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Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*

By Leo Kanowitz**

I. Introduction

At the beginning of the 20th century, there were in the United States 5,000,000 women workers constituting only 18 percent of the American labor force.1 By 1966, this figure had risen to over 27,000,000 women representing 36 percent of the U. S. total.2 At the present time, one-tenth of all family heads are women,3 and it has been observed that "most women are no longer in the labor market to supplement their husbands' income but primarily in order to provide the necessities of life for their families."4

In one sense, this steady rise in the proportion of women to the total American labor force has been an encouraging development for those who seek an end to arbitrary laws that discriminate on the basis of sex. As suggested in an earlier part of this series, many legal rules that distinguish between the sexes are fashioned to a considerable extent with the employability of women in mind.5

In another sense, however, the growth of the female labor contingent has not always been a positive force for eradicating male-

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2 Id.


4 Id.

5 Kanowitz, Sex-Based Discrimination in American Law II: Law and the Married Woman, 12 St. Louis U.L.J. 3 (1967).
female alienation and the female sense of "otherness" in American life. True, "society's prejudice against the worker-wife-mother combination appeared to soften in the expanding job market of the mid-sixties," and undoubtedly before then. Nevertheless, while the facts surrounding women's role in the labor market have sometimes accorded them a measure of economic and social independence, they have often tended to exaggerate the sense of arbitrary and culturally determined difference between the sexes.

These negative effects of rising female employment upon the relations between the sexes have been brought about by two important economic facts. One is that women workers have received, more often than not, considerably lower wages than men performing the same work. Whether such pay differentials merely have reflected employers' honest beliefs that they are warranted by the difference in the sex of the employees alone, or, as some have suggested, that women, like Negroes, have become the victims of super-exploitation by employers, the positive effects upon male-female relations achieved by men and women working together in industry and commerce have been largely weakened by constant reminders of the lower economic reward for women's work than for men's.

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6 Waldman, Marital and Family Characteristics of Workers, 90 MONTHLY LAB. REV. 27, 30 (1967).

7 In June, 1966, Congresswoman Martha Griffiths of Michigan stated, based on BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, No. 47 (1964), and BUREAU OF LABOR STATISTICS, SPECIAL LABOR-FORCES REPORT, that "the median earnings of white men are $6,497, of Negro men $4,285, of white women $3,859, and of Negro women $2,674. This adverse differential exists in spite of the fact that white females in the labor force have 12.3 years of education on the average as compared to 12.2 years for white men; and nonwhite females have 11.1 years of education to 10 for the nonwhite males. The unemployment rate is highest for the nonwhite female. The same disparities exist when we examine the data for all workers, including temporary as well as full time." 112 Cong. Rec. 13055 (1966).

8 This economic condition evoked a limited legislative response in some states. Although, until 1919, none went as far as requiring women employees to be paid the same wages as men performing equal work, many states now cover women but not men in their minimum wage legislation. Representative Martha Griffiths has noted that "the drive for these state protective laws was distorted for several reasons into laws applying solely to women." Statement of Congresswoman Martha W. Griffiths at Hearing of The Equal Employment Opportunity Comm'n [EEOC] Concerning Proposals to Amend the Commission's Regulations on Sex Discrimination 3 (May 3, 1967) (unpublished transcript on file in the Hastings Law Library). The principal reasons were the United States Supreme Court decisions in which a New York statute limiting working hours of male and female bakery employees to 10 hours a day was invalidated, Lochner v. New York, 198 U.S. 45 (1905), and Oregon's 10-hour a day limitation on working hours for females only was upheld, Muller v. Oregon, 208 U.S. 412 (1908). Statement of Congresswoman Griffiths, supra
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A second factor detracting from the positive effects of increased female employment in American life has been the general relegation of women, and consequently of men also, to particular types of jobs. Reflecting at times broad social prejudices, the desire of men to monopolize a particular calling⁹ or the simple inertia of past events, the practice of dividing jobs into those for men only, those for women only, and those for both needs little documentation. A simple glance at the workaday world will reveal which sex serves as the clerk-typists, which as the automobile mechanics, which as the telephone operators, which as the pilots, and which as the overwhelming majority of physicians, lawyers¹⁰ and architects in the United States. Though sex-based stratification of economic roles may to some extent reflect the socially conditioned desires of men and women themselves, there can be little doubt that there has been considerable employer resistance to the job applicant seeking employment in a position that tradition, collective bargaining agreement,¹¹ or law¹² had marked out as the exclusive preserve of the opposite sex.

Except for situations in which wage or employment opportunity discrimination was practiced by state governments or their agencies, or required by law,¹³ most discriminatory practices by employers, labor organizations, or employment agencies appeared immune to attack on substantive due process or equal protection grounds, at 3. Although the United States Supreme Court upheld governmental regulation of all employees' wages, hours and working conditions in the 1940's, Darby v. United States, 312 U.S. 100 (1941), the result of the earlier decisions was to convince the state legislatures that half a loaf was better than none, leading to widespread passage of protective legislation for women only. Statement of Congresswoman Griffiths, supra at 3-4. See also text accompanying note 126 infra, discussing the United States Department of Labor's interpretation of the 1963 Federal Equal Pay Act as requiring the extension to males of a state minimum wage applicable only to women whenever that minimum is higher than what the federal law requires. 29 C.F.R. § 800.161-2 (1968).

¹⁰ That the generally higher earnings and employability of male attorneys over female attorneys is the result of sex discrimination rather than other potential factors is persuasively demonstrated in White, Women in the Law, 65 Mich. L. Rev. 1051, 1070-87 (1967).
¹² See, e.g., CAL. BUS. & PROF. CODE § 25656.
since those constitutional safeguards are directed against governmental rather than private interferences. Moreover, even where state action was present, the United States Supreme Court, among others, had on many occasions held that sex discrimination in employment was constitutionally allowable.\textsuperscript{14} As a result, legislative treatment seemed the only way of curing this problem.

The pace of legislative enactments in this area has been uneven. In the equal pay field, despite scattered successes in the states,\textsuperscript{15} victory at the federal level was achieved in 1963 only "after 18 years of persistent, unsuccessful efforts to get an equal pay bill to the floor of Congress . . . ."\textsuperscript{16}

In the field of equal employment opportunities, two states—Wisconsin and Hawaii—had prohibited sex discrimination in employment by statute in 1961 and 1963, respectively. And, in 1961, the United States President's Commission on the Status of Women, established by President Kennedy’s Executive Order 10980, had also been charged with reviewing progress and making recommendations in two areas: (1) private employment policies and practices, including those on wages, under federal contracts; and (2) federal government employment practices.\textsuperscript{17} In the same Executive Order, the Commission was asked to explore "additional affirmative steps which should be taken through legislation, executive or administrative action to assure non-discrimination on the basis of sex and to enhance constructive employment opportunities for women."\textsuperscript{18} Significantly, except for its involvement with federal contracts, no reference to the private employment sector was contained in the Order.

In 1963, the Committee on Private Employment,\textsuperscript{19} one of the

\textsuperscript{14} See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); cf. In re Carragher, 149 Iowa 225, 128 N.W. 352 (1910) (discrimination founded on public policy, and not merely arbitrary, is not invalid). A separate article in this series, to be entitled Sex-Based Discrimination in American Law IV: Constitutional Aspects, will consider the prospects of future constitutional attacks on laws that discriminate on the basis of sex.

\textsuperscript{15} Montana and Michigan were the first states to enact equal pay laws in 1919. Twenty-four years later, in 1943, Washington became the third state to do so. Nine states—California, Connecticut, Illinois, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Alaska—were added to the list between 1944 and 1949. See STATE LEGISLATIVE RESEARCH COUNCIL OF SOUTH DAKOTA, STAFF BACKGROUND MEMORANDUM ON EQUAL PAY LEGISLATION 7 (1965). But as of July, 1968, 36 states had equal pay laws. CCH EMPLOYMENT PRACTICE GUIDE ¶ 1875. For a reference to the applicable statutes, see id.

\textsuperscript{16} Margolin, Equal Pay and Equal Employment Opportunities for Women, N.Y.U. 19TH CONF. ON LABOR 297 (1967).

\textsuperscript{17} Exec. Order No. 10980, 3 C.F.R. § 201 (1961) (establishing the President's Commission on the Status of Women).

\textsuperscript{18} Id.

\textsuperscript{19} The Committee name had been changed from the “Committee on Government Contracts.”
seven created by the President's Commission on the Status of Women, recommended the issuance of an Executive Order "setting forth the federal policy of equal employment opportunity in hiring, training and promotion, and establishing a President's Committee on Merit Employment of Women [which] would place main reliance on persuasion and voluntary compliance...." 20

Despite the Committee's expansion upon its original charge by urging coverage of all employers with or without federal contracts, 21 its recommendation was restricted severely in urging no more than an Executive Order that would be backed by persuasion to comply voluntarily rather than by more stringent enforcement measures. 22 Nor did the Committee contemplate any recourse to the courts for more tangible relief from sex-based employment discrimination. It is all the more surprising, therefore, that Title VII of the Civil Rights Act of 1964 designated as an "unlawful employment practice" sex discrimination in employment practices of employers, employment agencies, and labor organizations, and provided for ultimate legal redress in the courts in the form of money damages and injunctive relief for persons aggrieved by such practices—a development that will be explored later in this article. 23

Regardless of their legislative origins, the Federal Equal Pay Act of 1963, the prohibition against sex discrimination in employment in Title VII of the 1964 Civil Rights Act, and counterpart state laws enacted in their wake, have provided opportunities for developing a new era in male-female relationships in American society. Those opportunities must be seized, however, and possible restrictive interpretations of the two major federal statutes threaten the realization of their promise and potential. Without purporting to be a manual of practice and procedure under those statutes, the balance of this article explores some of their important provisions and interrelations. Specifically examined are: (1) some difficult problems raised by Title VII with respect to the so-called state "protective" laws, such as the frequently encountered state hours and weight-lifting restrictions applicable only to women workers; and (2) the prevention of evasionary devices that seek to circumvent the requirements of the Equal Pay Act.

21 Id. at 6.
22 A dissenting opinion was expressed by Committee Member Caroline Davis of the United Automobile Workers Union, protesting the proposed Executive Order's basic reliance "upon a voluntary program for an indeterminate period." Id. at 17.
23 See the section on the "peculiar legislative history" of Title VII's prohibition against sex discrimination in employment discussed in text accompanying note 24 infra.
II. The Sex Provisions of Title VII of the 1964 Civil Rights Act

A. The Peculiar Legislative History

Any consideration of the sex provisions of Title VII of the 1964 Civil Rights Act requires a preliminary glance at what can only be described as their peculiar legislative history. In the light of its tremendous potential for profoundly affecting the daily lives of so many Americans—both men and women—Title VII's prohibition against sex-discrimination in employment had a rather inauspicious birth.

This is not to say that some species of federal legislation outlawing sex-based discrimination in employment might not have emerged eventually from a Congress in which male representatives out-numbered female representatives overwhelmingly. Agitation for such a law, after all, had been going on for many years. Moreover, Congress had acted deliberately and responsively in enacting the Equal Pay Act of 1963. But the prospects for the passage of legislation prohibiting sex discrimination in hiring and promotional practices in employment were exceedingly dim in 1964. Had the sex provisions of Title VII been presented then as a separate bill, rather than being coupled as they were in an effusion of Congressional gimmickry with legislation aimed at curbing racial and ethnic discrimination, their defeat in 1964 would have been virtually assured. We have no less an authority for this conclusion than Oregon's Representative Edith Green, whose strong advocacy of equal legal treatment for American women lends great force to her appraisal. In her view, stated in Congress, the legislation against sex discrimination in employment, "considered by itself, and . . . brought to the floor with no hearings and no testimony . . . would not [have] receive[d] one hundred votes."  

In fact, it was not until the last day of the bill's consideration in Chairman Howard Smith's House Rules Committee, where it had gone after a favorable report from the Judiciary Committee, that there first appeared a motion to add "sex" discrimination to the other types of employment discrimination that the original bill sought to curb. That motion was defeated in Committee by a vote of 8-7. But after almost two weeks of passionate floor debate in the House and just one day before the act was passed, Representative Smith, a principal opponent of the original bill, offered an amendment to in-

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26 20 Cong. Q. 344 (1964).
clude sex as a prohibited basis for employment discrimination. Under that amendment, the previously proposed sanctions against employers, unions, hiring agencies, or their agents, for discrimination in hiring or promotional practices against actual or prospective employees on the basis of race, creed, or national origin, were, with some exceptions, also to apply to discrimination based upon the “sex” of the job applicant or employee. Offering his amendment, Representative Smith remarked: “Now I am very serious . . . I do not think it can do any harm to this legislation; maybe it will do some good.”

Despite Congressman Smith’s protestations of seriousness, there was substantial cause to doubt his motives. For four months Congress had been locked in debate over the passage of the Civil Rights Act of 1964. Most southern Representatives and a few of their northern allies had been making every effort to block its passage. In the context of that debate and of the prevailing Congressional sentiment when the amendment was offered, it is abundantly clear that a principal motive in introducing it was to prevent passage of the basic legislation being considered by Congress rather than solicitude for women’s employment rights.

