, e.g.*, CAL. LABOR CODE § 1350 (West 1971); ILL. ANN. STAT. ch. 48, § 5 (Smith-Hurd 1969); WIS. STAT. ANN. § 103.02 (Supp. 1973)) or restrictions on night work (*see, e.g.*, CONN. GEN. STAT. ANN. § 31-19 (1972); N.H. REV. STAT. ANN. §§ 275:17, 275:17-a (1955 & Supp. 1972); PA. STAT. ANN. tit. 43, §§ 104, 105 (Supp. 1973)), (*2*) laws preventing the placement of females in jobs requiring movement of objects over a specified weight (*see, e.g.*, CAL. LABOR CODE §§ 1251-52 (West 1971); MASS. ANN. Laws ch. 149, § 53A (Supp. 1972); OHIO REV. CODE ANN. § 4107.43 (Page 1965)), (*3*) legislation precluding employment within specified periods before and after delivery of a child (*see, e.g.*, MASS. ANN. Laws ch. 149, § 55 (1965); P.R. Laws ANN. tit. 29, §§ 467-74 (Supp. 1972)), (*4*) occupational prohibitions, such as bartending and mining (*see, e.g.*, ARIZ. REV. STAT. ANN. § 23-261 (1971) (coal mining); ARK. STAT. ANN. § 52-612 (1971) (coal mining); OHIO REV. CODE ANN. § 4107.43 (Page 1965) (crossing watchman, bellhop, express driver, and other occupations); R.I. GEN. Laws ANN. § 3-8-2 (Supp. 1972) (bartender)), (*5*) minimum wage (*see, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-311 to 329 (1971); ILL. ANN. STAT. ch. 48, §§ 198.1-.17 (Smith-Hurd 1966); WIS. STAT. ANN. § 104.02 (1957)) and overtime pay regulations applicable only to women (*see, e.g.*, ARK. STAT. ANN. § 81-601 (1960); CAL. LABOR CODE § 1350.5 (West Supp. 1973); N.M. STAT. ANN. § 59-5-1 (Supp. 1971)), (*6*) regulations requiring employers to afford females a lunch break (*see, e.g.*, ARK. STAT. ANN. § 81-410 (1960); OHIO REV. CODE ANN. § 4107.42 (Page 1965)) or a specified number of rest periods (*see, e.g.*, ARK. STAT. ANN. § 81-609 (1960); KY. REV. STAT. § 337.365 (1962)), and (*7*) legislation requiring special physical facilities for women (*see, e.g.*, ARK. STAT. ANN. § 81-620 (1960); CAL. LABOR CODE 1253 (West 1971); COLO. REV. STAT. ANN. § 80-2-13 (1963)).

[2] *See* PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PROTECTIVE LABOR LEGISLATION 1-2, 8-11, 22 (1963); *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 28-45 (1970) (statement of M. Wolfgang, Vice-President, Hotel and Restaurant Employees Union) [hereinafter cited as *Hearings*].

Historically, protective labor legislation has been invalidated on substantive due process grounds as inhibiting the freedom to contract in connection with one's business and the sale of one's labor. In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court held that a law providing that no laborer shall be required or permitted to work in a bakery more than 60 hours in a week or ten hours in a day was not, with regard to men, a legitimate exercise of the police power of the state. The law was viewed by the Court as an unreasonable and arbitrary interference with the right of the individual freely to contract with respect to his labor.

When protective laws regulate the working conditions of women, however, the states have wide discretion within which to exercise the police power to correct identified abuses. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-400 (1937); Adkins v. Children's Hosp., 261 U.S. 525, 570 (1923) (Holmes, J., dissenting); Miller v. Wilson, 236 U.S. 373 (1915); Muller v. Oregon, 208 U.S. 412 (1908).

challenged as emanating from Victorian notions of a woman's role in society and as proliferating incidents of employer discrimination.[3]

While often collectively referred to as female protective legisla-

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Female protective legislation first received constitutional sanction in Muller v. Oregon, 208 U.S. 412 (1908). In upholding a statute prohibiting the employment of women in laundries for more than ten hours per day, the Court held that there was a difference in the scope of legislative power over the regulation of employment of women as contrasted to that of men:

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

208 U.S. at 422-23.

Subsequent Supreme Court cases continued to uphold legislation pertaining only to terms of female employment. *See* Goesaert v. Cleary, 335 U.S. 464 (1948) (prohibiting female bartenders); West Coast Hotel Co. v. Parrish, *supra*, at 398-99 (minimum wage); Radice v. New York, 264 U.S. 292 (1924) (prohibiting women from working in restaurants at night); Miller v. Wilson, *supra*, at 382-83 (prohibiting overtime for women working in hotels); Riley v. Massachusetts, 232 U.S. 671 (1914) (setting maximum hours for women in factories). *See generally* Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U.L. REV. 481 (1971).

[3] Protective legislation prevents . . . women from going into the higher salary brackets. Yes, it certainly does.

> Women are protected—they cannot run an elevator late at night and that is when the pay is higher.
>
> They cannot serve in restaurants and cabarets late at night—when the tips are higher—and the load, if you please, is lighter.
>
> So it is not exactly helping them—oh, no, you [men] have taken beautiful care of the women.

110 CONG. REC. 2580-81 (1964) (remarks of Representative St. George). A similar complaint was voiced by Representative Martha Griffiths:

> Some people have suggested to me that labor opposes "no discrimination on account of sex" because they feel that through the years protective legislation has been built up to safeguard the health of women. . . . Most of the so-called protective legislation has really been to protect men's rights in better paying jobs.

Id. at 2580.

See also CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON LABOR STANDARDS 2 (1968); INTERDEPARTMENTAL COMM. ON THE STATUS OF WOMEN, AMERICAN WOMEN 1963-1968, at 19-20 (1968).

The topics of female protective laws and sex discrimination have been popular with legal commentators as well. *See, e.g.*, L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 111-31, 143-47, 178-92 (1969); Barnard, *The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved?*, 17 WAYNE L. REV. 25 (1971); Berg, *Title VII: A Three-Years' View*, 44 NOTRE DAME LAW. 311, 332-36 (1969); Brown, Emerson, Falk & Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 922-36 (1971); Durant, *The Validity of State Protective Legislation for Women in Light of Title VII of the Civil Rights Act of 1964*, 6 SUFFOLK L. REV. 33 (1971); Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 NOTRE DAME LAW. 514 (1972); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970); *Developments in the Law–Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1186-95 (1971).

tion, certain of these laws have an exclusionary effect since they pertain to women generally and thereby preclude individually qualified females from being considered for certain jobs.[4] Other protective statutes have proven beneficial to women by improving their working conditions and increasing their compensation.[5] However, when females receive additional benefits by virtue of state law, a discriminatory situation results with respect to similarly situated males who do not receive such benefits. Protective legislation resulting in female sex discrimination has been found in conflict with and thus pre-empted by Title VII of the Civil Rights Act of 1964.[6] A controversy exists as to whether protective laws genuinely considered to confer a benefit or privilege on women are to be pre-empted as well, or whether the differential in employment benefits between the sexes resulting from these laws will be eliminated by extending their benefits to male employees. This extension argument surfaced during the lively debate surrounding the Equal Rights Amendment,[7] and has been urged by proponents of the Amendment to quiet the fears of those who predict that the Equal Rights Amendment will adversely affect the hard-won beneficial protective labor legislation for women.[8]

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[4] *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (maximum hours and weightlifting statutes); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7150, 3 F.E.P. Cas. 968, 973-74 (N.D. Ohio 1971), *aff'd*, 466 F.2d 812 (1972) (maximum hours and weightlifting laws); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096 (S.D. Ohio 1971) (occupational prohibitions, maximum hours, and weightlifting laws); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 177-78, 281 N.E.2d 1, 6 (1972) (occupational prohibitions and maximum hour statutes).

[5] For example, a Wisconsin statute (WIS. STAT. ANN. § 103.16 (1957)) in pertinent part provides:

> Every person or corporation employing females in any manufacturing, mechanical or mercantile establishment in the state of Wisconsin shall provide suitable seats for the females so employed, and shall permit the use of such seats by them when they are not necessarily engaged in the active duties for which they are employed.

New Mexico also has a beneficial protective statute, which provides in pertinent part:

> No female shall be employed . . . within the state more than eight (8) hours in any one (1) day of twenty-four (24) hours, nor more than forty-eight (48) hours in any one (1) week of seven (7) days. The provisions of this act . . . shall not apply to . . . any female who signs a written agreement to work more than eight (8) hours a day or more than forty (40) hours a week; provided that every such agreement shall provide for an hourly rate of compensation equal to one and one-half (1½) times the regular hourly rate of pay, for each hour in excess of forty (40) hours which are worked in any one (1) week.