It is not surprising, therefore, that Representative Green, expressing her hope that “the day will come when discrimination will

27 110 Cong. Rec. 2577 (1964).
28 But see text following note 58 infra for how “sanctions” operate under Title VII.
29 110 Cong. Rec. 2577 (1964).
30 Representative Smith has since denied that the purpose of the amendment was to delay voting. See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 883 n.34 (1967). But evidence to the contrary seems overwhelming. Id. See also Kanowitz, Sex-Based Discrimination in American Law I: Law and the Single Girl, 11 S. Louis U.L.J. 293 (1967); Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 781 (1965), where it was said that “[t]he fragments of legislative history dealing with the unprecedented sex provision of the Civil Rights Act indicate that the inclusion of the term ‘sex’ in the bill was promoted by forces that were not primarily concerned with equality for women as a class.” But cf. Waters, Sex, State Protective Laws and the Civil Rights Act of 1964, 18 Lab. L.J. 344, 346 (1967), where it is stated that “[t]he amendment on ‘sex’ was offered by Rep. Howard Smith (D. Va.) on February 8, 1964. This may have been prompted for ‘political’ reasons since Rep. Smith had opposed its passage. It may also have been an ‘afterthought’ as a result of the letter he had previously received from the National Women’s Party.”
31 Cf. Cooper v. Delta Airlines, Inc., 274 F. Supp. 781, 782-83 (E.D. La. 1967), where Judge Comisky remarked that “the addition of ‘sex’ to the prohibition against discrimination based on race, religion, or national origin just sort of found its way into the equal employment opportunities section of the Civil Rights Bill.” (Emphasis added).
be ended against women,” 32 also registered her opposition to the proposed amendment, stating that it “will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it.” 33

Despite these misgivings, and despite the apparent objectives of its sponsors to block passage of the entire Act, the legislation that finally emerged contained Representative Smith’s amendment intact. As a result of this stroke of misfired political tactics, our federal positive law now includes a provision that had been desired for many years by those who were concerned with the economic, social and political status of American women, but which had been delayed because of the feeling that the time had not ripened for such legislation, and had been specifically opposed in this instance partly because of a belief that “discrimination based on sex involves problems sufficiently different from discrimination based on . . . other factors . . . to make separate treatment preferable.” 34

What significance should be drawn from this peculiar legislative history of Title VII’s prohibition against sex discrimination? It would be a most serious error to attribute to Congress as a corporate unit the apparently cynical motives of the amendment’s sponsor. Though most members of Congress were intent on prohibiting employment discrimination based on race, religion and national origin, they did vote to do the same with respect to sex discrimination once the matter, regardless of its sponsor’s apparent intentions, was brought to them for a vote. And when Congress adopts any legislation, especially a law with such important ramifications, one must infer a Congressional intention that such legislation be effective to carry out its underlying social policy—which in this case is to eradicate every instance of sex-based employment discrimination that is not founded upon a bona fide occupational qualification.

Though the absence of Committee hearings on the sex provisions leaves the courts and the Equal Employment Opportunity Commission, the federal agency created by the Act to process complaints of employment discrimination, without specific guides for resolving difficult problems of interpretation—such as the relationship between those provisions and various state “protective” laws—Congress’ general intentions are clear. Given those general intentions, the com-

33 Id. See also remarks of New York’s Representative Emmanuel Celler: “I think the amendment seems illogical, ill timed, ill placed, and improper,” Id. at 2578.
34 Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 881, quoting Letter to Representative Celler from the Women’s Bureau of the United States Department of Labor (opposing the proposed “sex” amendments of Title VII).
mon law processes of the courts and of the EEOC in exercising its quasi-judicial function may constitute, in the end, the best vehicle for filling out, on a case by case basis, the broad command of the Act's prohibition against sex discrimination in employment. The important points are that for the first time in United States history, an authoritative national agency and the courts have been charged with the responsibility of developing viable equitable principles to govern the employment role of men and women in American society and that opposition to sex discrimination in employment has become official national policy.

B. The Impact of the "Sex" Provisions

Though born under such questionable circumstances, the prohibition against sex discrimination in employment has proved since 1964 to be much more than the toothless tiger one would have expected. As a matter of fact, the Equal Employment Opportunity Commission reported at the end of its first year of operations that over one-third of its processed complaints had involved charges of sex discrimination.\(^{35}\) Attorneys have also been encouraged, as a result of the Act, to take cases involving sex discrimination in employment.\(^{36}\) Several large cases have been settled, including one involving a back pay factor of more than $35,000,\(^{37}\) and a growing number are being decided by the courts. The volume of litigation under the sex discrimination provisions of Title VII will no doubt also be increased as a result of the recent Supreme Court decision in *Newman v. Piggie Park Enterprises*,\(^{38}\) holding that a person "who succeeds in obtaining an injunction under [Title II of the 1964 Civil Rights Act] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."\(^{39}\)

\(^{35}\) "Sex as a basis of discrimination is charged in 33.7 per cent, 2,031, of the cases. This is a large jump from the figure of approximately 20 per cent which held constant for the first half of the year." Release of EEOC, July 2, 1966, [1965-1968 Transfer Binder] CCH EMPLOYMENT ACT. GUIDES ¶ 8076 (1966).


\(^{37}\) Id.

\(^{38}\) 390 U.S. 400 (1968).

\(^{39}\) Id. (emphasis added). The Court's analysis of Title II's attorneys' fees provisions would appear to apply equally to Title VII actions based on sex discrimination—especially since the wording of the special attorneys' fees section of Title VII, 42 U.S.C. § 2000e-5(k) (1964), closely follows that of the section construed in *Newman*. Attorneys and litigants will both therefore be encouraged to bring Title VII sex discrimination suits by the prospect of an award of attorneys' fees as an alternative to the contingent fee or other financial arrangement. See also id. § 2000e-5(e), permitting the court to appoint
In issuing its guidelines on sex discrimination, the EEOC, whose first chairman was Franklin D. Roosevelt, Jr., and which is now chaired by Clifford L. Alexander, Jr., has begun to develop a significant body of administrative law whose potential effect upon the daily relations between the sexes will no doubt be profound. Already some past patterns of sex-based job allocations show signs of cracking. Interestingly, such departures from existing employment norms have not always been in the direction of placing women in jobs previously reserved for men. The Act, after all, prohibits "sex" discrimination—and not discrimination against women. By its terms it therefore applies when men are denied a job because the one they seek has traditionally been reserved "for women only." Thus, the telephone company has already hired some males as telephone operators—to the consternation of customers who, upon hearing a male voice respond to their dialing "0," have demanded to speak to "the operator." Similar developments are occurring with regard to the employability of males as airline hosts—although the right of women to be an attorney for a complainant upon his application "in such circumstances as the court may deem just."  

40 These have taken the form of legal interpretations of the Act's language as well as the decisions of the Commission. The Act does not give the Commission power to enforce its decisions directly, its enforcement efforts being limited to "the informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(a) (1964). Nevertheless, the Commission's determination that reasonable cause exists to believe that an unlawful employment practice has been committed will be useful either to the aggrieved party who is authorized to sue on his or her own behalf, or by the United States Attorney General as intervenor in the aggrieved person's suit, or as an original suitor. Id. §§ 2000e-5(e),-6(a).

41 On February 21, 1968, the EEOC decided by a vote of 3-1 that an airline that refuses to hire and employ members of a particular sex for the position of flight cabin attendant—whether he or she be called a purser, hostess, steward or stewardess—violates the Act. 33 Fed. Reg. 3361 (1968); cf. Kaiser Foundation Hosp. v. Local 399, Bldg. Service Employees, [1965-1968 Transfer Binder] CCH E1VMi. PRAcT. GUIDE § 6166 (1967), where it is held that a hospital did not violate Title VII by refusing to permit two male licensed nurses to work in the Licensed Vocational Nurse (LVN) classification where a routine requisite of such employment was "intimate care of female patients." Although this result may have been correct, the award ignored the common practices of permitting male doctors to examine intimately female patients and of allowing female nurses to perform "sensitive personal care" for male patients. See also Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn. 1966), rejecting a male plaintiff's claim of union and employer discrimination in denying him permission to transfer to a job reserved for women and men with physical disabilities. Even had the plaintiff shown that he would derive tangible benefits from the transfer, noted the court, he could not claim discrimination because the employer "acted with honest purpose and within reason," since "sex and physical disability were bona fide occupational qualifications for the job." Id. at 581.
hired as pilots for the commercial airlines will also undoubtedly come up.

Aside from Title VII's specific effects upon disputes arising under it, there are a number of areas in which new legislation and other developments with respect to women's employment opportunities are directly traceable to the mood generated by the passage of Representative Smith's amendment. In 1967, for example, Presidential Executive Order 11,246, which since 1965 had established a policy of non-discrimination in government employment, was amended by the addition of "sex" as a prohibited type of discrimination.\(^4\) And still later in the same year, President Johnson signed a law permitting women to now become admirals and generals in the United States Armed Services.\(^4\) State fair employment legislation has also been dramatically affected by the passage of Title VII. Prior to the 1964 Civil Rights Act, only two states, Hawaii\(^4\) and Wisconsin,\(^4\) had prohibited sex discrimination in employment. By the beginning of 1968, however, 11 other jurisdictions had joined the ranks.\(^4\) Though pressure for such laws undoubtedly antedated the Federal Act in some of the states, it is not merely a post hoc, ergo propter hoc fallacy to suggest that their enactment was hastened by the presence of the sex discrimination prohibition in the federal law.\(^4\)

The sex provisions of Title VII have created a momentum in American society for a re-examination of some fundamental assumptions concerning women's role in the traditional family and that larger form of family called society. The ultimate effects of Title VII are still not in sight. For the moment, however, some immediate legal and social problems raised by the passage of the Act may be considered. To do so properly requires a preliminary examination of the scope and administration of the provisions prohibiting sex discrimination in employment.

\(^{43}\) Pub. L. No. 90-130 (Nov. 8, 1967). This law has been described as amending Titles "10, 32, and 37 of the United States Code to remove the provisions that limit the career opportunities available to women officers so that on the basis of merit they may have the same promotion and career tenure opportunities as male officers in similar circumstances." S. Rep. No. 676, 90th Cong., 1st Sess. 1 (1967).
\(^{44}\) HAWAII REV. LAWS § 90A-1 (Supp. 1963).
\(^{45}\) WIS. STAT. ANN. §§ 111.31-.32 (5), 111.36 (3)-(4) (Supp. 1964).
\(^{46}\) Arizona (1965); District of Columbia (1965); Idaho (1967); Maryland (1965); Massachusetts (1965); Missouri (1965); Nebraska (1965); Nevada (1965); New York (1965); Utah (1965); Wyoming (1965).
\(^{47}\) State laws are considered herein only to the extent that they assist in interpreting the federal law.
C. Scope and Operation of Title VII's "Sex" Provisions

Title VII of the Civil Rights Act covers employers in industries affecting commerce, employment agencies serving such employers, and labor organizations engaged in such industries. It declares that it "shall be an unlawful employment practice" for a covered employer, because of race, color, religion, sex or national origin

(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 . . . 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 . . .

The Act thus protects the right of persons to obtain and hold a job without regard to these factors, as well as the right to equal treatment once the job has been obtained. In addition, Title VII makes it unlawful for employment agencies to discriminate in their classification or referral practices and for labor organizations to discriminate on the same grounds in a variety of ways.

An important exception to these "unlawful employment practices" is found in the "bona fide occupational qualification" provisions of section 703(e) of the Act. That section in effect permits employment discrimination based on sex, religion or national origin—but significantly not on race—"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."

49 Id. § 2000e(c).
50 Id. § 2000e(d).
51 Id. § 2000e-2(a).
52 Id. § 2000e-2(b).
53 Id. § 2000e-2(c): "It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."
54 Id. § 2000e-2(e).
55 For a further consideration of these problems, see text following note 79 infra.
The Commission has already held that sex is not a bona fide occupational qualification for the position of flight cabin attendant, and that males may not be denied such employment solely on the grounds of sex. On the other hand, the Commission has recognized that where "it is necessary for the purpose of authenticity or genuineness, e.g., an actor or an actress." One of the knottiest problems in interpreting the bona fide occupational qualification language of the Act as applied to sex discrimination in employment, however, has been raised by the numerous state "protective" laws for women in employment.

Persons injured by the commission of an "unlawful employment practice" may ultimately procure legal redress from the federal courts. Section 706(e) allows suits by the person claiming to be aggrieved and authorizes the court to permit the United States Attorney General to intervene in cases of "general public importance." Upon finding an intentional unlawful employment practice, the federal courts may enjoin the defendant from engaging in it, and order reinstatement or hiring of employees with or without back pay. The EEOC may initiate a court proceeding on its own only to compel compliance with a previously issued order under the above provisions. If there is a pattern of intentional violations, the Attorney General may also bring a civil action in a federal district court.

Except for the last-named type of suit by the United States Attorney General, which need not be preceded by any EEOC investigation or previous referral to state or local agencies, the lawsuits authorized by Title VII represent the ultimate, or at least the penultimate, stage in the process of correcting the employment discriminations prohibited by the Act. The entire scheme of Title VII is designed to permit the EEOC to attempt to conciliate employment discrimination disputes. No private lawsuits may therefore be brought

56 See note 41 supra.
59 Id. § 2000e-5(e).
60 Id.
61 Id. § 2000e-5(g).
62 Id. § 2000e-5(i).
63 Id. § 2000e-6(a).
64 Id. § 2000e-5(a) provides in part: "If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The Commission's function has been characterized as "providing an arbitration clearing house for alleged employment discrimination." Air Transport Ass'n v. Hernandez, 264 F. Supp. 227, 228 (D.D.C. 1967).
under the Act until various waiting periods have expired, during which "the Commission has been unable to obtain voluntary compliance" with Title VII.\textsuperscript{65} Even the Commission is prevented for prescribed periods from investigating charges on its own,\textsuperscript{66} or on an aggrieved person's initiative\textsuperscript{67} if the alleged unfair employment practices are potentially subject to redress under state or local law.\textsuperscript{68}

Despite attempts since the bill was first introduced in the House of Representatives to give the EEOC remedial powers if conciliation failed (that is, to conduct hearings and issue orders), the Commission's power has remained limited to investigating complaints, determining whether reasonable cause exists to believe the allegations, and attempting to conciliate the matter.\textsuperscript{69} As a result, court proceedings following the failure of conciliation by the Commission are entirely de novo, and nothing "said or done during and as part of . . . [the Commission's conciliation] endeavors may be . . . used as evidence in a subsequent proceeding."\textsuperscript{70}

Nevertheless, the Commission's investigations, findings and opinions are important, and under some circumstances attain the force of law. They may, for example, influence the Commission's decision to intervene in an aggrieved person's private suit or to refer a matter for suit by the Attorney General. In addition, good faith reliance upon and conformity with the Commission's written interpretations and opinions constitutes an absolute defense in any action or pro-


\textsuperscript{67} Id. § 2000e-5(b).