N.M. STAT. ANN. § 59-5-1 (Supp. 1971).

[6] 42 U.S.C. §§ 2000e to 2000e-15 (1970). *See* note 9 and accompanying text *infra*.

[7] H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). The proposed Amendment is set forth in the text accompanying notes 75-76 *infra*.

[8] *See* notes 78 & 82-84 and accompanying text *infra*.

I

EXTENSION BY FORCE OF TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices on the basis of sex.[9] Although the prohibitions of the Civil Rights Act could be read as not affecting the validity of existing state protective legislation,[10] the "equal treatment" mandate of Title VII has been construed to permit only narrow exceptions to

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[9] Title VII sets forth the basic substantive law for employers:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1970). The provision applies to employers of 25 or more employees (*id.* § 2000e(b)), but explicitly excepts state and federal governmental units (*id.* § 2000e(b)(1)), private membership clubs (*id.* § 2000e(b)(2)), and religious enterprises and educational institutions (*id.* § 2000e-1).

[10] The threshold question is whether protective laws have continued validity in light of the nondiscriminatory requirement of Title VII. The legislative history surrounding the adoption of "sex" as one of the forbidden bases of discrimination in the Civil Rights Bill is inconclusive as to whether Congress intended to pre-empt certain protective legislation of the states. The initial bill was directed at the elimination of employment discrimination on the basis of race, color, religion, or national origin. H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 10, 27 (1963). Sex as a prohibited basis of discrimination was added to the bill by one of its strongest opponents, Representative Smith of Virginia. *See* 110 CONG. REC. 2577 (1964).

Representative Celler, the floor manager of the bill, used the threat of federal pre-emption when arguing against the amendment: "Would the many state and local provisions regulating working conditions and hours of employment for women be struck down? . . . This is the entering wedge, an amendment of this sort. The list of foreseeable consequences . . . is unlimited." 110 CONG. REC. 2577-78 (1964). Representative Multer was in accord with this concern, suggesting the possible "repeal by implication" of female protective laws. *Id.* at 2732. In contrast, Representatives Griffiths and St. George indicated they would welcome elimination of such laws by pointedly raising the issue that some protective legislation has actually been harmful, having prevented women from holding certain higher paying jobs. *Id.* at 2580-81. Although joining with her two colleagues in support of the Amendment, Representative Kelley noted that she was "sure the acceptance of the amendment [would] not repeal the protective laws of the several States." *Id.* at 2583.

With such a dichotomy in the views expressed, little congressional intent can be found, except, perhaps, an implicit recognition that some protective laws were worth preserving while others had worked in derogation of female equality.

> [I]t seems unrealistic to speak of an intent of Congress in the sense of an actual consensus among the supporters of the amendment that it would accomplish any particular result not plainly inferable from the language of the amendment and the logic of the title as a whole.

Berg, *supra* note 3, at 332 n.117. *But see* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 n.7 (9th Cir. 1971). *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967).

the principle that females be hired and promoted solely on the basis of their individual capabilities.[11] Differentials in employment prac-

[11] Initially, the bona fide occupational qualification (BFOQ) exception was thought to allow distinctions in employment practices based on sex resulting from an employer's adherence to state protective laws and regulations.

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e) (1970). Originally, the Equal Employment Opportunity Commission held that in some instances state protective laws would be regarded as a legislative determination of the BFOQ exception's applicability.

> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception.

30 Fed. Reg. 14,927 (1965). *See also* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 364-65 (S.D. Ind. 1967), *rev'd*, 416 F.2d 711 (7th Cir. 1969).

Presently, however, the BFOQ is narrowly construed as not shielding state protective laws from being superseded by the Civil Rights Act. "Construed . . . broadly, the exception will swallow the rule." Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969); *accord*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7151, 3 F.E.P. Cas. 968, 975 (N.D. Ohio 1972); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1094-95 (S.D. Ohio 1971); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 181-82, 281 N.E.2d 1, 8 (1972); *cf.* Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 717-18 (7th Cir. 1969). *But cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (BFOQ defined as attribute "reasonably necessary to the normal operation of that particular business or enterprise").

The recently revised Equal Employment Opportunity Commission regulations provide that the BFOQ exception "should be interpreted narrowly." 37 Fed. Reg. 6835, 6836 (1972). Only "[w]here it is necessary for the purpose of authenticity or genuineness" will sex be considered a BFOQ. *Id.* The Commission gives as an example of an appropriate application of the exception an audience's preference for an actor or actress playing a given role. *Id.*

Both a general saving clause (42 U.S.C. § 2000h-4 (1970)) applicable to the entire 1964 Civil Rights Act and a specific saving clause (*id.* § 2000e-7) added to Title VII were designed to ensure that Congress would not be understood as intending to occupy the field to the exclusion of similar state fair employment laws. The specific saving clause was designed to preserve the effectiveness of state antidiscrimination laws. *See* 110 CONG. REC. 7243, 12,721 (1964) (remarks of Senators Case and Humphrey). The general saving clause was in the Act to retain state laws aimed at preventing or punishing discrimination. H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 27 (1963) (remarks of Representative Meader).

However, no specific mention is made of state protective labor legislation in either of these two clauses. Accordingly, the courts have found that Congress did not specifically intend to preserve or to pre-empt protective laws by either of the saving clauses. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7150, 3 F.E.P. Cas. 968, 973 (N.D. Ohio 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1094 (S.D. Ohio 1971); Utility Workers Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1264 (C.D. Cal. 1970).

This interpretation is buttressed by the fact that the saving clauses were included in the Civil Rights Bill *before* "sex" was added as an impermissible category of discrimination. Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 179-80, 281 N.E.2d 1, 7 (1972).

tices and conditions resulting from state enforcement of female protective labor laws are therefore in violation of the 1964 Civil Rights Act.[12] It follows that an employer cannot refuse to hire or promote women solely to avoid providing a benefit required by a protective law.[13] Nor can an employer continue to afford female employees benefits pursuant to state laws while failing to provide the same benefits to males.[14] Either both or neither of the sexes must be provided the job benefits.

A. *Developing the Framework for Extension*

The courts and the Equal Employment Opportunity Commission (EEOC), the federal agency charged with the responsibility of administering Title VII,[15] had three alternatives for the elimination of differentials in job benefits resulting from female protective legislation:[16] (*1*) finding all protective legislation inconsistent with and thus pre-empted by Title VII; (*2*) holding some of the protective laws superseded while retaining others by extending the benefits to male employees; or (*3*) equalizing the differential in job benefits by extending all protective laws to embrace male employees.[17]

[12] *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225, 1227 (9th Cir. 1971); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7150-51, 3 F.E.P. Cas. 968, 973-75 (N.D. Ohio 1971); Garneau v. Raytheon Co., 323 F. Supp. 391, 394 (D. Mass. 1971); General Elec. Co. v. Young, 4 Empl. Prac. Dec. 6233, 6237, 3 F.E.P. Cas. 560, 565 (W.D. Ky. 1971); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 474 (W.D. Pa. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 609 (E.D. La. 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096 (S.D. Ohio 1971); Rinehart v. Westinghouse Elec. Corp., 4 Empl. Prac. Dec. 5053, 5055 3 F.E.P. Cas. 851, 854 (N.D. Ohio 1971); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1307 (S.D. Ill. 1970); Utility Workers Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1265 (C.D. Cal. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Ore. 1969); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 183, 281 N.E.2d 1, 9 (1972). *See also* 37 Fed. Reg. 6835, 6836 (1972).

[13] *See* cases cited in note 12 *supra*. *See also* 37 Fed. Reg. 6835, 6836 (1972).

[14] Title VII is equally applicable to sex-based discriminatory practices adverse to males. *See* Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1970); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 179, 281 N.E.2d 1, 7 (1972). *See also* Steelworkers Local 1104 v. United States Steel Corp., 4 Empl. Prac. Dec. 6328, 6342, 4 F.E.P. Cas. 1103, 1117 (N.D. Ohio 1972), *aff'd*, 5 Empl. Prac. Dec. 7974, 5 F.E.P. Cas. 1121 (6th Cir. 1973).

[15] 42 U.S.C.A. § 2000e-4 (Supp. 1972), *amending* 42 U.S.C. § 2000e-4 (1970). The EEOC had only the power to investigate charges of violations of Title VII and to bring about compliance with the statute through "informal methods of conference, conciliation, and persuasion." Act of July 2, 1964, Pub. L. No. 88-352, § 706, 78 Stat. 259. The Commission had no authority to issue judicially enforceable cease and desist orders. *See* Sheet Metal Workers Local 104 v. EEOC, 439 F.2d 237, 238-39 (9th Cir. 1971); Durant, *supra* note 3, at 42 n.70. The Equal Employment Opportunity Act of 1972 (42 U.S.C.A. § 2000e-5 (Supp. 1972)) significantly enhances the power of the EEOC to prevent unlawful employment practices.

[16] *See* Durant, *supra* note 3, at 42-46; *cf.* L. KANOWITZ, *supra* note 3, at 117-24.

[17] Faced with little guidance from legislative history and substantial disagreement among interested union and nonunion female employees, the EEOC took a very cautious position on the continued validity of state protective legislation. *See* Berg, *supra* note 3, at 333 n.121. The

The third alternative is not tenable given industrial realities.[18] For example, the extension of maximum-hours laws to male employees would be intolerable in many businesses which, either because of the seasonal nature of the work or because of the impossibility of precisely predicting labor needs, require considerable overtime employment.[19]

The appeal of the second alternative, selective pre-emption, is that it would permit the retention of that protective labor legislation which is genuinely beneficial to women.[20] Following this line of reasoning, protective laws can be divided into two categories: (*1*) those which "prohibit" or "restrict" the employment of women in particular circumstances;[21] and (*2*) those which confer additional benefits on female employees.[22] Although some regard the first

EEOC simply found it "difficult, from a legal point of view, to assume that Congress intended to overthrow the laws and regulations of over forty states." *Id.* at 333.

Shortly after taking office, the chairman of the EEOC called on Congress to clarify its intent regarding any seeming conflicts between state protective laws and the sex prohibition of Title VII. *See Hearings on H.R. 8998 and H.R. 8999 Before the Subcomm. on Labor of the House Comm. on Educ. and Labor,* 89th Cong., 1st Sess. 105 (1965) (statement of F. Roosevelt Jr., Chairman, EEOC).

In its Guidelines on Discrimination Because of Sex, adopted in November 1965, the EEOC chose a compromising posture. While calling on states to update "archaic provisions" of their protective labor laws and renewing an invitation to Congress to consider this problem, the Commission postponed the more difficult question of pre-emption of protective laws by allowing "such state laws [and] regulations as a basis for application of the . . . [BFOQ] exception." 30 Fed. Reg. 14,926-27 (1965).

For nearly three years following the adoption of the Guidelines, the EEOC did not declare that any protective laws were pre-empted or that Title VII required extension of benefits to male employees. *See* Berg, *supra* note 3, at 333-36. Because the Commission had no enforcement powers of its own, it came to realize that only litigation would resolve the issue. Accordingly, in August 1966, the EEOC issued a policy statement that it would not make any determination on the merits of cases in which parties were alleging discrimination as a result of state protective legislation. Rather, it would merely inform the charging party of the right to seek a judicial determination under 42 U.S.C. § 2000e-5(e). *Id.* at 335. In February 1968, the EEOC rescinded the policy statement of 1966, and gave notice that "in cases where the effect of State protective legislation appears to be discriminatory rather than protective, the Commission will proceed to decide whether that legislation is superseded by the [1964 Civil Rights] Act." 33 Fed. Reg. 3344 (1968).

[18] L. KANOWITZ, *supra* note 3, at 183; Barnard, *supra* note 3, at 65; Brown, Emerson, Falk & Freeman, *supra* note 3, at 928-29; Durant, *supra* note 3, at 54.

[19] Similarly, many businesses would find unduly burdensome the extension of laws prohibiting the lifting or carrying of weights over a specified maximum. The extension of laws restricting night work would completely shut down those employers whose manufacturing process requires uninterrupted operation or whose plant and equipment is so expensive that economics necessitate three work shifts.

[20] *See* L. KANOWITZ, *supra* note 3, at 123, 182, 188; Durant, *supra* note 3, at 55-56; Note, *supra* note 3, at 1188-89.

[21] *See* statutes cited in groups (*1*)-(*4*) in note 1 *supra.*

[22] *See* statutes cited in groups (*5*)-(*7*) in note 1 *supra.* The terms "prohibitive" and "beneficial" have become words of art commonly used as a shorthand means of referring to these two categories of protective laws. Use of these terms is not intended to imply that

category of protective legislation to be highly desirable,[23] these employment laws preclude all women from being placed in those jobs with work requirements considered by state legislatures to be unsuitable for females.[24] Since the effect is to ignore an individual female's personal qualifications and choice of employment, these "prohibitive" or "restrictive" female protective laws are increasingly being considered pre-empted by Title VII.[25]

The "beneficial" category of protective labor legislation does not bar women from certain jobs. Instead, these laws are designed to improve the working conditions of women and to increase their compensation by requiring that minimum benefits or facilities be provided whenever an employer hires or promotes a woman.[26] Accordingly, these laws can have both favorable and unfavorable effects on women. For a female job-seeker the result is discriminatory if the employer is inclined to hire a male to avoid providing the additional benefits required for female employees.[27] Once employed, however,

"prohibitive" laws are always detrimental to females or that laws in the "beneficial" category cannot result in discriminatory employment practices.

The distinction between the two categories of protective laws was first made by the EEOC at an early stage of the interpretation of Title VII. *See* 30 Fed. Reg. 14,927 (1965). Curiously, these early guidelines only implicitly suggested a reason for the distinction. A clearer rationale for the categories began to surface the following year. *See* EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS: JULY 2, 1965 THROUGH JULY 1, 1966, at 24 (1966) (opinion letter of March 1, 1966, GC 227-66, and opinion letter of March 22, 1966, GC 181-66). *See generally* Barnard, *supra* note 3, at 41-44; Brown, Emerson, Falk & Freeman, *supra* note 3, at 922-23; Durant, *supra* note 3, at 34; Kennedy, *supra* note 3, at 515-16.

[23] *See* note 2 and accompanying text *supra*.

[24] *See* note 4 and accompanying text *supra*.

[25] *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (maximum hours and weight lifting); Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971) (maximum hours); General Elec. Co. v. Young, 4 Empl. Prac. Dec. 6233, 3 F.E.P. Cas. 560 (W.D. Ky. 1971) (maximum hours); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971) (maximum hours); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971) (maximum hours); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 3 F.E.P. Cas. 968 (N.D. Ohio 1971) (maximum hours and weight lifting); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971) (prohibited occupations, maximum hours, and weight lifting); Rinehart v. Westinghouse Elec. Corp., 4 Empl. Prac. Dec. 5053, 3 F.E.P. Cas. 851 (N.D. Ohio 1971) (prohibited occupations and weight lifting); Utility Workers Local 246 v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970) (weight lifting); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970) (maximum hours); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969) (weight lifting); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972) (occupational prohibitions and maximum hours).

Several state attorneys general have also ruled that their state protective laws are superseded by the 1964 Civil Rights Act as to Title VII employers. *See, e.g.*, [1972-1976] KY. ATT'Y GEN. OP. 2-132 (maximum hours); 59 WIS. ATT'Y GEN. OP. 114 (1970) (maximum hours). *See also* 37 Fed. Reg. 6835, 6836 (1972).

[26] *See* note 5 and accompanying text *supra*.

[27] Considering an Arkansas statute requiring that females be paid time and a half for hours worked in excess of eight hours per day and 48 hours per week, the court in Potlatch Forests, Inc. v. Hays, 318 F. Supp. 1368, 1373 (E.D. Ark. 1970), *aff'd*, 465 F.2d 1081 (8th Cir. 1972), stated:

the female is in a better position than her male counterparts since she must be afforded benefits in accordance with state law.[28]

Thus, although the two categories of protective laws can be conceptually distinguished, each category can result in discriminatory practices against women.[29] The question that remains is whether beneficial protective laws conflict with Title VII and are pre-empted by it.[30]

B. *The Remedy of Extension*

Potlatch Forests, Inc. v. Hays[31] was the first judicial attempt to reconcile an alleged conflict between Title VII and a state beneficial

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The Arkansas statute does not forbid an employer from hiring women for more than eight hours a day or forty-eight hours a week; but, in the Court's estimation, the purpose of the statute was to discourage such employment by commanding premium pay for it.

[28] In the latter case it is really the male employees who are being discriminated against. This double-edged discrimination has led one judge to quip that "[o]ne is tempted to rejoin that a state regulation which discriminates against both sexes discriminates against neither." Rivera v. California Div. of Indus. Welfare, 265 Cal. App. 2d 576, 604, 71 Cal. Rptr.739, 762 (1968).

[29] For cases in which beneficial protective laws have resulted in discriminatory practices adverse to females, see Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972) (rest periods); Steelworkers Local 1104 v. United States Steel Corp., 4. Empl. Prac. Dec. 6328, 4 F.E.P. Cas. 1103 (N.D. Ohio 1972), *aff'd*, 5 Empl. Prac. Dec. 7974, 5 F.E.P. Cas. 1121 (6th Cir. 1973) (lunch breaks); General Elec. Co. v. Young, 4 Empl. Prac. Dec. 6233, 3 F.E.P. Cas. 560 (W.D. Ky. 1971) (rest periods); Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 3 F.E.P. Cas. 968 (N.D. Ohio 1971) (seating law); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972) (rest periods, lunch breaks, and seating laws).