\textsuperscript{68} See generally Rosen, Division of Authority Under Title VII of the Civil Rights Act of 1964, 34 Geo. Wash. L. Rev. 846 (1966). Since only a minority of states outlaw sex discrimination in employment, initial recourse to a state or local agency would not be required with respect to charges arising in most states.

\textsuperscript{69} See Blumrosen, Processing Employment Discrimination Cases, 90 Monthly Lab. Rev. 25 (1967).

ceeding based on an alleged unlawful employment practice. Such interpretive rulings have therefore been held to have legal effect, and are important in developing the law of sex discrimination in employment.

Moreover, it is very likely that the Commission's powers will someday be extensively enlarged. In that event, the Commission's decisions could become as authoritative in the area of sex discrimination as those of the NLRB in the field of labor-management relations.

Aside from Commission hearings and rulings and federal court suits, the process of interpreting the equal employment opportunity provisions of the 1964 Civil Rights Act can occur in a number of other procedural contexts. Since the Act makes sex discrimination "unlawful," the question whether particular conduct is covered may come up in state administrative hearings to determine, for example, whether a woman is entitled to unemployment insurance if she has been discharged because of her marriage in violation of a company rule.

Similarly, provisions in collective bargaining agreements limiting job opportunities may be held to be "unlawful" by arbitrators deciding disputes under such agreements. In many cases, moreover, adherence to such union contract provisions may provide a basis for an NLRB determination that a union has committed the unfair labor practice of breaching the duty of fair representation. The NLRB's

71 Id. § 2000e-12(b).
72 Air Transport Ass'n v. Hernandez, 264 F. Supp. 227, 229 (D.D.C. 1967). Notwithstanding the broad language in the Hernandez case, their effect as law should be limited to cases in which the Commission has ruled that a particular course of conduct would not violate the Act. A Commission opinion that particular conduct does violate the Act would not dispose of the issue in any case.
73 Several bills introduced in the First Session of the 90th Congress would have authorized the Commission to conduct hearings and issue remedial orders to the same extent as is now done by the National Labor Relations Board. The Senate Labor Committee approved such a bill in mid-1968. 36 U.S.L.W. 2724 (May 21, 1968). Shortly thereafter, the threat of a filibuster made the chances for passage in that session very dim. 68 L.R.R.M. 79 (1968).
74 Cf. Cooper v. Doyal, 205 So. 2d 59 (La. 1968).
75 In Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 14 (5th Cir. 1966), an NLRB determination that the breach of the duty of fair representation constituted an unfair labor practice under section 8(b) (1) of the National Labor Relations Act, where separate seniority rolls (white male, Negro male, and female) had been maintained and the local union had summarily refused to process grievances of its Negro members based on improper application of those seniority provisions was approved. Though the unfair labor practice charges were filed by eight Negro employees in the unit, and the case therefore deals with acts of racial discrimination, no reason appears why a comparable result could not be reached where the complainants charge sex discrimination. Dictum in the Rubber Workers case suggests, moreover, that this result would obtain despite the alternative remedies available under Title VII. Id. at 24.
actual remedy of refusing to consider a racially discriminatory collective bargaining agreement as a contract barring an election, or its potential remedy of decertifying a union that discriminates on the basis of race, now would appear to be available also where the offense is that of sex discrimination. The developing law on sex discrimination in employment, as a result, must be garnered from the work of all of these judicial and quasi-judicial institutions—which should explain the variety of sources relied on in the following discussion.

D. Title VII and State “Protective” Laws

One of the most difficult questions raised by the sex provisions of Title VII has been their effect on the so-called “protective” laws of the states. These include the widespread minimum wage and maximum hours laws applicable to women only, limitations upon women's working hours and the weight they may lift on the job, as well as other laws, apparently based upon varying legislative notions of “ladylike” and “unladylike” occupations, which occasionally prohibit women from working as bartenders or wrestlers.

The potential conflict between the prohibition against sex discrimination in Title VII and state “protective” legislation for women only is rendered more than ordinarily difficult by the section of the Act which, in effect, permits sex-based employment discrimination where sex is “a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise.” In the light of this provision, the question has arisen, for example, whether an employer who, because state law limits women's working hours, insists upon hiring only men for certain jobs violates the Federal Act, or whether adherence to the state hours limitation for women constitutes a “bona fide occupational qualification.” Similar questions have arisen with respect to an employer's adherence to state weight-lifting restrictions for women in establishing his hiring or promotional policies, and even with respect to an employer's own weight restrictions not required by state law.

The EEOC has not ignored the likelihood of conflict between federal and state law in this area but has followed a somewhat checkered

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career in indicating how it would deal with it. The Commission gave the first indication of its approach on November 11, 1965, in issuing its official guidelines on sex discrimination. Significantly, the Commission divided state laws regulating women's employment into two categories: (1) laws providing benefits for female employees, such as rest periods; and (2) those barring women from employment in certain hazardous or strenuous occupations. The Commission expressed its belief that Congress had not intended to disturb laws and regulations intended to, and having "the effect of, protecting women against exploitation and hazard." Consequently, the Commission stated that it would consider limitations or prohibitions imposed by such state laws or regulations as "a basis for application of the bona fide occupational qualification exception."

At the same time, the Commission noted that "some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, had ceased to be relevant to our technology or to the expanding role of the woman worker in our economy." Thus, under its original guidelines, employers who discriminated against women would commit unlawful employment practices though they did so in accordance with the state statute, if that statute did not have the effect of protecting women from exploitation and hazard. Yet, as has been observed, "the Commission did not reveal what laws or types of laws it considered to fall within its test of protection from 'exploitation' or 'hazard.'"

The next step was taken on August 19, 1966, when the Commission disclaimed any authority to determine whether Title VII superseded and in effect nullified "a state law which compels an employer to deny equal employment opportunity to women," stating that in such cases it would advise the charging parties of the right to bring suit under section 706(a) of the Act to secure a judicial determination as to the validity of the state law or regulation, reserving the right to appear as amicus curiae and to present its views as to the proper construction of the Act.

Finally, on February 21, 1968, after holding public hearings and receiving written statements on the subject from interested persons and organizations, the Commission released new guidelines on the relationship of state "protective" laws to Title VII's bona fide occupational exception to prohibited sex discrimination in employment.

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80 29 C.F.R. §§ 1604.1(b), (c) (1967).
81 Id. § 1604.1(c).
82 Id. § 1604.1(b).
Those new guidelines reaffirm the distinction drawn in the first instance between discriminatory and protective state laws, while rescinding the hands-off policy of the 1966 guidelines. Henceforth, "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 Act." 85

In the meantime, a number of lawsuits are pending in which the federal courts are being urged to resolve apparent conflicts between the state labor laws applying to women only and Title VII of the Civil Rights Act. 86 Although two federal district courts have upheld employers' or states' limitations on maximum weights that women may lift on a job, 87 at least one federal district court—in Mengelkoch v. 

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85 CCH EMPL. PRACT. GUIDE ¶ 16,900.001 (1968).
86 See, e.g., Mengelkoch v. Industrial Welfare Comm'n, CCH EMPL. PRACT. GUIDE ¶ 9129 (C.D. Cal. 1968), where the court abstained from a decision on an alleged conflict between California's maximum hours law for women and Title VII; Ward v. Luttrell, Civil No. 67-1622 (D. La., filed Nov. 6, 1967), where there is a challenge to Louisiana's maximum-hour law as being in conflict with the 14th amendment and Title VII; Roig v. Southern Bell Tel. & Tel. Co., Civil No. 67-574 (D. La., filed Apr. 20, 1967), where damages and injunctive relief were sought for an employer's refusal to accept plaintiffs' bids for the position of test deskman because the job required hours of work in excess of those permitted by Louisiana hours law. Plaintiffs asserted that the hours law did not apply to the job they sought and that if it did it violated the due process and equal protection clauses of the 14th amendment. See also Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 177 (S.D. Ga. 1967), in which an employer's refusal to hire a woman for the job of switchman because it requires lifting more than 30 pounds, in contravention of Rule 59 of the Georgia Department of Labor, was upheld; Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), where it is held that even in the absence of a state weight-lifting law, employers did not violate Title VII by not allowing women to bid on jobs requiring the lifting of more than 35 pounds; Rosenfeld v. Southern Pac. Co., Civil No. 67-1377-5 (C.D. Cal., filed Sept. 19, 1967), which involved possible conflict between Title VII and California's legislation restricting women's working hours and weight-lifting in employment; Dixon v. Avco, (S.D. Ohio, filed Feb. 13, 1968), where it was alleged that there was a denial of promotion in violation of Title VII, while the company claimed the job required lifting over 25 pounds in violation of Ohio law.

87 See Weeks v. Southern Bell Tel. & Tel. Co., 277 F. Supp. 117 (S.D. Ga. 1967); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967). These results were each based in part upon the EEOC's own interpretation of Title VII's bona fide occupational qualification exception as applied to this area. "[R]estrictions on lifting weights will . . . [be honored] except where the limit is set at an unreasonably low level which could not endanger women." 29 C.F.R. § 1604.1(3)(b) (1968). It should be noted that the factors that are relevant to weight-lifting restrictions—general physical limitations of women and other sex-based differences in physical strength—are not necessarily present when the subject of maximum-hour legislation is in question. Moreover, even with respect to weight-lifting ability, some women
Industrial Welfare Commission of California—has adopted an abstention approach to state maximum hours legislation for women that may prove appealing to other federal courts faced with similar questions.

In Mengelkoch, the plaintiffs, three female employees of the defendant, North American Aviation, Inc., sued to have California's maximum hours law for women declared unconstitutional as violating the 14th amendment's equal protection clause or invalid as conflicting with Title VII of the 1964 Civil Rights Act. A three-judge federal court, convened because of the plaintiff's prayer for an injunction against state enforcement of an allegedly unconstitutional state statute, was first dissolved on the ground of the insubstantiality of the constitutional question in the light of settled precedents of the United States and California Supreme Court levels. Then Federal District Judge Stephens, acting alone, granted the defendants' motion to abstain from deciding the issues in the case on the grounds that "there are serious problems of interpretation and construction of the state law," that "if the state law in question is in conflict with the Civil Rights Act of 1964, it would also conflict with . . . provisions of the California Constitution," that "[t]he case may be disposed of on questions of state law and federal constitutional questions [if they exist] . . . needless conflict with the administration by the State of its own affairs may be avoided . . ." The effect of this decision was that any relief the plaintiffs were entitled to receive would have to come in the first instance from a state court rather than a federal court.

are possessed of "extraordinary strength and stamina"—a fact that the federal court in Bowe found too difficult for employer ascertainment to impose this duty upon him. Bowe v. Colgate-Palmolive Co., supra at 357.

89 CAL. LAB. CODE § 1350.
90 Since a subsequent article in this series on the constitutional aspects of sex-based discrimination will deal with the equal protection argument in Mengelkoch and other cases, the present discussion is limited to Mengelkoch's disposition of the alleged conflict between the state law and Title VII.
92 See Miller v. Wilson, 236 U.S. 373 (1915); Muller v. Oregon, 208 U.S. 412 (1908); In re Miller, 162 Cal. 687, 124 P. 427 (1912).
94 Id.
95 Id.
96 Judge Stephens' dismissal of the federal proceedings, rather than staying them until state court determination of the state issues would reveal whether a decision on the federal question was still necessary, appears to violate what the Supreme Court has characterized as the "better practice." Zwick-
That the abstention approach may appeal to other federal courts when faced with similar issues is not unlikely. In many respects, this is merely an expression on the federal court level of the administrative abstention first announced and subsequently abandoned by the EEOC. The fact of the matter is that the reconciliation of Title VII's prohibition against sex discrimination in employment and various state protective laws—especially those prescribing maximum working hours or weight lifting restrictions for women only—is extraordinarily difficult. Moreover, as the court in Mengelkoch observed, "[t]he importance of the questions which are raised by a threat to the validity of laws affecting working women as a class from the standpoint of the orderly administration of the law by the state is enormous." It comes as no surprise, therefore, that various tribunals, whether administrative or judicial, have tended to treat this area as a hot potato and, if the reader will excuse the mixing of metaphors, to pass the buck.

But eventually some authoritative resolution of this problem will no longer be avoidable. Whether it will be the state courts, the federal courts, the EEOC with its limited authority, or even Congress itself, some arm of government will have to spell out some day

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97 ler v. Koota, 389 U.S. 241, 244 n.4 (1967). See also Wright, Federal Courts 171 (1963). Characterizing a potential conflict between state and federal law as essentially a state question is also of doubtful validity—but in view of the considerations discussed in the text this approach may appear beguiling to other federal courts. At the same time, Judge Stephens suggested that a "good case can be made for re-examination" of the constitutional precedents as applied to this situation, in view of the 1967 amendment adding Section 1350.5 to the California Labor Code, which limited hours of women working in interstate commerce to 10 per day, while other women working on the same job were limited to 8 hours per day. This "makes suspect the true present purposes of the limitation of working hours for women. Are these restrictions truly based upon a concern for the public health and welfare, a determination to restrict the number of women in industry in favor of male employees, or to protect women against the competition of men?"

98 Cf. Coon v. Tingle, 277 F. Supp. 304 (N.D. Ga. 1967), dismissing plaintiff's action seeking to have Georgia Code § 58-1062, which provides that "No female shall be allowed to work in any liquor store as hostess, bar maid or in any manner whatsoever," declared violative of the 14th amendment and in conflict with Title VII. Though the dismissal in Coon was based upon various procedural defects in the complaint and the non-applicability, on jurisdictional grounds, of Title VII, the court also observed that even if these procedural defects had not been present, "the Court would not have reached the constitutionality of the statute under attack . . . because of the doctrine of abstention, the exercise of which seems appropriate here . . . ." Id. at 307.

99 See text at note 84 supra.

SEX-BASED DISCRIMINATION

the exact effect of the federal Act upon the state protective laws. When that is done, the choice will be narrowed to relatively few alternatives, and it is the purpose of the balance of this section to evaluate those alternatives with an eye toward recommending those that seem most desirable in the light of all the circumstances.

1. Weight-Lifting Limitations for Women

For reasons discussed below, considerations relevant to determining the fate of state or employer-imposed weight-lifting limits for women employees are different from those involved in state maximum hour legislation, and are therefore discussed separately here.