For examples of discriminatory employment practices resulting from prohibitive protective legislation, see cases cited in note 25 *supra*.

[30] In circumstances in which state beneficial protective laws have clearly resulted in discriminatory employment practices (*see* note 29 *supra*), the unavoidable conclusion is that these laws frustrate the equal treatment policy of Title VII. Therefore, consideration of the supremacy clause becomes paramount in determining whether beneficial laws are pre-empted by Title VII.

Determining whether a state statute is inconsistent with a federal law and thus superseded by force of the supremacy clause requires "a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict." Perez v. Campbell, 402 U.S. 637, 644 (1971). In construing the two laws, it is established that conflicts are not to be presumed and that both statutes should be read in harmony whenever possible. Reid v. Colorado, 187 U.S. 137, 148 (1902). The court must look to the effect of the state statute on the objectives of the federal law and not to the purpose of the state legislature in enacting the law. Perez v. Campbell, 402 U.S. 637, 652 (1971). Various judicial "tests" have been advanced for determining whether a state law or regulation should be invalidated under the supremacy clause: whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); if "the purpose of the federal statute would to some extent be frustrated by the state statute" (Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714, 722 (1963)); or if there is "such actual conflict between the two [laws] that both cannot stand" (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963)). It is apparent that none of these formulae provides a litmus paper test for determining supremacy clause pre-emption. *See* Hines v. Davidowitz, *supra*.

[31] 318 F. Supp. 1368 (E.D. Ark. 1970), *remanded on other grounds*, No. 20654 (8th Cir., filed

protective law by adopting the extension approach. In *Hays*, an employer brought suit against the Arkansas Commissioner of Labor seeking declaratory and injunctive relief[32] with regard to the validity of a state labor law requiring that women be paid time-and-a-half for all hours worked in excess of eight hours per day and forty hours per week.[33] The employer argued that the state law could not be enforced against Title VII employers because the classification was on its face "discriminatory on account of sex and . . . contrary to and inconsistent with the provisions of Title VII."[34] The employer conceded that if the state law was not pre-empted, the equal treatment policy of Title VII required extension of the overtime pay provisions to men.[35] The employer's position was simply that the federal law occupied the field to the exclusion of state laws which would otherwise "prevent national uniform operation of federal legislation intended by Congress to provide a uniform solution to a national problem."[36]

The federal district court was careful to note that no issue of discrimination against male employees had been presented.[37] Nor had the employer contended that the state statute resulted in discriminatory practices against women,[38] although the court recognized that the practical effect "of the statute was to discourage [female] employment by commanding premium pay for it."[39]

The court reasoned along the following lines: (*1*) Title VII requires that male and female employees be treated equally; (*2*) in this case there was no factual showing that the overtime pay law had resulted in discriminatory practices; (*3*) therefore, the state and federal laws were not in conflict so as to call for supremacy clause pre-emption; (*4*) since the "overtime pay for women" law was not pre-empted, equal treatment required that the overtime pay requirement be extended to males.[40] The court was careful to leave

May 7, 1971) (unreported), *aff'd*, 3 Empl. Prac. Dec. 7008, 4 F.E.P. Cas. 112 (E.D. Ark. 1971), *aff'd*, 465 F.2d 1081 (8th Cir. 1972).

[32] 318 F. Supp. at 1369.

[33] ARK. STAT. ANN. § 81-601 (1960):

> No female shall be employed in this State . . . by any person, persons, partnership, or corporation whatsoever in any capacity except in those occupations that are expressly exempted by law, for more than eight (8) hours in any one [1] day or more than six (6) consecutive days in any one (1) week, unless such female employee receives compensation for her employment in excess of the hours above specified at the rate of not less than one and one-half [1½] times the regular rate at which she is employed. . . .

[34] 318 F. Supp. at 1371.

[35] *Id.* at 1374.

[36] *Id.*

[37] *Id.* at 1373.

[38] *See* 465 F.2d at 1082 n.3.

[39] 318 F. Supp. at 1373.

[40] *Id.* at 1375.

open the question of whether there would be pre-emption if sex discrimination were shown to result from a beneficial protective law.[41]

The Court of Appeals for the Eighth Circuit affirmed.[42] Apparently, the court of appeals mistakenly understood the employer's argument to be that the state statute had resulted in discrimination against his male employees in violation of Title VII.[43] Significantly, the Eighth Circuit opted for the extension approach in the face of an allegation of male discrimination thus inadvertently going beyond the holding of the district court. The rationale of the court of appeals appeared to be that any conflicts between Title VII and beneficial protective legislation could be avoided given the *possibility* of extension.[44]

A more analytical approach would first distinguish between prohibitive and beneficial protective laws. Whereas prohibitive laws preclude women from being placed in certain jobs,[45] beneficial laws do not compel an employer to discriminate against women. The latter statutes require him only to provide additional pay or facilities.[46] When this distinction is recognized, the test of supremacy clause pre-emption becomes not whether the state beneficial law *resulted* in discriminatory practices, but rather whether the law *compelled* it.[47] It

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[41] In two other cases courts have refused to find state protective laws pre-empted by Title VII without a showing of discrimination between the sexes arising from the state law. *See* Rivera v. California Div. of Indus. Welfare, 265 Cal. App. 2d 576, 71 Cal. Rptr. 739 (1968); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971).

[42] 465 F.2d at 1082-83, 1084. On appeal, the employer argued for the first time that the state statute discriminated against women by discouraging their employment. The employer produced a letter written by the Arkansas Department of Labor as evidence that the purpose of the law was to limit overtime hours of women. But the court refused to consider the contention because the district court had made no finding in that regard, nor was there evidence in the record tending to show that the statute had a discriminatory effect on women. *Id.* at 1082 n.3.

[43] *Id.* at 1082, 1083. *See* notes 37 & 41 and accompanying text *supra.*

[44] 465 F.2d at 1082. Extension is generally available as a remedy in the case of beneficial laws because affording these benefits to males places only a reasonable burden on the employer. *Id.* at 1084. *But see* note 72 *infra.* Extension of prohibitive laws is generally not possible. *See* notes 18-19 and accompanying text *supra.*

The reasoning of the court tends to gloss over the mechanics of how it reached the result of extending the statute to males. The court merely quoted a passage from the opinion of the district court for the proposition that extension did not "impede" or "frustrate" the purpose of the Civil Rights Act. 465 F.2d at 1082.

[45] *See* note 4 and accompanying text *supra* and text accompanying note 24 *supra.*

[46] *Accord,* CCH 1968-1973 EEOC Dec. 4428, 4429-30 (1971); CCH 1968-73 EEOC Dec. 4044, 2 F.E.P. Cas. 78, 79 (1969).

[47] *See* General Elec. Co. v. Young, 4 Empl. Prac. Dec. 6233, 6237, 3 F.E.P. Cas. 560, 564-65 (W.D. Ky. 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1098 (S.D. Ohio 1971); Rivera v. California Div. of Indus. Welfare, 265 Cal. App. 2d 576, 604-05, 71 Cal. Rptr. 739, 762 (1968); CCH 1968-1973 EEOC Dec. 4629, 4630, 4 F.E.P. Cas. 843 (1972); CCH 1968-1973

follows that there is no conflict between the statutes such that both Title VII and beneficial protective laws cannot stand.[48]

Having concluded that beneficial laws are not pre-empted, the problem of reverse discrimination arises since females are receiving greater benefits than similarly situated males. Although this discrimination is also contrary to the mandate of Title VII,[49] it is not forced upon the employer. The differential in benefits can be eliminated by extending the overtime pay to the males.[50]

EEOC Dec. 4428, 4429-30 (1971); CCH 1968-1973 EEOC Dec. 4044, 2 F.E.P. Cas. 78, 79 (1969); [1972-1976] KY. ATT'Y GEN. OP. 2-132. This test of supremacy clause pre-emption would seem to be in line with the rule that state and federal laws should be construed if possible so as to avoid conflicts between them. *See* note 30 supra.

But cf. Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972). In *Walker*, an employer sought a declaratory judgment that Ohio protective laws requiring seats, lunchroom facilities, and meal periods for women, and laws limiting hours and prohibiting certain occupations of women were in conflict with Title VII. The court so held as to the seating, lunchroom, and meal period laws because they provided privileges to females not accorded to males. *Id.* at 178-79, 281 N.E.2d at 6-7. This suggests a supremacy clause pre-emption test in which the court looks not to what the state law compels but to the discriminatory result of the law. *See also* Manning v. General Motors Corp., Empl. Prac. Dec. 7145, 3 F.E.P. Cas. 968 (N.D. Ohio 1971), *aff'd*, 466 F.2d 812 (6th Cir. 1972) (seating law for females held pre-empted by Title VII); N.M. Att'y Gen. Op. No. 72-22 (1972) (female overtime pay law pre-empted by Title VII).