As noted earlier, two federal district courts have upheld employers' weight-lifting restrictions on women workers in the face of a challenge based on their apparent conflict with Title VII. In Bowe v. Colgate-Palmolive Company, the 35 pound weight limit for women was set by the employer itself rather than being required by state law. In Weeks v. Southern Bell Telephone and Telegraph Company, it was a state rule limiting the weights that women were allowed to lift on a job to 30 pounds that was upheld.

Although both decisions relied heavily on section 1604.1 (3) (b) of the EEOC's own regulations, the Bowe case also considered at some length the standards for testing a weight-lifting limitation in the light of Title VII's prohibition against employment sex discrimination and the Act's bona fide occupational qualification provision. Relying heavily on an earlier law review study, the court in Bowe in

100 The Missouri Attorney General has held, without extensive discussion, that Missouri laws limiting women's overtime and other "special protection laws . . . have been enacted for the public interest, specifically the protection of the working woman, [and are therefore] a bona fide occupational qualification within the meaning of Section 703 (e) of Title VII of the Civil Rights Act of 1964." [1965-1968 Transfer Binder] CCH EMPL. PRACT. GUIDE ¶ 8136 (1967). By contrast, the Arizona Civil Rights Commission, noting that Arizona's eight-hour day and forty-eight hour week limitation on women's working hours "does not prevent a woman from working [excess hours] provided that the excess time is spent working for a second employer," has held that state's hours limitation for women to be in conflict with Title VII. Reynolds v. Mountain States Tel. & Tel. Co., [1965-1968 Transfer Binder] CCH EMPL. PRACT. GUIDE ¶ 8111, at 6184 (Ariz. Civ. Rgs. Comm'n 1966). Though persuasive, these determinations are not dispositive of the question even within their own states, and are cited as limited authority for their respective positions.

103 Id. at 118; Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 364 (S.D. Ind. 1967); see note 109 infra.
104 Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 IOWA L. REV. 778 (1965).
effect adopted the "test of reasonableness as developed in the many decisions interpreting the equal protection clause of the Constitution . . . [as a] standard [that] ought to afford some guidelines for business"\(^{105}\) in barring women from particular jobs on the ground that sex is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." As related to state protective laws, therefore, this test would appear to validate such laws that do not run afoul of the equal protection clause, and hold them invalid only if they are so unreasonable as to violate the command of that constitutional provision. But this test seems erroneous for a number of reasons. Aside from the fact that the equal protection guarantee has been interpreted begrudgingly as applied to sex discrimination and has rarely been held applicable in that area, the distinction between a constitutional and statutory provision must be borne in mind. Even if the United States Supreme Court should some day overrule its earlier decisions upholding sex discrimination in the face of a constitutional challenge, the meaning of Title VII would continue to differ from that of the 14th amendment. What meaning should the EEOC and the courts, therefore, attribute to section 703(e) of the 1964 Civil Rights Act with respect to weight-lifting rules?

Weight-lifting restrictions for women workers, unlike limitations on women's working hours, seem presumptively valid in view of the general differences in strength between the sexes, and the fact that the lifting of heavy weights requires a sudden concentrated effort for which a minimum physical capacity or a great manipulative skill is required. In addition, it is not feasible in this area to adopt an approach that is suggested below\(^{106}\) as one of the possibilities with respect to maximum hours legislation; i.e., extending such limitations to men as well as women. It is an unfortunate fact of economic life that many jobs do require the lifting of heavy weights and, were both men and women barred from such jobs, much of industry would come to a halt.\(^{107}\) That some general limitation on the weights women may lift on a job is a reasonable restriction is therefore evident.\(^{108}\)

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106 See text accompanying note 120 infra.
107 However, the extension of the rule to men as well as women, along with an interpretation requiring both to satisfy a burden of proof that they can perform the job with little or no harmful personal effects, would have the virtue of equalizing the rules, with males generally being able to satisfy the burden more often and more readily than females.
108 See references in Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 355 (S.D. Ind. 1967), to the maximum permissible weight limits for women in industry of between 33 and 41 1/10 pounds, set by an I.L.O.-authorized study in 1964, and the 1965 Bulletin of the United States Secretary of Labor, recom-
However, even where a general limitation may be regarded as generally reasonable—50 pounds for example—many individual women may still be capable of lifting such weights, occasionally or regularly, without suffering any ill effects. Rather than being possessed of "extraordinary strength and stamina" as the court characterized such women in Bowe, these women may have learned the skills that make it possible to lift heavy weights with relatively little strain. The important point is that for these women who are ready, willing and able to perform the tasks required on a particular job, an employer's own weight-lifting limitation or one prescribed by state law merely has the effect of keeping them from being hired or promoted to a job, in favor of male applicants for the same position—a result that seems directly opposed to the spirit as well as the letter of Title VII.

It is with regard to such women that the distinction between the statutory and constitutional commands becomes important. Whenever possible, the Act should be interpreted so as to make possible the introduction of men or women—or at least the opportunity to be so introduced—to jobs formerly reserved for the other sex only. Reconciliation of the Act, including its above mentioned exception, with a reasonable general statutory or employer-established weight-lifting restriction, could be achieved by holding that the latter merely creates a burden of proof and of persuasion in individual women applicants to show that they can perform the work in question without harmful effects, though such work requires occasional lifting of weights in excess of those permitted by the rule. That burden could be satisfied by a certificate from a family physician or some other testing procedure. While such an interpretation of the Act may create some administrative burdens for employers, the extent of those burdens should not be exaggerated. One cannot overlook the fact that employers are already burdened by a multitude of governmental

mending essentially the same limits with further qualifications concerning the compactness of the package and the height to which it may be lifted.


110 In Bowe, the court found that "it was not [and is not] practical or pragmatically possible for [Colgate], in the operation of its plant, to assess the physical abilities and capabilities of each female who might seek a particular job, as a unique individual with a strength and a stamina below average or above average or to consider special female individuals as uniquely qualified among women in general as suited to the performance of certain ... general labor jobs [which she might seek] ... by means of her preference sheet." Id. at 332. The approach suggested in the text would also conform to the EEOC position, stated in the Commission Guidelines on November 22, 1965, CCH EMP. PRACT. GUIDE ¶ 17,352.04, that "the principle of nondiscrimination in employment requires that applicants be considered on the basis of individual capacities and not on characteristics generally attributed to a group."
requirements at the state and federal levels that are deemed necessary for effectuating important social policies.

As noted earlier, the passage of Title VII's sex provisions may have a profound and salutary effect upon the entire tenor of male-female relationships in American society—one that will redound to the benefit of the total society. It is important for the courts, the EEOC, and other interested persons and groups to make the most of this opportunity by interpreting the Act's provisions to bring about those goals.

2. State Maximum-Hour Legislation\(^{111}\)

The number of hours women may work in a day or a week is controlled by two types of statutes. One, sometimes applicable to men as well as women, provides for the payment of premium wages for hours worked in excess of a certain maximum. The effects of Title VII and the Equal Pay Act upon such laws, where they prescribe a higher minimum rate than is required under the Federal Fair Labor Standards Act and apply only to women, are discussed later in this article. The present concern is with those laws prevailing in over 40 states that place an absolute limitation on the number of daily or weekly working hours for women employees. Though such laws sometimes also cover children, they do not at the present time cover male adult employees.

In particular, various alternative approaches to reconciling such laws with Title VII's prohibition against sex discrimination in employment and the bona fide occupational qualification exception are examined and evaluated. Among those alternatives are: (1) to hold all maximum-hour laws for women only totally invalid as conflicting with Title VII; (2) to hold all state maximum-hour laws for women only valid as not being in conflict with Title VII and to do nothing more; (3) to hold such laws valid as not conflicting with Title VII, but to interpret Title VII as requiring the extension of state maximum-hour laws to men also; (4) to provide an ultimate solution to the problem by enacting new federal and state legislation that would make overtime work, for men as well as women, voluntary rather than compulsory.

\(^{111}\) Although the following discussion deals with the possible effects of Title VII upon state laws limiting the hours a woman may work in the course of a day or of a week, it may be applicable also to many other types of state "protective" labor laws for women only, such as requirements that women be provided seats at work, e.g., Colo. Rev. Stat. Ann. § 80-2-13 (1963), rest periods for women only, e.g., Wyo. Stat. Ann. § 27-218 (1957), and even weight-lifting restrictions for women workers.
a. Hold All Maximum-Hour Laws for Women Only Totally Invalid as Conflicting with Title VII

This alternative seems highly undesirable. Maximum-hour legislation for women developed only as a legislative response to early judicial indications that maximum-hour legislation for both sexes would not be permitted, a judicial attitude that has since been reversed.\footnote{112}{See note 7 supra.} While to strike down as conflicting with Title VII all maximum-hour laws for women only may be one way of effectuating Title VII's prohibitions against sex discrimination in employment, it is by no means the only way, and certainly is not as satisfactory as extending such protection to men also in the variety of ways suggested below. For if the concept that employers should be deterred from requiring their employees, male or female, to work longer hours reflects, as it does, enlightened social goals, then it would be a step backward in American social history for even limited expression of those social goals to be undone.

Unfortunately, limited efforts to achieve these ends have already been undertaken at the state legislative level. Some states have repealed laws prescribing maximum hours for women workers only.\footnote{113}{See, e.g., Law of Mar. 12, 1943, ch. 160, 44 Del. Laws 495 (repealed 1965); Law of Apr. 18, 1935, ch. 214, 40 Del. Laws 759 (repealed 1965); Law of Mar. 22, 1917, ch. 230, 29 Del. Laws 741-42 (repealed 1965); Law of Mar. 20, 1913, ch. 175, §§ 2, 4, 6, 7, 8, 27 Del. Laws 425-27 (repealed 1965), which had provided, \textit{inter alia}, for maximum-hour limitations for females 16 years of age and older in certain establishments, as well as meal and rest periods; \textsc{Va. Code Ann.} § 40-35a (Cum. Supp. 1968), exempting businesses meeting the requirements of the Fair Labor Standards Act from the 9-hour day, 48-hour week limitation on women's working hours. See also Law of June 30, 1909, No. 285, § 9, [1909] Mich. Pub. Acts 646 (repealed 1967), which had set a 54-hour per week, 10-hour a day, absolute limitation on working hours of women of all ages and minors below the age of 18 of both sexes. In those states distinguishing maximum hours for women in accordance with whether they are covered by the Fair Labor Standards Act, a constitutional challenge alleging arbitrary discrimination may also be feasible. See discussion of \textsc{Mengelkoch} decision, text accompanying notes 87-97 supra.} The net effect of such developments is that in those states neither men nor women now are protected from excessive employer demands for overtime work, and the situation has reverted to what it was in the early years of this century when the United States Supreme Court refused to uphold New York's efforts to impose a 10-hour-a-day limitation on working hours for men and women.\footnote{114}{\textsc{Lochner v. New York}, 198 U.S. 45 (1905).}

A similar approach seems to have been taken by women plaintiffs in various pending lawsuits seeking, as a preliminary step to their being hired or promoted to jobs that "require" the working of
hours in excess of that maximum, to have state maximum-hour laws declared invalid as conflicting with Title VII or as unconstitutional under the 14th amendment.\[115\] Were these plaintiffs to succeed in this effort, however, their "success," like the legislative repeal of maximum-hour laws for women, rather than representing social progress would have to be deplored.

Particularly ironic is the fact that the approach of invalidating state maximum-hour legislation may not be necessary to prevent such laws from thwarting Title VII's promise of equal job opportunity without regard to sex. For, as suggested below, Title VII can be interpreted as requiring an employer to provide equal opportunities for male and female job applicants seeking a position that he believes requires overtime work without invalidating the state maximum-hour laws for women. This could be achieved by holding that, because of Title VII, state maximum-hour laws for women only must

\[115\] See cases cited in note 86 supra. Since the above was written, Federal District Judge Ferguson has ruled orally that the California law limiting women's working hours violated Title VII. Rosenfeld v. Southern Pac. Co., Civil No. 67-1377-F (C.D. Cal., filed Sept. 19, 1967) (result reported in L.A. Daily Journal, Sept. 17, 1968, at 1, col. 6). Significantly, this was the result sought by the EEOC itself in that case. Brief for EEOC as Amicus Curiae at 6-7, Rosenfeld v. Southern Pac. Co., Civil No. 67-1377-F (C.D. Cal., filed Sept. 19, 1967). The Commission's efforts to completely invalidate such laws rather than to seek to extend them to men is regrettable and in a fundamental sense contrary to what is intended by Title VII. It would appear that the EEOC made the same error in its guideline issued in February 1968, which stated that "a difference in optional or compulsory retirement ages based on sex [in pension or retirement plans] violates Title VII." 33 Fed. Reg. 3344 (1968). The effect of this guideline was that, if an existing retirement plan gave women employees the option of retiring at age 62, but withheld this option from men until they reached 65, the inequality would be "cured" by requiring women to work until 65. It is submitted that it would have been within the EEOC's statutory power to remedy the situation by requiring the lowering of the optional retirement age for men—subject of course to actuarial factors limiting what can be done to plans now in force. That its earlier ruling may have been an unwelcome development for many women has recently been impliedly conceded by the Commission's general counsel in an opinion permitting "continued early retirement for current female employees of certain ages, depending on the specific pension and retirement plan under consideration." (EEOC News Release No. 60-68, Sept. 16, 1968) (emphasis added). This, too, is an unsatisfactory answer to the long-range problems created by the EEOC's earlier ruling. The Commission and the courts should extend the benefits of an early optional retirement age to male employees, rather than take it away from female employees in plans that presently distinguish between the sexes in this area. On August 1, 1968, the Senate Finance Committee reported out H.R. 2767, with an amendment that would permit sex discrimination in pension and retirement plans. H.R. 2767, 90th Cong. 2d Sess. (1968). Representative Martha Griffiths has ably demonstrated the danger such an enactment would create for Title VII. Cont. Rsc. E 7894 (Daily ed., Sept. 12, 1968).
now be extended to men also. Were this done, employers could re-
require neither male nor female applicants to work such excess
hours—thus removing this apparent justification for hiring or pro-
moting males rather than females, though the latter, in certain cases,
are senior in service, are better trained for the position, or have other
equities in their favor. At the same time, by extending the maxi-
mum-hours limitation to male employees in those states having such
a limitation on women's working hours, a long overdue reform in
American industrial life finally will have come to pass.