[48] *See* note 30 *supra.*

[49] *See* notes 14 & 28 and accompanying text *supra.*

[50] Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1082 (8th Cir. 1972). Both the district and circuit courts in *Hays* drew support for their opinions by analogy to § 3 of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1970). 318 F. Supp. at 1375; 465 F.2d at 1083. *See* Rivera v. California Div. of Indus. Welfare, 265 Cal. App. 2d 576, 605 n.47, 71 Cal. Rptr. 739, 762 n.47 (1968).

The Equal Pay Act provides in pertinent part:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1)(1970). This provision amends the Federal Fair Labor Standards Act of 1938, which also provides:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . .

Id. § 218.

The Wage and Hour Division of the Department of Labor has interpreted § 3 of the Equal Pay Act as requiring an employer paying women minimum wages and overtime pursuant to state protective laws to pay the higher wage rate to male employees. 29 C.F.R. §§ 800.160, .163 (1972).

Although the administration of the Equal Pay Act of 1963 presents an issue similar to that involved in the debate over extension of beneficial protective laws and is of persuasive value (*cf.* Ammons v. Zia Co., 448 F.2d 117, 119-20 (10th Cir. 1971); Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (10th Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Hodgson v. Brookhaven Gen'l Hosp., 436 F.2d 719, 727 (5th Cir. 1970)), the problem with the analogy is that in drafting Title VII Congress did not express an intent, like that in the Equal Pay Act, to raise wages when

The EEOC has taken a strong position in favor of extension in its recently amended Guidelines on Discrimination Because of Sex.[51] In *Griggs v. Duke Power Co.*,[52] the Supreme Court held that EEOC Guidelines are entitled to "great deference. . . . [S]ince the [Civil Rights] Act and its legislative history support the Commission's construction."[53] *Griggs*, however, was decided in the context of racial discrimination,[54] and the legislative history of the addition of the "sex" prohibition to Title VII, unlike that of the "race" prohibition, affords little help in interpreting the Act.[55] Nevertheless, the "great deference" wording of the Court lends weight to the extension approach.[56]

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differentials in pay are found to exist. Nor is the analogy appropriate when discussing other beneficial protective laws such as rest breaks, lunch periods, or seating laws.

[51] (3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) *It does not provide the same benefits for male employees.*

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) *It does not provide the same benefits for male employees.* If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

37 Fed. Reg. 6835-36 (1972) (emphasis added). These revised Guidelines became effective April 5, 1972. The original Guidelines adopted by the EEOC in November 1965 were first amended in February 1968. 30 Fed. Reg. 14,926-27 (1965); 33 Fed. Reg. 3344 (1968).

Although the extension approach has only recently been adopted in the form of a regulation, the EEOC foreshadowed its position as long ago as 1966. EEOC, *supra* note 22, at 24. *See* CCH 1968-1973 EEOC Dec. 4629, 4630, 4 F.E.P. Cas. 843 (1972); CCH 1968-1973 EEOC Dec. 4428, 4429-30 (1971); CCH 1968-1973 EEOC Dec. 4044, 2 F.E.P. Cas. 78 (1969).

For a discussion and cases presenting issues arising out of application of the "business necessity" test of the Guidelines, see note 72 *infra*.

[52] 401 U.S. 424 (1971). *Griggs* dealt with the EEOC's Guidelines on Employment Testing Procedures.

[53] *Id.* at 434; *accord*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969); *see* Udall v. Tallman, 380 U.S. 1, 16 (1965). Technically, however, a court is free to interpret the law differently in any case that presents an issue similar to those addressed in the Guidelines. American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100, 1103 (D.D.C. 1968), *stay vacated*, 1 Empl. Prac. Dec. 1416, 1 F.E.P. Cas. 703 (D.C. Cir. 1969).

[54] 401 U.S. at 426-28.

[55] *See* note 10 *supra*.

[56] Following the *Griggs* opinion one federal district court stated:

In sustaining the EEOC's application of the statutory interpretation, it is not necessary

C. *Precedent Against Extension*

The recent case of *Burns v. Rohr Corp.*[57] was the first squarely to confront and reject the extension argument. In *Burns*, the employer had adopted a policy pursuant to a regulation of the California Industrial Welfare Commission granting all female employees a formal ten-minute rest break every four hours.[58] A recently discharged male employee instituted suit alleging discriminatory employment practices in the employer's failure to afford males similar rest-break privileges. The employee drew the distinction between prohibitive and beneficial protective legislation and contended, as had the defendant in *Hays*,[59] that the pre-emption issue should not be reached by the court because equal treatment between the sexes could be attained by extending the rest-break privilege to men.[60]

In rejecting the employee's argument, the federal district court formulated a supremacy clause test of pre-emption based upon the principle that "[t]he basic objective of Title VII is to cause employment to be based only upon applicable job qualifications."[61] Finding the state regulation in conflict with this principle and thus pre-empted, the court reasoned:

> [T]he regulation challenged here has, as its major premise, the same premise as regulations restricting the number of hours that women may work or the amount of weight that they are allowed to lift; viz., women as a class are inherently weaker physically than

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for this Court to hold that the conclusion reached is the only reasonable one, or even that it is the one this court would have reached if it initially had decided the matter de novo.

Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7151, 3 F.E.P. Cas 968, 974 (N.D. Ohio 1971); *see* Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946).

[57] 346 F. Supp. 994 (S.D. Cal. 1972).

[58] *Id.* at 995. The regulation provides:

> 11180. Order Governing Wages, Hours, and Working Conditions for Women and Minors in the Manufacturing Industry. 1. Applicability of Order. This Order shall apply to all women and minors employed in the manufacturing industry whether paid on a time, piece rate, commission, or other basis, except that the provisions of Sections 3 through 12 shall not apply to women employed in administrative, executive, or professional capacities.
>
> . . . .
>
> 12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

8 CAL. ADMIN. CODE § 11180 (Order No. 1-68, eff. Feb. 1, 1968).

[59] Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972).

[60] 346 F. Supp. at 997.

[61] *Id.*

> men. Without more, case law which binds this Court makes it clear that the rest-break regulation involved herein runs contrary to the objectives of Title VII.[62]

This rationale recognizes that in formulating the protective regulation the state agency had in mind what it believed to be a rational basis for the distinction between male and female employees, *i.e.*, that women are the weaker sex. Since this basis of classification is now discredited, it would seem anomalous to allow the regulation to stand, and indeed, to extend it to embrace a larger class.[63]

Extension of benefits to male employees without any determination of their need for such benefits may find little underpinning in the normally broad powers of a state to regulate employment practices in the business-labor field.[64] If the benefits of the protective laws are being extended to males merely in the name of equality between the sexes,[65] and not as suitable protection of the health, safety, or welfare

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[62] *Id.* at 998. Similar statements can be found in other cases. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969):

> Title VII rejects . . . this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

See also Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 7150, 3 F.E.P. Cas. 968, 973 (N.D. Ohio 1971):

> The upshot of the "protective" laws is the exclusion of women from certain positions on a generic basis, by stating that they are not physically or biologically suited for such employment. Apparently, this is a carryover of the stereotype that females are the weaker sex. Such employment practices constitute a violation of Title VII . . . .

[63] In *Burns*, the district court failed to adopt the extension approach despite urging by the EEOC as amicus curiae (346 F. Supp. at 998) thus implicitly declining to afford "great deference" to the EEOC interpretation pursuant to Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See* notes 51-56 and accompanying text *supra*.

The paradoxical result of the recent revision of the EEOC Guidelines (*see* note 51 *supra*) is that earlier cases striking down beneficial protective laws have done so citing the previous Guidelines as authority. Manning v. General Motors Corp., 3 Empl. Prac. Dec. 7145, 3 F.E.P. Cas. 968 (N.D. Ohio 1971) (striking down seating laws that EEOC has decreed preserved in its amended Guidelines (37 Fed. Reg. 6835, 6836 (1972)); Jones Metal Prods. Co. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972) (striking down rest period, lunch break, and seating laws saved by the EEOC in its amended Guidelines (37 Fed. Reg. 6835, 6836 (1972)); N.M. Att'y Gen. Op. No. 72-22 (1972) (overtime law applicable only to women pre-empted; preserved by EEOC in amended Guidelines (37 Fed. Reg. 6835, 6836 (1972)). The new Guidelines now urge extension in circumstances in which these earlier opinions opted for pre-emption, and employers now decide whether to adhere to the case law or the revised EEOC Guidelines.

[64] *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 728 (1942); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393-94 (1937).

[65] Of course, there is more than just equality underlying the motives of proponents of the extension argument, for equality could be achieved by invalidating the beneficial protective legislation and thus lowering the employment benefits of females to the level of benefits accorded to males. The attractiveness of the extension remedy is that it allows females to retain

of male employees, then an employer has a cogent argument that such an extension is an unconstitutional exercise of the police power. The interaction between the police power of the state and the due process clause of the federal constitution demands not only that legislation be neither arbitrary nor capricious, but also "that the means selected shall have a real and substantial relation to the object sought to be attained."[66] The principle object sought through selective pre-emption is the retention of the benefits of protective laws for women while still achieving equal footing with males in the labor market. Although equality is a laudable goal, it is unreasonable to achieve it by forcing employers to provide expensive and unnecessary physical facilities or privileges to male employees.[67] Thus, if a state legislature could not satisfy due process requirements by justifying a statute affording the benefits of a female protective statute to males on grounds other than the need of male employees for such statutory protection, it is difficult to see how the same result can constitutionally be achieved when federal legislation, by virtue of the supremacy clause, utilizes a state statute or regulation to confer the same benefits on the identical class of male employees.[68]

The extension approach was rejected in *Burns* for two additional reasons. First, the court expressed the opinion that the extension remedy "would amount to usurpation of the legislative power that has been vested exclusively in the state legislature."[69] The court correctly noted that extension would " 'amend' the state's labor laws,"[70] but the extension approach would confer benefits on males only as an additional federal duty imposed on employers covered by Title VII. It would not involve judicial legislation.[71]

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the benefits of the protective laws while still achieving equality. This became a valuable selling point during the debate over the Equal Rights Amendment. *See* notes 82-83 and accompanying text *infra*.

[66] Nebbia v. New York, 291 U.S. 502, 525 (1934).

[67] The facts of *Burns* illustrate that a blind application of the extension approach could lead to unreasonable results. Male employees were already receiving unsupervised break time, although not the formal ten-minute rest breaks every four hours that the regulation required. 346 F. Supp. at 995-96, 998. There was, therefore, no *need* for extension of the beneficial regulation in order to cure a "social ill."

[68] This reasoning suggests that two constitutional hurdles must be faced before a protective labor law will be extended to males. First, under the supremacy clause only beneficial protective laws escape pre-emption. *See* notes 24-25 & 45-50 and accompanying text *supra*. Second, is the substantive due process argument based on the unreasonableness of imposing additional burdens on employers through the extension of beneficial protective laws when such extension is not to safeguard the health, safety, or welfare of male employees, but rather is to erase discriminatory employment practices while preserving for females the benefits of protective legislation.

[69] 346 F. Supp. at 997.

[70] *Id.*

[71] *See* Brown, Emerson, Falk & Freeman, *supra* note 3, at 926, n.107.

The second objection raised by the court was that extension would create competitive disadvantages between employers of all males and employers of a mixed labor force.[72] In highly competitive industries, this could result in the attempted discharge by employers of female employees in order to reduce costs. The court also rejected the alternative of limiting an extension remedy to the particular facts of the case because that approach would be likely to cause enforcement problems for the state and confusion among employers as to the applicability of the regulation.[73]

II

A Look at What Is Ahead: The Equal Rights Amendment

The proposed Equal Rights Amendment, passed by Congress on March 22, 1972,[74] is presently before the state legislatures for

[72] 346 F. Supp. at 997. An analogous problem arises when the mode of operation or business requirements of an employer makes extension of beneficial protective legislation to males either impossible or extremely difficult. In Steelworkers Local 1104 v. United States Steel Corp., 4 Empl. Prac. Dec. 6328, 4 F.E.P. Cas. 1103 (N.D. Ohio 1972), *aff'd*, 5 Empl. Prac. Dec. 7974, 5 F.E.P. Cas. 1121 (6th Cir. 1973), the nature of the employer's industry required that some of the employees remain "on-call" at all times in the event of an emergency thus necessitating that lunches be eaten at work stations. Pursuant to a protective law prohibiting the employment of a female for a period of more than five hours of continuous labor unless such period is broken by a one-half hour meal period, the employer kept only male employees on the "on-call" status while affording females a guaranteed uninterrupted lunch period. Since the males were subject to demand based on the day's work requirements, they were paid for a full eight hours of each scheduled eight hour shift; females were paid for only seven and one-half hours. The court recognized that the necessary continuous operation of the employer's plant precluded the extension of the one-half hour lunch break to men. Furthermore, in the face of a suit by females seeking back wages, the court concluded that to have paid the females for eight hours while continuing to provide them a guaranteed uninterrupted meal period, would have been "vulnerable to reverse discrimination claims by male employees." *Id.* at 6341-42, 4 F.E.P. Cas. at 1117.

In General Elec. Co. v. Young, 4 Empl. Prac. Dec. 6233, 3 F.E.P. Cas. 560 (W.D. Ky. 1971), two employers sought a determination that protective statutes limiting the hours of female workers had been pre-empted by Title VII. Because the plant operations frequently required the scheduling of work hours in excess of the limits imposed by the state laws, the overtime hours were being assigned solely to males. The court agreed that this differential in the treatment of male and female employees "compel[led] an employer to make a prohibited classification of employees on the basis of a stereotyped characterization of the sexes in violation of Title VII." *Id.* at 6237, 3 F.E.P. Cas. at 565. However, the court never considered the possibility of extending the benefits of the rest-period statute to males.

In those situations in which the mode of an employer's operation precludes the extension of beneficial protective laws to males, the EEOC has adopted a "business necessity" test which places the burden upon the employer to prove the impropriety of extension. *See* 37 Fed. Reg. 6835, 6836 (1972); note 51 *supra*. No hint is given as to whether the employer must establish that extension is possible or merely that its implementation would be an onerous burden. In the event of a showing of business necessity the beneficial protective law is superseded by Title VII as to that employer, and the benefits may not be provided to members of either sex.

[73] *But cf.* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971).

[74] H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). For an excellent short summary of the circuitous legislation path of the amendment, see Equal Rights for Men and Women, S. Rep.

ratification.[75] The proposed Amendment provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

The Amendment has its genesis in the principle that sex should not be a determining factor by which a government affects the legal rights of its citizens.[76] Only governmental action is constrained; private actions and relationships are unaffected.[77]

Resistance to the Equal Rights Amendment has been generated by the fear that the Amendment will become a vehicle for invalidating hard-won protective labor legislation for women.[78] This is a somewhat belated argument since significant inroads have already been made on prohibitive protective laws under Title VII and state fair employment laws.[79] Judicial interpretation of the Equal Rights Amendment regarding prohibitive protective statutes is expected to follow the lead of the Title VII cases.[80]

The more troublesome problem is how courts will reconcile the Equal Rights Amendment with state beneficial protective laws. The resolution of this question is significant because the Amendment, unlike Title VII, will affect all employer-employee relationships covered by state protective statutes.[81] In an effort to dispel opposition to the Amendment and in recognition of the desirability of preserving

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No. 689, 92d Cong., 2d Sess. 4-6 (1972) [hereinafter cited as SENATE REPORT].

[75] Approval by 38 states is required to make the joint resolution our 27th amendment. As of this date 30 states have ratified the Amendment. Nebraska, however, is attempting to rescind its ratification, and a constitutional battle over its ability to do so is brewing.

[76] *See* SENATE REPORT 11-12; U.S. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, A MEMORANDUM ON THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION 1 (1970) [hereinafter cited as MEMORANDUM].

[77] *See* SENATE REPORT 2. It is in the private sector that the most serious discrimination against women occurs. *See* Committee on Federal Legislation, *Amending the Constitution To Prohibit State Discrimination Based on Sex*, 26 RECORD OF N.Y.C.B.A. 77, 78 (1971); Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234, 236-37 (1971).

[78] SENATE REPORT 42-44 (minority views); *Hearings* 48-51, 57, 62 (testimony of M. Wolfgang, Vice-President, Hotel and Restaurant Employees Union).

[79] SENATE REPORT 14-15; *Hearings* 69 (testimony of M. Wolfgang, Vice-President, Hotel and Restaurant Employees Union); U.S. PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, REPORT: A MATTER OF SIMPLE JUSTICE 5 (1970); MEMORANDUM 15.

[80] Brown, Emerson, Falk & Freeman, *supra* note 3 at 928; *see* sources cited in note 79 *supra*. For the current judicial treatment of prohibitive protective legislation under Title VII, see cases cited in note 25 and accompanying text *supra*.