b. Hold All State Maximum-Hour Laws for Women Only Valid as
Not Being in Conflict with Title VII

This, too, seems an undesirable choice, if nothing more is done.
Conceivably, this result could be achieved by reasoning that state
legislation prescribing maximum hours for women, but not for men,
expresses the legislature's reasoned judgment that because of sex-
based differences in physical strength, social roles, family responsibili-
ties and the like, separate treatment is reasonable. In effect, this
would involve the application of the equal protection test under which
certain discriminatory legislation will be upheld as long as it has
some reasonable basis, though the members of a reviewing court, had
they been legislators rather than judges, would not have enacted such
laws themselves. Once the basic legislation is validated, the next
step is to hold that an employer, in following such legislation by
refusing to hire or promote a woman to a job requiring hours of
work in excess of those prescribed by state law, is merely applying a
bona fide occupational qualification test to the job in question.116

One apparent obstacle to adopting this approach stems from the
1964 Civil Rights Act itself. Section 708117 provides that "[n]othing
in this title shall be deemed to exempt or relieve any person from any
liability, duty, penalty or punishment provided by any present or fu-
ture law of any State or political subdivision of a State, other than
any such law which purports to require or permit the doing of any
act which would be an unlawful practice under this title."118

As one commentator has suggested, however, it is possible to
interpret the word "purports" in that section as excluding state
statutes that retain "an underlying protective policy pertinent to
the modern labor force."119 But certainly as applied to maximum-

116 This was the employer's position in Mengelkoch v. Industrial Welfare
Comm'n, CCH EMPL. PRACT. GUIDE ¶ 9129 (D.C. Cal. 1968).
118 Id.
119 Oldham, Sex Discrimination and State Protective Laws, 44 DEN. L.J.
344, 370 (1967).
hour laws, the effect of such an interpretation without doing anything more, would be to deny employment opportunities to masses of American women. This is by no means to suggest that the sex provisions of the Act would thereby be rendered meaningless and of little effect. There would still be significant areas in which sex discrimination in employment would be an actionable wrong, subject first to the administrative remedies of state agencies and the EEOC, and ultimately to redress in the courts. But much of the Act's potential for reshaping male-female relations in the United States would be weakened substantially were this interpretation to prevail without additional steps being taken.

Is it possible, then, to break out of this impasse? What can responsible administrative agencies, the courts, or Congress do to preserve the social gains in the employment area that have been hammered out over the years, while at the same time fulfilling Title VII's promise and potential for creating true equality of employment opportunity for men and women in the United States?

The answer is not to invalidate state protective laws for women, but rather to extend them wherever possible to men also, and if necessary to enact new laws that will preserve the protective goals of the old ones while eliminating their discriminatory impact. How this might be achieved within present constitutional and statutory limits is considered in the following section.

c. Interpret Title VII as Requiring the Extension of State Protective Laws to Men Also

While such an approach may provoke some adverse reaction in the states—invoking as it does a species of federal intrusion into a state domain and being especially abrasive where it is effected by the EEOC rather than by the courts—it is not without precedent.

The Equal Pay Act of 1963 provides in part:

No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

This provision is part of the Federal Fair Labor Standards Act which, in section 218, also provides in part:

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, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.\textsuperscript{121}

Combining the effect of these two provisions, the Department of Labor has issued interpretations which state:

State laws providing minimum wage requirements may affect the application of the equal pay provisions of the Fair Labor Standards Act. If a higher minimum wage than that required under the Act is applicable to a particular sex pursuant to State law, and the employer pays the higher State minimum wage to male or female employees, he must also pay the higher rate to employees of the opposite sex for equal work in order to comply with the equal pay provisions of the Act.\textsuperscript{122}

Further:

[The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a State law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women.\textsuperscript{123}]

No cases appear to have questioned the validity of these interpretations, and in certain instances, settlements have been worked out benefiting male employees pursuant to their provisions.\textsuperscript{124}

If such measures in the minimum wage area can be taken at the administrative level by the Department of Labor,\textsuperscript{125} there seems to

\textsuperscript{121} Id. § 218.
\textsuperscript{122} 29 C.F.R. § 800.161 (1987).
\textsuperscript{123} Id. § 800.162.
\textsuperscript{124} “In one case, 11 men employees of a bank in San Francisco benefited by obtaining overtime compensation which had been paid only to women pursuant to the requirements of a California state law. In another instance men checkers in a grocery store had been paid 35 cents less than women.” Margo-lin, Equal Pay and Equal Employment Opportunities for Women, N.Y.U. 19TH CONF. ON LABOR 297, 310 (1967).
\textsuperscript{125} The EEOC, in an Opinion Letter of its General Counsel, has taken the same position, stating that “[w]here an employer pays a certain wage to employees of one sex in order to comply with a minimum wage law, he must also pay the same wage rate to employees of the opposite sex for equal work.”
be no reason why the EEOC could not in the same manner extend to men also those state statutes limiting working hours for women only—provided, of course, that the Commission's action affects only those employers, labor organizations and employment agencies that fall within Title VII's jurisdictional ambit.126

How would such an extension to men of a state maximum-hour law, presently applying to women only, actually affect the question of equal job opportunities? It would simply mean that an employer could not invoke the state maximum-hour limitation for women workers as a bona fide occupational qualification permitting him to discriminate arbitrarily against a female job applicant in favor of a male applicant. He could no longer say: (1) The job requires overtime work; (2) State law forbids me to require women to work such overtime hours; (3) But it allows me to require men to do so; (4) Therefore, I will not violate Title VII by arbitrarily assigning the job to the male applicant. Since the extension of the hours limitation to men would mean that the employer could not require male employees to work overtime hours either, he simply could not use that excuse for denying female job applicants equal job opportunities.

Were the EEOC and the federal courts to interpret Title VII as requiring such extension of state maximum-hour laws to men, how are the states likely to react? Ultimately their response will be

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126 The jurisdictional reach of Title VII is much greater than that of the Equal Pay Act. The latter, being part of the Fair Labor Standards Act, is riddled with exemptions. 29 U.S.C. § 213 (1964). The Equal Pay Act specifically provides that employers who are in violation of the Act shall not comply by reducing the wage rate of any employee. Id. § 206(d) (1). This has no bearing, however, on the validity of extending state minimum wage laws to men, or with respect to the suggestion in the text that other laws be similarly extended under Title VII. In at least one state, however, an Attorney General's Opinion has interpreted the state's own equal employment opportunities statute, which prohibits sex discrimination, as not allowing male employees to avail themselves of state statutory provisions for “minimum wages, food and lodging, maximum hours, meal periods, rest periods, when seats must be provided, uniforms, and certain other working conditions designed for the benefit of female employees, [since males] do not come within the class sought to be benefited, i.e., female employees.” Nevada Attorney General's Opinion No. 458, Nov. 13, 1967, CCH EMPL. PRACT. GUIDE ¶ 8207 (1967). This result can be characterized only as question-begging, since the basic problem in such cases is whether the statute involved requires or permits the extension of women's employment benefits to males. It is significant that the article from 31 AM. JUR., Labor § 763 (1958), relied upon in the Nevada Attorney General's Opinion, dealt with the constitutional right of the legislature to pass laws safeguarding the health of female employees, and that none of the lawsuits challenging such laws appear to have been brought by male employees seeking to have their benefits extended to them.
determined by the types of political pressures exerted upon their respective legislatures. Some, for example, may decide to equalize the situation by repealing present hours limitations for women workers. Though, as indicated earlier in this article, such an approach is to be deplored, it is no worse than what has already been undertaken voluntarily by some legislatures or what has been specifically sought by particular women plaintiffs in pending law suits. A second approach may be simply to let the extension to males take effect without doing anything more. Certainly, in those states in which a state minimum wage for women has, as a result of the Federal Equal Pay Act, been extended to men, no movement for the repeal of the state minimum wage for women appears to have developed. Moreover, in some states the extension of maximum-hour laws to men also may be regarded by the legislatures themselves as a highly desirable move. Though these legislative bodies would probably prefer to take such steps themselves, rather than having it imposed upon them as a result of federal law, this will not always be the case; in some instances, this device may even strike the state legislatures as being preferable to their acting on their own. Finally, in some states, neither of the above two approaches will be acceptable because: (1) the repeal of a state maximum-hour law for women will strike them as a step backward; or (2) the extension of the limitation to men will strike them as creating an undue burden on employers in depriving them of the power to require any employees, male or female, to work overtime hours. For them, a third approach, which in many respects is the most desirable, will also be possible. That approach is to enact laws making overtime work voluntary for both sexes. While such a law is also desirable at the federal level, state enactments will be useful to fill in the inevitable jurisdictional gaps in any future federal legislation on the subject.

The approach of extending the protection of the state maximum-hour legislation to men—which can be done initially by the EEOC and should then be ratified by the courts if challenged in individual cases—would have the double virtue of preserving past gains while fulfilling Title VII's promise of equal opportunity in employment, without regard to sex. Of all the approaches considered to this point, this seems by far the most desirable—although it, too, has its problems. Until Congress and the state legislatures act on these fundamental problems, however, extension of state protective laws to men, especially those prescribing maximum hours of employment

127 Of course, some exceptions could be made in the statutes for emergency situations, provided that “emergency” was precisely defined and it was not permitted to become a means of circumventing the basic purpose of the laws to restrict working hours for both sexes.

128 See text following note 138 infra.
for women,\textsuperscript{129} appears to be a satisfactory reconciliation of Title VII with those protective laws.\textsuperscript{130}

d. Ultimate Legislative Action on Permissive Overtime Work

That the ultimate reconciliation of the maximum hours problem with Title VII may require further Congressional or state legislative action on the subject of overtime employment—for men as well as women in industries subject to their regulation—seems likely. As a point of departure in considering legislative needs here, some of the language of the three-judge federal court granting the defendants' motion to dissolve itself in \textit{Mengelkoch} is particularly apt. In that opinion the court stated:

\begin{quote}
It has also been pointed out that the abandonment of limitations on working hours for women would place women on an equal basis with men in the matter of overtime pay, but at the same time would also make them subject to the obligation to perform as much overtime work as required of men. This is a mixed blessing. It is not a matter of letting women earn overtime when they want to, but an obligation to work overtime whether they want to or not on pain of being discharged. This could result in women being squeezed out of certain industrial work rather than broadening the employment base and opportunity for women in industry. It is not so certain as plaintiffs assume that their position represents the will of many other women, even if similarly situated.\textsuperscript{131}
\end{quote}

Though these remarks were addressed to the \textit{Mengelkoch} plaintiffs' efforts to invalidate California's maximum-hour law for women only, they, and especially the italicized portion of the above excerpt, are pertinent to a general consideration of the overtime problem.

It is submitted that the current state and national legislation on the subject of overtime employment is entirely inadequate to achieve the apparent aims of such laws to limit the hours of work of cov-

\textsuperscript{129} The same approach could be taken with some other laws (see note 111 \textit{supra}) but would not be feasible, of course, with respect to laws providing, for example, certain benefits in the event of pregnancy.

\textsuperscript{130} Further support for this approach can be garnered from section 708 of Title VII, 42 U.S.C. § 2000e-7 (1964), which in effect relieves persons from any duty, liability, etc. provided by any law "which purports to require the doing of any act which would be an unlawful employment practice under this title." See text accompanying note 119 \textit{supra}. When this is coupled with the fact of Congressional approval of the amended bill that prohibited sex discrimination, over the objection of Congresswoman Green on the floor of Congress that passage of the sex provisions would create "new problems for business, for managers, for industrial concerns [which] should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation," \textit{110 Cong. Rec. 2584 (1964)}, EEOC extension of state protective laws to men, wherever feasible, appears consistent with the spirit and tenor of the basic legislation.

\textsuperscript{131} \textit{Mengelkoch v. Industrial Welfare Comm'n, CCH EMPL. PRACT. GUIDE ¶ 9128, at 6514 (C.D. Cal. 1968) (emphasis added).}
SEX-BASED DISCRIMINATION

Excluded employees. Except for laws such as those in California and other states, placing an absolute limit on the permissible number of hours in a day or a week that an employer may require to be worked by women only, children only, or at times women and children only, overtime laws, including the wages and hours provisions of the Federal Fair Labor Standard Act, merely provide that workers who actually perform work in excess of a designated number of hours must be paid at premium rates, such as one and one-half times the normal rate of pay. These provisions were not enacted to reward workers for their willingness to work excess hours. Rather, they were designed to deter employers from requiring their employees to work such hours. The overtime rates provided for by such laws, rather than being denominated as premium rates, are therefore probably more accurately described as penalty rates, when they are viewed from the perspective of their intended objects—employers as a class. The idea behind such provisions was that employers, faced with the prospect of having to pay one and a half times as much for each excess hour of work as they would pay for each hour of nonover- time work, would pause before requiring their employees to work such excess hours.

But unfortunately, things have not quite worked out that way. Many employers have found that it is often more economical to pay experienced workers a premium (penalty?) rate than to engage the services of inexperienced workers at straight-time rates to complete a job at hand. When employers have done this, their employees have found that no provisions of the various wages and hours laws afforded them any job protection if they refused to comply with their employers' requests for overtime work. Even under many union-management collective bargaining agreements, refusal to work overtime may be designated as a cause for discharge of an employee.

132 In its August 19, 1966 policy statement, the EEOC noted that “over forty states have laws or regulations which . . . limit the maximum daily or weekly hours which women employees may work.” 35 U.S.L.W. 2137 (1966).


136 See, e.g., Continental Oil Co., 161 N.L.R.B. 95 (1966), wherein the NLRB upheld the discharge of an employee for refusal “to work on two Saturdays.”