[81] *See* note 9 *supra*.

beneficial protective laws for women, the Amendment's proponents have supported the extension approach, claiming that it would aid, not only in retaining the state laws for women,[82] but also in conferring their benefits on the male workforce.[83] Opponents of the Amendment fear that it will automatically render unconstitutional all statutes treating women differently from men.[84]

Conflicting statements made by proponents of the Equal Rights Amendment have left congressional intent less clearly defined than the courts might otherwise prefer.[85] Although no one can predict

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[82] *See Hearings* 168-74 (testimony of L. Kanowitz, Professor, University of New Mexico School of Law).

> Not only has the Labor Department, in administering the Equal Pay Act, entitles [*sic*] men . . . to the same minimum wage if they are covered by the Federal law, but the EEOC, also has taken the position that the benefits of State laws, presently applicable to women only . . . are required by title VII to be extended to men. Even in those situations that are beyond the jurisdictional reach of title VII and the Equal Pay Act, . . . the judicial extension technique employed in equal protection and other constitutional cases, could lead to the same results.
>
> Moreover, these results can also be achieved under the proposed equal rights amendment—especially if the legislative history discloses that Congress intends this. The fears of some opponents of the amendment that its adoption would nullify laws that presently protect women only are thus unfounded—since the equality of treatment required by the amendment can be achieved by extending the benefits of those laws to men rather than by removing them from women.

Id. at 170-71 (testimony of L. Kanowitz, Professor, University of New Mexico School of Law); *accord*, SENATE REPORT 15-16; MEMORANDUM 11-12, 15; U.S. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1970, at 18 (1971); Brown, Emerson, Falk & Freeman, *supra* note 3, at 912-20, 927; Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 220-21 (1971).

[83] [T]he current renewed concern with the legal status of women will in many respects result in improving the situation of men as well as women. Just as breakthroughs in the legal status of American blacks has [*sic*] benefited other racial and ethnic "minorities," so the effort to provide women with equal employment opportunity can substantially improve the situation of male employees in industry and commerce.

Kanowitz, *Women and the Law: A Reply to Some of the Commentators*, 4 FAMILY L.Q. 19, 29 (1970).

[84] SENATE REPORT 27, 33-35, 42-44 (minority views); *Hearings* 85 (remarks of Senator Ervin and P. Freund, Professor, Harvard University School of Law); Rawalt, *Congressional Treatment of the Proposed Equal Rights Amendment*, 57 WOMEN LAW. J. 19, 20 (1971) (quoting AFL-CIO spokesmen).

[85] Proponents of the Amendment are in considerable disagreement as to when the extension remedy should be utilized. For example, Professor Kanowitz urges that the maximum hours and weight lifting protective laws be extended to men:

> [T]he path chosen by the Equal Employment Opportunity Commission (EEOC) and most plaintiffs in sex-discrimination cases has been aimed at seeking the invalidation of such state protective laws. . . . My own view is essentially that, with victories like these, women don't need many defeats. For success in these efforts not only removes limitations upon women's right to work extra hours or lift extra weights, but also means that those women who do not wish to lift heavy weights or do not wish to work excessive hours—and I would suggest that they are many if not in the majority—can henceforth be *forced* to do so.

Kanowitz, *supra* note 83, at 28. *See Hearings* 172-77.

Diametrically opposed to this interpretation of the operation of the Amendment is the position of the Citizens' Advisory Council that weight-lifting laws and maximum-hours laws will

with confidence the impact of the Amendment on beneficial protective laws, the final report on the Amendment opts for some application of the extension remedy.[86]

A. *Selective Extension Under the Equal Rights Amendment*

The extension remedy would operate in a wholly different manner under the Equal Rights Amendment than under Title VII. In Title VII cases, protective laws are either pre-empted by virtue of the supremacy clause or extended as an additional duty imposed upon employers by federal law.[87] The Equal Rights Amendment, however, would operate directly upon a state protective law which classified on the basis of sex invalidating the law *in toto*, saving part of the statutory scheme by excision of constitutionally offensive parts, or undertaking major judicial surgery by extending the benefits of the statute to both male and female employees, even though the state legislature did not intend to benefit males.[88]

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not be extended by the Amendment, but rather they will be rendered unconstitutional by it. MEMORANDUM 12.

A similar ambiguity has crept into the final Senate report in support of the proposed Amendment. First, weight-lifting laws are categorized as discriminatory rather than protective, and thus they will be invalidated under the proposed amendment. SENATE REPORT 14-15. The case of Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), which extended a weight-lifting limitation to men, is then cited in support of the extension remedy. SENATE REPORT 16.

One additional uncertainty merits discussion. The *Senate Report* makes the unqualified statement that such beneficial protective provisions as rest periods and meal periods will be extended to men. *Id.* However, the EEOC in its recently revised Guidelines has recognized that in some cases business necessity militates against extension of certain protective laws. *See* note 72 *supra*. Whether the Equal Rights Amendment requires a similar business necessity test remains open to question. Such a test cannot, however, be found in the language of the proposed Amendment. *See* text accompanying notes 75-76 *supra*; note 51 *supra*.

[86] SENATE REPORT 14-16. Since the courts are inclined to give significant weight to the views expressed by the proponents of the Amendment in its final form, it is probable that some form of extension will be adopted as a judicial remedy. The unlikelihood that all protective laws will withstand the scrutiny of the Equal Rights Amendment is further supported by the many amendments rejected by the Senate before passage of the joint resolution in its present form. *See, e.g.*, H.R.J. Res. 208, Amdt. No. 1067, 92d Cong., 2d Sess. (1972).

[87] *See* note 71 and accompanying text *supra*.

[88] *See* Brown, Emerson, Falk & Freeman, *supra* note 3, at 913; note 89 *infra*. Generally, a court will try to ascertain whether the state legislature would prefer to have an underinclusive (the word was coined by Mr. Justice Harlan in Welsh v. United States, 398 U.S. 333, 361 (1970), apparently as a shorthand antonym for overbreadth) statute remain in effect on an equalized basis or, if the purpose of the statute is fundamentally defeated, to have it fall in its entirety. *See* Welsh v. United States, 398 U.S. 333, 355-56 (1970) (Harlan, J., concurring); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932); *Hearings* 81; Brown, Emerson, Falk & Freeman, *supra* note 3, at 920. To the extent that legislative intent is lacking, the following rules of construction have been suggested in determining when a court will extend an underinclusive statute to circumscribe a larger class: (*1*) if the statute deals with a subject of major significance, a saving construction is generally preferred (*see* Welsh v. United States, *supra* at 366-67 (Harlan, J., concurring); Brown, Emerson, Falk & Freeman, *supra* note 3, at 914); (*2*) it must be feasible to

It is somewhat doubtful that the judiciary has the power to extend the benefits of a protective law to males by force of a constitutional provision for the mere purpose of equalizing employment practices.[89] Nevertheless, the prospect of passage and ratification of the Equal Rights Amendment has spurred a few commentators to search for supporting authority.[90] Most frequently cited has been *Levy v. Louisiana*[91] in which the Supreme Court held that a statute permitting an action by legitimate children for the wrongful death of their mother, but which was construed by the state court to deny illegitimates the right to bring such an action, was in contravention of the equal protection clause.[92] Instead of invalidating the statute, the Court implicitly extended the statutory wrongful death action to illegitimates. More recently, in *Shapiro v. Thompson*,[93] the Supreme Court found that a state law which predicated the right to receive welfare payments upon a lengthy residency requirement unconstitutionally inhibited the freedom to travel.[94] Again, the right to receive the payments was implicitly extended to the excluded class.

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extend the statute to the larger perimeters of a new class (*see* Brown, Emerson, Falk & Freeman, *supra* note 3, at 914: for a discussion of the feasibility of extending prohibitive and beneficial protective legislation, see notes 18-19 and accompanying text *supra* and note 44 *supra*); (*3*) if the statutory scheme is sufficiently disrupted after excision, the court will be inclined to invalidate it entirely (*see* Welsh v. United States, *supra* at 365 (Harlan, J., concurring)); (*4*) a court will be more inclined to expand the class if the number to be added is not proportionally at variance with the original composition of the class (*see* Brown, Emerson, Falk & Freeman, *supra* note 3, at 914-15); (*5*) in deference to the maxim that criminal laws are to be strictly construed, courts are less inclined to expand the coverage of a criminal statute (*see id.* at 915, 920. The violation of protective laws generally carries criminal monetary fines. *See, e.g.*, ILL. ANN. STAT. ch. 48, § 6 (Smith-Hurd 1969)); (*6*) a saving construction is more likely when the effect is to confer a benefit on a class (*see* Welsh v. United States, *supra* at 366 n.18 (Harlan, J., concurring); Brown, Emerson, Falk & Freeman, *supra* note 3, at 916-17); and, finally (7) judicial modesty and a desire to avoid the appearance of judicial legislating incline courts to excise words from a statute more readily than to add language (*see* Bastardo v. Warren 4 Empl. Prac. Dec. 5500, 5501 (W.D. Wis. 1970); *Hearings* 82; Brown, Emerson, Falk & Freeman, *supra* note 3, at 917).

[89] Perhaps the frankest articulation of the power of courts to adopt the extension approach in proper circumstances is found in Mr. Justice Harlan's concurring opinion in Welsh v. United States, 398 U.S. 333, 361 (1970):

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

It is significant that the Court was unwilling at that time to adopt the path of statutory rebuilding advocated by Mr. Justice Harlan.

[90] *See* L. KANOWITZ, *supra* note 3, at 186-96; Brown, Emerson, Falk & Freeman, *supra* note 3, at 918-20; Dorsen & Ross, *supra* note 82, at 221.

[91] 391 U.S. 68 (1968). *See* SENATE REPORT 16; L. KANOWITZ, *supra* note 3, at 159, 186; Brown, Emerson, Falk & Freeman, *supra* note 3, at 919.

[92] 391 U.S. at 71-72.

[93] 394 U.S. 618 (1969).

[94] *Id.* at 629-34, 642.

Following ratification of the fifteenth and nineteenth amendments, the Supreme Court held that they should not be read as invalidating state voting laws that excluded blacks and women. Rather than adopt the invalidation approach, which would have temporarily left many of the states without a voting law, the Court construed the amendments to be self-executing, operating directly on state laws and enlarging their scope to embrace the newly enfranchised.[95] Similar judicial molding of statutory classifications which discriminated on the basis of sex has taken place when women were excused from jury duty,[96] when females were excluded from admission to a state supported university,[97] when longer prison terms for the same offense were given to women,[98] and when unwed fathers were denied a hearing on their fitness for child custody.[99]

In each of the cases mentioned above the courts either were contracting the class to which the statute was applicable in order to afford women equal protection of the laws or were expanding the class to include the party aggrieved by exclusion only when fundamental civil rights were involved.[100] Following this line of reasoning, it would seem that only males would have standing to challenge beneficial protective laws under the Equal Rights Amendment because only they are arguably aggrieved by exclusion from the favored class.[101] This would be a surprising result since the Amendment's purpose is to assist females. Moreover, the cases cited in support of extension are not in point for another reason. State protective legisla-

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[95] *See* Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Leser v. Garnett, 258 U.S. 130, 136 (1922); Guinn v. United States, 238 U.S. 347, 362-63 (1915); Myers v. Anderson, 238 U.S. 368, 382 (1915); Neal v. Delaware, 103 U.S. 370, 389 (1880).

In Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), state laws prohibiting or restricting the admission of blacks to state supported universities were struck down under the equal protection clause, and the right to attend the institutions on an equal basis with whites was extended to black students. This construction by the Court was facilitated by the language of state voting laws which permitted a simple excision of the "white" or "male" qualification. *See* Leser v. Garnett, 258 U.S. 130, 135-36 (1922); Myers v. Anderson 238 U.S. 368, 382 (1915); Neal v. Delaware, 103 U.S. 370, 390 (1880).

[96] White v. Crook, 251 F. Supp. 401, 408-09 (M.D. Ala. 1966).

[97] Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184, 187-89 (E.D. Va. 1970).

[98] United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 14-16 (D. Conn. 1968); Commonwealth v. Daniel, 430 Pa. 642, 650, 243 A.2d 400, 404 (1968).

[99] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[100] Consider the following language in Levy v. Louisiana, 391 U.S. 68, 71 (1968):

> In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. . . . However that might be, we have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. . . . The rights asserted here involve the intimate, familial relationship between a child and his own mother.

[101] *See* Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

tion cannot be aptly characterized as affecting basic civil rights, *e.g.*, right to vote, freedom to travel, or interfamilial relationships, since the states have long been given broad powers to classify in the business-labor field.[102]

B. *The Major Objection to Extension: Division of Powers*

Because extension is a judicial rather than a legislative development, the major objection to extension by force of the Equal Rights Amendment is the issue of separation of powers. In *Bastardo v. Warren*,[103] a male farm worker sought a declaratory judgment that a state minimum wage law,[104] applicable only to women and minors, denied him due process and equal protection of the laws. The plaintiff sought to enjoin the state from denying him the protection of the minimum wage law, even though the statute did not mention males.[105]

In determining that an injunction was not an available remedy, the court reasoned that if the state legislature had known that it could not constitutionally afford the protection of a minimum wage to women only, it might well have determined that the law would be too burdensome for employers and would not have enacted it. The court concluded that the weighing of the interests of employers and employees was a legislative and not a judicial function.[106]

CONCLUSION

Selective extension is an adroit means of retaining state beneficial protective legislation for women while achieving sexual equality

[102] *See* cases cited in note 64 *supra*.

[103] 4 Empl. Prac. Dec. 5500 (W.D. Wis. 1970).

[104] *See* WIS. STAT. ANN. § 104.02 (1957).

[105] 4 Empl. Prac. Dec. at 5501; *cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (rejecting argument that minimum wage law applicable only to women and minors constituted arbitrary discrimination because same benefits not extended to men).

[106] 4 Empl. Prac. Dec. at 5503. The language of the court is revealing:

> The relief plaintiffs seek is not really that defendants cease excluding men from the protection of [the minimum wage law], although this is how plaintiffs wish to state the issue; plaintiffs actually seek to compel defendants to take affirmative action to extend the protection of [the minimum wage law] to men, although men are not named in the statute. Such relief cannot be judicially molded. . . . It may be that the Wisconsin Legislature would not have enacted [the minimum wage law], had it known that the section would be construed to protect men as well as women and minors. For example, a legislature might weigh the interests of employers, on the one hand, and female and minor employees, on the other, and decide that any adverse effects imposed on employers by a minimum wage law are offset by the benefits accruing to women and children. But if such a law could not constitutionally fail to include adult males, a legislature might decide that it is better to have no minimum wage law at all. Such a decision should be left to the legislature.

But see L. KANOWITZ, *supra* note 3, at 123-24.

under the sweeping egalitarian mandates of Title VII and the proposed Equal Rights Amendment.[107] Despite the problems that such an approach might yield, it is apparent that Congress has left to the judiciary the task of working out many of the details of achieving sexual equality by either invalidating or extending protective laws. The courts will be called upon to make difficult policy determinations that either affect the health and safety of large numbers of the working class or dip into the employer's pocket.[108] Although the courts are the proper forum for balancing fundamental rights, the social and economic judgments behind occupational health and safety labor laws are best left to the legislative branch.

One avenue remains for the courts to avoid being the final appraisers of the numerous state protective laws. If the Equal Rights Amendment is ratified, two years will remain before its effective date.[109] State legislators should utilize this period of grace to review

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[107] One commentator termed selective pre-emption a "have your cake and eat it too" approach. *Hearings* 31 (statement of M. Wolfgang, Vice-President, Hotel and Restaurant Employees Union).

[108] If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen . . . .

[T]he fate of all this varied legislation could be left highly uncertain in the face of judicial review.

SENATE REPORT 34 (statement of P. Freund, Professor, Harvard University School of Law).

[109] Congress has already taken a step in this direction by the establishment of a comprehensive statutory and regulatory scheme to safeguard both male and female employees. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970). The Act expressly provides for states to assume the duties of enforcement and administration under similar state laws. *Id.* §§ 667, 672.

On May 14, 1973, in *Frontiero v. Richardson,* 411 U.S. 677, a plurality of the Supreme Court for the first time applied the "inherently suspect" test to a statutory classification based on sex. The plaintiff in *Frontiero* was a married woman Air Force officer who sought increased allowances for quarters, medical, and dental expenses claiming that her husband was a "dependent" under 10 U.S.C. §§ 1072, 1076 (1970) and 37 U.S.C. §§ 401, 403 (1970). Those statutes provided that spouses of male members of the armed forces are dependents for purposes of obtaining the increased benefits, but that a female member is required to demonstrate that her spouse does not provide more than one-half of her support. Reversing the decision below, the Court held the statutes discriminatory in violation of the due process clause of the fifth amendment.

Frontiero, in hinting that sex-based classifications are inherently suspect, provides a potential means of achieving the same end result as the Equal Rights Amendment. In *Frontiero,* the Court strayed from previous jurisprudence by striking down a sex-based classification even though fundamental civil rights were not involved (*cf.* notes 100-02 and accompanying text *supra*). However, *Frontiero* does not break new ground on the question of whether laws which benefit only one sex should be extended rather than invalidated. As Mr. Justice Brennan, writing for the plurality was careful to note (411 U.S. at 691 n. 25), the Court was able to extend to the plaintiff the increased benefits she desired by excision from the statutory scheme only

and revise protective statutes and regulations so that they will pass constitutional muster.

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those parts which required a female member to prove her spouse's dependency. This is an established rule of statutory severability previously used by the Court. *See* note 88, *supra.*