The net effect is that despite widespread overtime-hours legislation at the state and federal levels, many employees (women as well as men in states not having the California-type statute for women only, and men only in states that do) frequently work 48, 58, and perhaps 68 hours in a given week—a situation not unlike that prevailing at the turn of the century when organized labor was struggling to reduce the 12-hour, 6-day week to a 10-hour, 6-day week.\textsuperscript{138} 

In an era that has seen a growing awareness of the importance of parental supervision—male as well as female—of the youth of our nation, the possibility of this type of prolonged separation between parents and children, husbands and wives, cries out for legislative correction. This conclusion is supported by the general economic need, in an era of galloping automation, to distribute available work among all persons in the labor market, rather than to concentrate it in the hands of some at the expense of others.

These goals could be achieved in those states having maximum-hour laws for women only by adopting the approach proposed above,\textsuperscript{139} the extension of those laws to men also. But not all states have such laws, and even in those that do, the inability to solicit any overtime work at all may prove a difficult burden for employers.

It is in the light of these considerations that new legislation at the federal and state levels that would represent a compromise approach may be needed. Such legislation would permit both men and women to work a designated number of hours in excess of an established norm, but would provide that no employer subject to the coverage of the law would be allowed to discharge any employee for his or her refusal to work overtime. In at least one state, Arizona, the legislature has made a tentative pass at the approach suggested herein. In 1968, Arizona excepted from its maximum-hour law female employees of employers operating in compliance with the Fair Labor Standards Act, provided that one and one-half times the regular rate is paid for hours over eight in one day, that the employer provides the employee with sufficient notice, and that “the refusal of overtime by an employee, for just cause or reason, shall not be considered as cause for dismissal.”\textsuperscript{140}


\textsuperscript{139}See text accompanying notes 120-30 \textit{supra}.

\textsuperscript{140}\textit{Ariz. Rev. Stat.} § 23-281(B)(3) (Supp. 1968). \textit{See also Neb. Rev. Stat.} § 48-203 (Supp. 1968), which permits women to work up to 12 hours a day and 60 a week on permit from the Commissioner provided that the “female consents to” additional hours. This is a limited expression of the voluntary overtime principle, being voluntary for women and not for men, and therefore perpetuating sex-based inequality in another form.
The shortcomings in this legislation are at least three. One is the limitation to employees covered by the Federal Act, which leaves out approximately 30 percent of the female work force.\footnote{ Cf. TASK FORCE REPORT 58. This distinction in the Arizona law may also make it vulnerable to constitutional attack as an arbitrary discrimination. See discussion of \textit{Mengelkoch} decision in text accompanying notes 87-97 \textit{supra}.} Another is the requirement that the refusal of overtime be “for just cause or reason” in order not to be a cause for dismissal. Aside from the litigation-engendering effect of such a provision, it would seem that refusal to work more than a normal work day or work week is by definition “for just cause or reason” and that no further justification should be required. Finally, though the statute is not entirely clear on this matter, its use of the phrase “an employee” in the context of the entire statute appears to refer only to female employees, thus creating a new arbitrary distinction between the sexes, with the principle of voluntary overtime recognized for women but not for men.

The need is for new legislation by the states and the federal government, each covering the area already within its statutorily-allotted jurisdiction, applying equally to employees of both sexes, and permitting hours of work in excess of 40, but in no event in excess of, say, 60. The legislation should provide that a discharge of an employee for refusal of overtime in excess of 40 hours a week or 8 hours a day would be unlawful, entitling the discharged employee to reinstatement with back pay in a proceeding conducted by the various state and federal agencies already administering wages and hours legislation, and ultimately through court action.\footnote{ The Task Force on Labor Standards has also endorsed the principle of “voluntary overtime,” but its recommendations appear to emphasize the development of private employer-employee agreements on the subject, rather than legislative treatment of the problem. It is also unclear whether the Task Force contemplates that the principle of voluntary overtime shall apply to men employees as well as women. TASK FORCE REPORT 29-30.}

Were such laws to be enacted, the problem troubling the three-judge court in \textit{Mengelkoch} would become moot. Not only would women not have “an obligation to work overtime whether they want to or not on pain of being discharged,”\footnote{Mengelkoch v. Industrial Welfare Comm’n, CCH \textsc{EMPL. PRACT. GUIDE} \S 9128, at 6514 (C.D. Cal. 1968).} but neither would men. In this manner, the social gains of the past would be preserved, while the opportunities afforded by Title VII would be seized. In this area at least, the employment situation of men and women would be equalized, with each having equality of “choice”—a concept that is central to this entire discussion of sex discrimination.

That the states can achieve such goals once they determine to do so is seen in the Arizona legislation discussed above. The feas-
ibility of similar legislation at the federal level can also be demonstrated. For many years, the National Labor Relations Act has forbidden employers to discharge an employee for engaging in any activity protected by section 7 of the Act, such as joining a union or participating in collective action. Recent federal legislation in the consumer protection field has also made it unlawful for an employer to discharge an employee because his wages have been subjected to garnishment for one indebtedness. No constitutional or statutory obstacles would appear to prevent congressional and state enactment of statutes similarly prohibiting employers from discharging an employee for refusal to work overtime.

As suggested above, this may be an ultimate way of solving the problems in this area. Short of that type of solution, however, the one recommended in section (3) above, calling for EEOC or federal court extension of state protective laws for women to men also would go a long way toward creating a nation in which the promise of equal employment opportunity without regard to sex will become a reality for all. In addition to the intrinsic merits of such an extension, it may provide the necessary stimulus to state and federal action on the voluntary overtime legislation suggested herein.

Conceivably, of course, the extension to males by the EEOC and the courts of maximum-hour laws previously applying to women only could, instead of stimulating the enactment of voluntary overtime legislation, induce Congress to repeal the sex provisions of Title VII. This is not likely to happen, however. The growing resort to sex discrimination complaints and lawsuits by aggrieved female members of the work force suggests that the sex provisions of Title VII have struck a responsive chord in masses of American women. Given that response, repeal may simply become politically unthinkable. Professor Sovern has suggested, in connection with Title VII's prohibition against racial discrimination, that it is "an irreversible beginning: the Act will never be repealed; it will, rather, be elaborated and improved upon as the political influence of Negroes waxes and resistance to equal employment opportunity wanes." The substitution of the word "women" for "Negroes" in that excerpt would not, it is believed, render that observation any less valid. In any event, this is a risk that must be run if Title VII is to represent, in the field of

145 See Consumer Credit Protection Act, Pub. L. No. 90-321, § 304 (May 29, 1968): "(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness; (b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both."
146 M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 110 (1966).
women's employment rights, an opportunity to forge new gains rather than a justification for undoing those that have been won in the past.

3. **Statutes Barring Women from Specific Jobs**

Many state statutes prohibit women from working in certain types of employment, such as bartending, wrestling or mining.\(^{147}\) Although the United States Supreme Court has sustained such statutes in the past,\(^ {148}\) noting that “[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards,”\(^ \text{149}\) the Court, in the light of the changing jurisprudential climate surrounding this area, could invalidate such discriminations on constitutional grounds in the future. Even should the Court do this, however, the degree of discrimination required to find such a state statute unconstitutional would be higher than that required to find a violation of a statute prohibiting sex discrimination in employment.\(^ {150}\)

Where state statutes barring women from certain employment also regulate industries “affecting commerce,” they are also vulnerable to attack under Title VII—provided, of course, that the jobs from which they bar women are not deemed properly reserved for men only under the “bona fide occupational qualification” provision. It also should be noted—as the converse of the proposition stated in the last paragraph—that although the EEOC and the courts, in construing Title VII, determine that an employer violates the Act by refusing to employ a woman in a job barred to her by a state statute, the statute would not necessarily be deemed unconstitutional in either an intrastate or an interstate factual context.

The EEOC has already indicated how it would deal with some of these laws in a general counsel’s opinion letter released on August 23, 1966\(^ {151}\) antedating the Commission’s latest pronouncement that it would no longer avoid determining whether state “protective” laws are invalidated by the Act.\(^ {152}\) In the August 23 letter, the Commission ruled that a section of a union contract which excludes female employees from working as bartenders violates Title VII “unless a state statute or local ordinance prohibits females from tending bar.”\(^ {153}\) Having taken this position with respect to a provision of a


\(^{149}\) Id. at 466.

\(^{150}\) See text following note 105 supra.

\(^{151}\) CCH EMPL. PRACT. GUIDE ¶ 17,304.04 (1966).

\(^{152}\) See text following note 84 supra.

\(^{153}\) CCH EMPL. PRACT. GUIDE ¶ 17,304.04 (1966).
union contract, the Commission, unless it subsequently overrules its earlier determination, will be hard pressed to avoid ruling when it considers the question that state statutes barring women from such jobs also violate the Act. It must be emphasized that the Commission's task is to interpret the statute and not the Constitution. If under the statute, females cannot be kept out of bartending by private agreement when a state statute forbids such employment, neither can they be barred by the state statute itself or by a local ordinance.

By contrast, the Commission does not appear yet to have had an occasion to state its position on state laws that do not permit women to wrestle or to be licensed to wrestle. No reason appears, however, why this area should be treated any differently than bartending. A recent opinion of the New York Supreme Court, Appellate Division, in *Calzadilla v. Dooley*, has sustained a discriminatory wrestling rule against an equal protection attack, noting that "it is of interest that petitioner does not cite section 291 of the [New York] Executive Law which provides that one has a civil right not to be discriminated against because of sex." Petitioner's failure to cite the New York law in *Calzadilla* is not only "of interest," but is also rather inexplicable. While the New York law, like Title VII, deals in terms only with the employment relationship as such, it would also appear to have a spill-over effect in criminal prosecutions or administrative proceedings purporting to enforce statutes that run counter to the policy expressed in the later acts.

Notwithstanding what has been stated in the preceding paragraph, one obvious difference separates bartending from wrestling. While both pursuits run counter to traditional notions of women's social role, wrestling requires a measure of physical arduousness not always present in bartending. The same is true with respect to the occupation of mining which, under the laws of many states, is also

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156 Id. at 515.
157 Cf. *Hill v. Florida*, 325 U.S. 538 (1945), holding that a state statute providing criminal penalties for "business agents" who were not licensed by the state was invalid as being in irreconcilable conflict with employees' full freedom in collective bargaining envisioned by Congress in the National Labor Relations Act. Thus it would also appear that a wrestling promoter or a woman wrestler who relies upon an EEOC opinion letter that a state prohibition against woman wrestlers is "unlawful" should be able to invoke that ruling as a complete defense to any criminal prosecution for "violating" the state statute. The same result would obtain, moreover, even without an EEOC ruling if a court should hold the state rule "unlawful" in the light of federal or state policy.
barred to women.158 But this factor should not, of itself, permit the EEOC to rule that such laws survive Title VII. While actual or supposed differences in the physical capacity of men and women to engage in certain jobs may deter many women from applying for such work, they should not be denied this opportunity if they choose it. If, in individual cases, women's greater physical weakness turns out to be actual rather than supposed and if it interferes with their proper performance of a job, this would be a justifiable reason for their not being retained. Employer expense could be avoided, moreover, were applicants for various jobs, male or female, required to take reasonable physical examinations, testing their ability to meet the physical requirements of the job, or to provide a physician's certificate as previously suggested with regard to state weight-lifting restrictions for women workers.159

For what must be stressed here, as in this entire area, is the fundamental goal of making choice available to men and women alike. That some women choose a wrestling career is evidenced by the cases upholding statutes or other rules forbidding them this choice and by the actual conduct of wrestling matches between women in other states. The experience during World War II, when the economy was marked by a shortage of industrial manpower, also demonstrated that womanpower was in many cases capable of performing such physically exacting jobs as operating lift trucks in the warehouse and longshore industries, and driving long distance trucks in the transportation industry. The frequency with which women cab drivers and bus drivers are now encountered in many American cities also contrasts sharply with the situation that existed only 25 years ago, when such sights were rare or even non-existent.

To these considerations may be added those suggested in 1968 by the Task Force on Labor Standards of the Citizens' Advisory Council on the Status of Women. Recommending the total repeal of existing laws that prohibit the employment of adult women in certain occupations, the Task Force noted that:

The justification for these laws is generally premised on the concept that such occupations are considered hazardous or injurious to health and safety. Hazards associated with such work can be eliminated or at least controlled by adequate health and safety regulations applicable to all workers without resorting to absolute occupational prohibitions applicable to women only.160

Again, while such laws may still survive attacks on constitutional grounds, the enactment of Title VII's sex provisions provides the

158 See, e.g., ARIZ. REV. STAT. § 23-261 A (1956); COLO. REV. STAT. ANN. § 92-10-2 (1963); UTAH CODE ANN. § 34-4-1 (1953).
159 See text preceding note 110 supra.
160 TASK FORCE REPORT 32.
EEOC and the courts with an opportunity to strike such laws down where they affect employees covered by the Act.

III. The Relationship Between the Equal Pay Act of 1963 and Title VII

The Federal Equal Pay Act was enacted in 1963, one year before passage of the 1964 Civil Rights Act. In contrast to Title VII's prohibition against sex discrimination in employment opportunities, the Equal Pay Act was supported by an extensive legislative history, including elaborate committee hearings demonstrating widespread wage discrimination against women.\(^{161}\)

The heart of the Equal Pay Act is found in section 3, adding a new subsection (d) to section 6 of the Fair Labor Standards Act of 1938 (FLSA), which provides in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) 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.\(^{162}\)

The Act also states that labor organizations or their agents shall not "cause or attempt to cause" covered employers to discriminate against an employee in violation of the above subsection.\(^{163}\) Though the Equal

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\(^{161}\) See Legislative History of the Equal Pay Act of 1963 (printed for use of Committee on Education and Labor) S. Rep. No. 176, 88th Cong., 1st Sess. 687 (1963). Indeed, it has been suggested that the legislative history of the Equal Pay Act may bear "on the legislative intent or objectives of the 'sex' amendment to Title VII." Margolin, Equal Pay and Equal Employment Opportunities for Women, N.Y.U. 19th Conf. on Labor 297, 301 (1967). There can be no quarrel with this suggestion if it means that many members of Congress voted for inclusion of the sex provisions in Title VII because they were informed, directly or indirectly, of the facts about employment discrimination against women that had emerged in the hearings and debate on the Equal Pay Act. But it is difficult to believe that the specific legislative history of the Equal Pay Act can be used to interpret the meaning of difficult provisions in Title VII—especially since the one reference in Title VII to the Equal Pay Act, if interpreted mechanically, may lead to results that are destructive of Title VII's basic promise of equal employment opportunity for women workers. See text following note 220 infra.


\(^{163}\) Id. § 206(d) (2).
Pay Act became generally effective one year after its date of enactment, an exception was made in the case of employees covered by a bona fide collective bargaining agreement in effect at least 30 days prior to the enactment of the Act. For them the equal pay amendments were to take effect two years after the date of enactment or upon the termination of the collective bargaining contract, whichever occurred first. This was presumably designed to allow an opportunity for the adjustment of existing contracts calling for sex-based wage differentials.

As part of the FLSA, the equal pay provisions are subject to that Act's administrative and enforcement procedures. In addition, under the FLSA there is a two-year limitation period on actions for unpaid wages, which, in the case of willful violations, is extended to three years. The FLSA also allows injunction suits to be brought by the Secretary of Labor and provides criminal penalties for willful violators. It is clear that the remedies for equal pay violations under the FLSA are more effective than those established under Title VII, the latter being limited to the investigative and conciliation efforts of the EEOC, with eventual legal action, where feasible, by the complainant.

Though Title VII of the 1964 Civil Rights Act also applies to sex-based wage discrimination, it does not replace the earlier Act. In fact section 703(h) of Title VII provides in part that it is not an unlawful employment practice under Title VII "for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d))." The EEOC also has interpreted Title VII as requiring "that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable," and has accordingly decided to apply "to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor." Elsewhere, the Commission has

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166 29 C.F.R. § 800.166(b) (1968).
168 Id. § 216; see 29 C.F.R. § 800.166 (1968), for additional remedies under the F.L.S.A.
170 Id. The significance of this provision is explored in text accompanying note 209 infra.
171 29 C.F.R. § 1604.7(a) (1968).
172 Id. § 1604.7(b).
stated that section 703(h) "merely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act (which were added to that Act by the Equal Pay Act of 1963), together with such interpretive rulings thereon as the Wage-Hour Administrator has made or may make." 173 The potential dangers to the purpose of Title VII's sex provisions inherent in an undifferentiated adherence to this approach toward the relationship between the two Acts are discussed below. 174 Finally, it should be noted that the Department of Labor, in amending its regulations under the Equal Pay Act, has also taken cognizance of the subsequent enactment of Title VII's sex provisions, and indicated that they are relevant to its own functions. 175

In many respects, the goal of eliminating sex-based wage discrimination is central to both the Equal Pay Act and Title VII's sex discrimination provisions. While Title VII's scope is in one sense much broader than that of the Equal Pay Act, dealing as it does with equal employment opportunity as well as wage discrimination, much of its thrust with respect to employment opportunity also affects the question of wage discrimination. Thus, a female employee denied an opportunity to be promoted to a higher paying job because state law limits her working hours and her job requires hours of work in excess of that limit, will ordinarily be more disturbed by the loss of the higher pay than by the loss of the opportunity to do the work of the higher-paying job.

Although the Equal Pay Act preceded Title VII, some of its provisions, as well as interpretations under it, are relevant to a consideration of the relationship between state "protective" legislation, applicable only to women workers, and Title VII of the 1964 Civil Rights Act. These are considered in this section, and the suggestion is made that past interpretations of the Equal Pay Act by the Wage-Hour Administrator of the Department of Labor may need to be revised to harmonize them with the later Title VII, and that such an approach will better serve the ultimate goals of eliminating sex-based discrimination in wages and employment opportunity than any slavish adherence by the EEOC to the earlier interpretations under the Equal Pay Act. Before dealing with that question, however, this section will consider some other problems raised by the Equal Pay Act, such as (1) the responsibility of trade unions for wage discrimination; (2) the "establishment" coverage of the Equal Pay Act; and (3) efforts to circumvent the Act by assigning male workers additional duties to justify sex-based wage differentials.

174 See text at note 218 infra.
175 29 C.F.R. § 800.114 (1968).
A. The Responsibility of Trade Unions for Wage Discrimination

Since it is the employer who pays his employees their wages, it is only natural that any statute aimed at eliminating wage discrimination in employment will provide penalties of a civil and criminal nature, as does the Equal Pay Act, for employers who violate its provisions. But as noted earlier, the Act provides the same penalties for unions who “cause or attempt to cause” an employer to commit a violation.\(^{176}\)

That numerous collective bargaining agreements contain provisions contravening the principle of equal pay for equal work was recognized by Congress in postponing the effective date of the Act for employees covered by such agreements to permit adjustment of those agreements.\(^{177}\) But the phrase “cause or attempt to cause,” as any student of the law of torts would quickly recognize, is rife with interpretative problems.

The Department of Labor has dealt with part of these problems in its Interpretive Bulletin on the Equal Pay Act, stating that covered labor organizations and their agents

must refrain from strike or picketing activities aimed at inducing an employer to institute or maintain a prohibited wage differential, and must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages contrary to the provisions of section 6(d)(1). Section 6(d)(2), together with the special provision in section 4 of the Equal Pay Act of 1963 allowing a deferred effective date for application of the equal pay provisions to employees covered by specified existing collective bargaining agreements (see § 800.101), are indicative of the legislative intent that in situations where wage rates are governed by collective bargaining agreements, unions representing the employees shall share with the employer the responsibility for ensuring that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions. . . \(^{178}\)

It would thus appear that to avoid liability under the Act a labor organization must not make contract demands that violate the principle of equal pay for equal work or engage in collective action to achieve such ends. Where existing contracts provide for sex-based wage discrimination, it would also appear that unions would be well advised at least to communicate publicly to co-contracting employers their understanding that the law now requires the elimination of such discrimination by raising the wages of the lower paid sex to that of the higher paid sex where they are performing “equal work,” and that the union is agreeable to this move.

\(^{176}\) See text at note 163 supra.

\(^{177}\) See note 164 supra.

\(^{178}\) 29 C.F.R. § 800.106 (1968).
That something more than its silence may be required to insulate a union from liability under the Act appears in a decision of the Wisconsin Industrial Commission applying its own state fair employment practices act. Although the latter contains no "cause or attempt to cause" language, it does prohibit labor organizations from discriminating on the basis of sex. Nevertheless, the Wisconsin Commission, though finding that a union discriminated against the female complainants by signing a contract that "established different wage rates on account of sex," held that it "need not be jointly liable for back pay because the record shows it made a valid attempt to eliminate the discriminatory practice of wage differentials." The valid attempt apparently consisted of union proposals, during new contract negotiations, that the same rate be paid to both sexes engaged in similar work—a proposal that had been rejected by the employer.

B. The "Establishment" Coverage of the Equal Pay Act

The Equal Pay Act, in adding subsection (d)(1) to section 6 of the FLSA, prohibits sex-based wage discrimination by employers against employees subject to the section, "within any establishment in which such employees are employed . . . ." Interpreting this provision, the Department of Labor has stated that

it is clear from the language of the Act that in each distinct physical place of business where the employees of an employer work (including but not limited to, the employer's own establishments), the obligation of the employer to comply with the equal pay requirements must be determined separately with reference to those of his employees who are employed in that particular establishment.

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181 See note 179 supra.
182 Id.; see Wirtz v. Rainbo Baking Co., 54 CCH Lab. Cas. ¶ 31,884 (E.D. Ky. 1967). Though the wage differential held unlawful in that case was contained in a collective bargaining agreement, the union does not appear to have been made a party defendant in the action. Cf. Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 358 (S.D. Ind. 1967), where, in a Title VII charge against an employer and a union, the court observed that even if a technical basis existed for imposing liability on the union, it "has been most assiduous in seeking to protect the rights of the [plaintiff women employees] and to secure relief for them. Although named as a defendant by the plaintiffs, it has been aligned with them and against the defendant Colgate. Under these circumstances, a judgment requiring the Union to recompense the plaintiffs, or to indemnify Colgate for the very actions which the Union has protested [maintenance of separate male and female seniority lists to which the union had originally agreed in a contract] would not be warranted." Id. at 358.
184 29 C.F.R. § 800.104 (1968) (emphasis added).
The literal terms of the "establishment" provision and of its interpretation by the Department of Labor would therefore appear to permit an employer to establish a new facility across the street from his present one, place the women employees in the new facility and continue sex-based wage differentials with impunity. As long as he did not discriminate within the particular establishment, he presumably would not violate the Act.

Indeed, the suggestion has been made that application of the law could be avoided where a single establishment is involved by assigning all males to certain operations and all females to other, different operations [and that when] multiple establishments are involved, the same thing could be accomplished by limiting the personnel of particular establishments to one sex.  

But the possibility of this type of lawful wage discrimination within a single establishment has been impliedly repudiated by the Department of Labor in one of its regulations, taking cognizance of the passage of Title VII. The Department of Labor has noted that "wage classification systems which designate certain jobs as 'male jobs' and other jobs as 'female jobs' may contravene Title VII of the Civil Rights of 1964 except in those instances where sex is a bona fide occupational qualification . . . ."  

While not dispositive of the multi-establishment possibility, this Regulation does indicate the Department of Labor's understanding that the Equal Pay Act may need to be harmonized with Title VII. Given that understanding, employers would be well advised not to attempt to circumvent the Equal Pay requirements of either Act by the separate establishment device. For though section 703(h) of Title VII also permits employers to apply different standards of compensation "to employees who work in different locations," this is qualified by a proviso that such differences must not be "the result of an intention to discriminate" on any of the prohibited grounds. Thus, an employer who sets up a new establishment, or moves his employees around to separate existing establishments so that the same type of work was performed in one by males and in another by females, and maintains a wage differential between establishments, would violate both Title VII and the Equal Pay Act, if his purpose in making these moves was to discriminate because of sex.

Moreover, it would seem, that if under these circumstances the wage discrimination complaint were lodged with the Department of Labor rather than with the EEOC, the Department would be entirely competent in determining whether the Equal Pay Act had

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185 CCH EMPL. PRACT. GUIDE ¶ 1624 (1965).
186 29 C.F.R. § 800.114 (1968).
188 Id.
been violated to first decide whether the provisions of Title VII had been contravened. This would not be a usurpation of the EEOC's jurisdiction nor a violation of congressional intent in devising remedies for Title VII infractions. The Department of Labor would merely be applying the standards of Title VII (and/or interpretations of Title VII by the EEOC and the courts) to the enforcement of the Equal Pay Act, a task entrusted to it when Congress made the equal pay provisions part of the FLSA. This technique has been employed by arbitrators in determining the legality of an employment discrimination clause in a collective bargaining agreement,\textsuperscript{189} and by state administrative agencies in trying to decide whether the discharge of a female employee for having married in contravention of a company rule disqualified her from receiving unemployment compensation.\textsuperscript{190} No reason appears why such a procedure cannot also be employed by the Department of Labor in administering the equal pay provisions of the Fair Labor Standards Act.

C. Other Ways in which the Use of Title VII Can Close Potential Loopholes in the Equal Pay Act

Since the setting up of separate establishments may be difficult for most employers, that type of attempted avoidance of the Equal Pay Act—which was shown in the previous section to be preventable by harmonizing the Equal Pay Act with Title VII—is not nearly as serious a possibility for circumventing the Act as the requirement in section 6(d)(1) that the work, for which equal compensation must be paid, be "on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions . . . ."\textsuperscript{191} The Act's allowance of wage discrimination based on a "system which measures earnings by quantity or quality of production"\textsuperscript{192} is also susceptible of abuse unless, in interpreting it, the goals of eliminating employment discrimination expressed in both Acts are constantly kept in mind.

One thing is beginning to emerge very clearly from the Regulations of the Department of Labor and some of the federal court opinions in sex-based wage discrimination cases. No longer will an employer be allowed to pay employees of one sex (which in the cases have usually been males) a higher wage rate than employees of the other sex, if the extra job effort, skill or responsibility of the former is

\textsuperscript{189} See note 41 supra.
\textsuperscript{190} See text at note 74 supra.
only slight or occasional or insubstantial.\textsuperscript{193}

Where such differences are substantial, however, a number of federal court cases have recognized them as a basis for sex-based wage discrimination presumably permitted by the Equal Pay Act. Thus in \textit{Wirtz v. Dennison Manufacturing Company},\textsuperscript{194} male machine operators on the third shift were permitted to be paid at a higher base rate than female machine operators on the first and second shifts, on the ground that 10 percent of the time worked on the third shift required additional duties over those required of women on the first two shifts. Similarly in \textit{Kilpatrick v. Sweet},\textsuperscript{195} a higher wage rate for a male employee was upheld on the basis of “substantial differences in terms of skills and responsibility between the jobs performed by” the male employee and the female plaintiff.\textsuperscript{196}

The problem with these cases is that they give very little attention to the circumstances under which these jobs were assigned to the male or female employees in the first place. Widespread employment opportunity and wage discrimination had obviously existed in American life prior to the enactment of the two Acts under consideration here. How many American women now work at jobs requiring little skill or responsibility,\textsuperscript{197} not because they are incapable of acquiring the skill or assuming the responsibility of higher paying jobs, but because, in the past, they have been denied the opportunity to do so by the discriminatory practices of employers, labor organizations and employment agencies? For the Act to permit wage discrimination on the basis of differences in skills or responsibility without allowing an examination of the reasons for those differences may have the effect of destroying much of its effectiveness.

To avoid that result, the harmonization of the Equal Pay Act with Title VII is once again crucial. Section 703(h) of Title VII permits wage discrimination based on “quantity and quality of production” but this exception is subject to the qualification that it not be “the

\textsuperscript{193} See, e.g., \textit{Wirtz v. Meade Mfg. Inc.}, 55 CCH Lab. Cas. ¶ 31,936 (D. Kan. 1967) (occasional greater physical demands of job no basis for higher pay for males); \textit{Wirtz v. Rainbo Baking Co.}, 54 CCH Lab. Cas. ¶ 31,884 (E.D. Ky. 1967) (occasional heavy lifting no excuse for wage differential based on sex). See also \textit{Wirtz v. Basic, Inc.}, 256 F. Supp. 786 (D. Nev. 1966) (though male employees may be paid shift differential for night work, this does not justify a higher rate for males than females on day shift); 29 C.F.R. § 800.122 (1968): “Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable.”

\textsuperscript{194} 55 CCH Lab. Cas. ¶ 31,919 (D. Mass. 1967).

\textsuperscript{195} 262 F. Supp. 561 (M.D. Fla. 1966).

\textsuperscript{196} See also \textit{Wirtz v. Wheaton Glass Co.}, 36 U.S.L.W. 2705 (D.N.J. 1968).

\textsuperscript{197} The problem of “effort” is considered in the text accompanying note 206 infra.
result of an intention to discriminate because of the prohibited grounds, including sex. It would appear that the limitation periods for actions under both Acts can be observed by the agencies and the courts by restricting recoveries to the period allowed (since the wage discrimination would have occurred within that limitation period) but by looking as far back as necessary to determine whether the present wage discrimination occurring within the limitation periods of either or both Acts is the result of past discriminatory conduct with respect to employment opportunity.

This suggested approach, of course, will have to overcome the inevitable claim that Title VII's provisions can in no sense be applied retroactively. Conflicting views on this question have already been expressed. For example, the Supreme Court's decision in Hamm v. City of Rock Hill that Title II of the 1964 Civil Rights Act abated convictions of civil rights workers for engaging in lunch counter sit-ins has been characterized as giving "a certain retroactive effect to the Civil Rights Act." By contrast, a recent federal district court opinion in United States v. Local 36, Sheet Metal Workers International Association has held in an Attorney General's "pattern or practice" suit that "discriminatory actions and conduct which occurred prior to the [effective date of the Civil Rights Act, July 12, 1965] cannot constitute a violation of the Act." In so holding, the court stressed the Interpretative Memorandum on Title VII by Senators Clark and Case, which stated that the effect of the title was "prospective and not retrospective." However, this observation was made by the Senators only with reference to seniority rights between employees themselves and solely as those rights affected the question of layoffs or firing. Therefore, an employer who had been discriminating in the past "would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." Presumably, the Senators would have also included the word "males" along with "whites" and the word "females" along with "Negroes" had they been aware at the

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199 An analogy to this technique can be found in the practice of ignoring a statute of limitations where a cause of action is pleaded defensively as a counterclaim or a set-off. See, e.g., King Bros. Prod., Inc. v. RKO Teleradio Pictures, Inc., 208 F. Supp. 271 (S.D.N.Y. 1962).
201 Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. IND. & COMM. L. REV. 495, 519 (1966).
203 Id. at 728.
204 110 CONG. REC. 7213 (1964).
205 Id. (emphasis added).
time they prepared their memorandum that the title would be expanded later to cover sex discrimination. But this would not dispose of the question as to whether an employee who had been the victim of wage discrimination ultimately stemming from a prior employment opportunity discrimination would now be entitled to have the wage discrimination corrected, bearing in mind that the correction would not require—nor would it be permitted under the Equal Pay Act—the reduction of the male employees' wage scale. In effect, the employer, whose past conduct had created the situation, would bear the entire financial cost of correcting it. (Employers would also have new incentives for promoting women to higher paying job classifications, since under the above proposal, women who could prove that they had been previously discriminated against with respect to job opportunities would be entitled to the pay rates of the higher job classification, though they continued to work in the lower job classification).

Among other ways, this could be achieved by resorting to the time-honored device (which, in this case, is probably more fact than fiction) of the continuing wrong; i.e., that the initial discrimination is, in effect, repeated every day and moment of the employees' relationship with the employer. Restricting the recovery of wages to the limitations period following the effective date of Title VII would, moreover, preserve the prospective thrust of that legislation, though the initial employment opportunity discrimination producing the wage discrimination might have occurred prior to its enactment.

Moreover, it is not even absolutely necessary, in order to achieve these goals, for the Department of Labor to refer to the provisions of Title VII. For the Equal Pay Act generally allows wage discrimination "based on any other factor other than sex."206 Interpreting these provisions, the Department of Labor has held that the requirements for exceptions to the equal pay standard "are not met unless the factor of sex provides no part of the basis for the wage differential."207 Although this provision and its interpretation appear to collide head-on with the Act's exceptions based on skill, responsibility, etc., they can be reconciled by a holding that higher rates for men (or women) on jobs requiring higher skills, responsibility, etc., are permissible, unless the lower paid employee can show that, at any time, she or he was denied an opportunity, on grounds of sex alone, to be employed on that job.208

207 29 C.F.R. § 800.142 (1968) (emphasis added).
208 Such a result would appear to be consistent with what the New York courts have done in two cases in requiring special promotional examinations to be given to policewomen who, because of an earlier policy of sex discrimination, had been bypassed in favor of policemen when promotional opportunities had arisen. Shpritzer v. Lang, 17 App. Div. 2d 285, 234 N.Y.S.2d 285
1. *The Meaning of “Effort”*

The Act’s exception for differences in effort required on the job, though sharing some of the same attributes as the exceptions based on skill, responsibility and working conditions, is sufficiently dissimilar to warrant separate treatment. As has been suggested earlier in this article, the general differences in the physical stamina of the sexes, subject to exceptions in individual cases, must be conceded. Thus, on many jobs in which men are being paid higher wages than women because greater physical effort is apparently required, most women have not wanted or sought an opportunity to be so employed. Where, in individual cases, a woman has sought and been denied the opportunity to be employed in such a job, however, this fact could serve as a basis for a wage discrimination finding.

Recognizing these physical facts, the EEOC has held that an employer might, without violating Title VII, adopt physical standards (not sex standards) reasonably related to a job “even though the standards might operate to exclude a disproportionate number of one sex.” But whether additional physical effort justifies additional pay will not always be a simple matter to determine. Discussing the exception of differences in working conditions, for example, the Department of Labor’s Interpretive Bulletin suggests that account must be taken of whether they are the kind customarily taken into consideration in setting wage levels. The same test would appear properly to apply to wage differentials based on differences in physical effort. But aside from the need to ascertain whether custom itself has not been the cause of sex discrimination, much evidence suggests that industry has not always rewarded greater physical effort with higher pay. Indeed, physical effort frequently has been less highly rewarded than the factors of skill or responsibility in employment. Before particular instances of wage discrimination are therefore permitted on the basis of greater physical effort, custom in the

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209 See text at note 106 supra.
210 Though the Department of Labor has interpreted the word “effort” as being “concerned with the measurement of the physical or mental exertion needed for the performance of a job,” 29 C.F.R. § 800.127 (1968), the present discussion is concerned only with the matter of physical exertion—since differences in mental exertion that may be required on a job are subject to the same analysis employed above with respect to skill, responsibility, etc.
213 29 C.F.R. § 800.131 (1968).
214 See text accompanying note 197 supra.
industry and enterprise must be closely scrutinized.

There is still another possible interpretation of the phrase "effort" in the Equal Pay Act that may limit its potential for circumventing the principle of equal pay for equal work. If there are general differences in the physical strength of men and women, the amount of effort required by males generally to lift, let us say, 60 pounds may be no greater than the amount of effort expended by females generally in lifting 25 pounds. The important question is the relative effort expended by each worker. Were this interpretation to prevail, wage differences between the sexes would be permitted only on the basis of extreme differences in physical effort, provided that such effort was customarily rewarded in the particular enterprise or industry with higher pay rates than those received by either women or men who were not required to exert such efforts on their own job.

This suggested interpretation of the word "effort", moreover, would not have the result of requiring the same wage rates for the sexes though they were in work requiring a different degree of mental exertion. For, as suggested in an earlier footnote, the discussion here has been confined to the matter of physical effort, as opposed to mental effort. The two are further distinguishable in that, although mental capacity may vary tremendously between individuals of the same sex, there is a general difference in physical capacity between men as a group and women as a group. Nor would this interpretation of the word "effort" as applied to physical exertion be prevented by the provision of the Equal Pay Act permitting a system of compensation "which measures earnings by quantity or quality of production," since the interpretation of that phrase could incorporate the interpretation of "effort" suggested above.

What must be stressed is that the words "skill, effort, responsibility, and similar working conditions" should not be interpreted to weaken the Act's stated purpose of eliminating sex-based wage discrimination. The interpretation of these phrases suggested herein may be one way to prevent that from happening.

D. The Equal Pay Act and State "Protective" Laws

The difficulties in reconciling so-called state protective laws for women only with the bona fide occupational qualification of Title VII of the 1964 Civil Rights Act have been explored in an earlier section of this article. The present inquiry seeks to determine whether the legislative history or the text of the Equal Pay Act or administrative

215 See note 209 supra.

interpretations and court decisions under it shed any light on that problem. That the two acts are related is evident from the reference in section 703 (h) of Title VII to the earlier Equal Pay Act, the EEOC's administrative deference to the equal pay interpretations of the Wage-Hour Administrator of the Department of Labor, and the reference in at least one of those interpretations to the sex provisions of Title VII.

The interpretations will be considered first. Section 800.183 of the Department of Labor's Interpretive Bulletin provides:

In making a determination as to the application of the equal pay provisions of the Fair Labor Standards Act, legal restrictions in State or other laws upon the employment of individuals of a specified sex, with respect to such matters as hours of work, weight-lifting, rest periods, or other conditions of such employment, will not be deemed to make otherwise equal work unequal or be considered per se as justification for an otherwise prohibited differential in wage rates. For example, under the Act, the fact that a State law limits the weights which women are permitted to lift would not justify a wage differential in favor of all men regardless of job content. The Act would not prohibit a wage differential paid to male employees whose weight-lifting activities required by the job involve so significant a degree of extra effort as to warrant a finding that their jobs and those of female employees doing similar work do not involve equal work within the meaning of the Act. However, the fact that there is an upper limit set by State law on the weights that may be lifted by women would not justify a wage differential to male employees who are not regularly required to lift substantially greater weights or expend the extra effort necessary to make the jobs unequal. The requirement of equal pay in such situations depends on whether the employees involved are actually performing "equal work" as defined in the Act, rather than on legal restrictions which may vary from State to State.

While at first blush, this passage appears to reject wage differentials based upon restrictions under state protective laws, a close reading reveals that it does not do this at all. This interpretive Regulation merely holds that state protective laws will not be recognized as a justification for a sex-based wage differential where men and women are performing similar work. Where the work is dissimilar, however (as where men do lift substantially greater weights than women), the differential is allowable. But on the crucial question as to whether males may be paid a differential for lifting greater weights than women, if the reason for this state of facts is the state restriction on weight-lifting for women, the Regulation is ambiguous. Though it does not explicitly concede that it would be permissible under these circumstances, the entire context of this Regulation strongly implies that it would. Some support for the proposition

217 See text at note 170 supra.
218 See text accompanying note 171 supra.
219 See text accompanying note 175 supra.
220 29 C.F.R. § 800.163 (1968).
that state maximum-hour legislation for women may have been intended to serve as a permissible basis for sex-based wage differentials where there was, because of such laws, a difference in the actual hours worked, also appears from an isolated and questionable item in the legislative history of the Equal Pay Act.²²¹

The thrust of this interpretive Regulation and this item of legislative history would therefore be to approve generally the principle of state protective laws, and to allow sex-based differentials where work is divided between male and female employees on the basis of what is allowable under these laws. If, therefore, the command of section 703(h) to permit wage differentials that are allowed under the Equal Pay Act is interpreted, as it has been, to require the EEOC to accept the interpretations of the Wage-Hour Administrator in determining whether sex-based discrimination has occurred under Title VII, all state protective laws for women would survive Title VII's prohibition against sex discrimination in employment—certainly in the area of wage discrimination and, logically, also in the realm of employment opportunity discrimination. But as will be demonstrated below, compelling reasons militate against such a mechanical interpretation of section 703(h) and the Department of Labor's interpretations.

There is still another item of legislative history behind the Equal Pay Act of 1963 that may have some bearing on the continued viability of state protective laws. The Senate Report on the Equal Pay Bill²²² suggests that there was no intention to invalidate wage-rate differentials based on hazardous or objectionable work even though there incidentally might be a division on sex lines. This may have been the source of the later guidelines by the EEOC stating that state laws protecting women against exploitation and hazard would be honored.²²³ But it is one thing to say that a wage differential may be paid for hazardous work actually performed, and it is quite a different thing to hold that state laws denying women the opportunity to work on such jobs should they choose to do so, and provided that they can perform its duties, are also valid—unless such laws are validated by the previous item of legislative history and the Wage-Hour Administrator's interpretation discussed above.²²⁴

It is submitted that this isolated bit of legislative history, and the Administrator's interpretation of the relationship between state pro-

²²¹ See 109 Cong. Rec. 9196 (1963) (remarks of Representative Thompson): “Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects . . . would also be exempted under this act.”


²²³ See text accompanying note 80 supra.

²²⁴ See text accompanying notes 219-20 supra.
tective legislation and the Equal Pay Act, should not be followed, in the light of specific language in the Act itself and other interpretations by the Administrator. The specific language of the Act referred to is that provision of section 6(d)(1) permitting wage differentials “based on any other factor other than sex.”

The Administrator of the Department of Labor has interpreted this provision stringently, stating that the requirements for an exception to the Act’s prohibition of sex-based wage discrimination “are not met unless the factor of sex provides no part of the basis for the wage differentials.” Elsewhere, the EEOC has noted that the “principle of non-discrimination in employment requires that applicants be considered on the basis of individual capacities and not on characteristics generally attributed to a group.”

Taking these provisions together, it is very doubtful that a state law restricting women’s working hours or weights to be lifted on a job, without taking into account the individual capacities of particular women, can be said to be a law in which the factor of sex plays no part. If, then, sex-based differences in actual work performed, which are in turn based upon restrictions in such laws, produce differences in pay, it would appear that the Wage-Hour Administrator, as well as the EEOC, would be required to hold such pay differences unlawful under either Act. For the Department of Labor this would mean repudiating any implication in its regulation, section 800.163, that such state laws were all necessarily valid, regardless of the individual ability of particular job applicants. This repudiation would flow from the terms of the Equal Pay Act itself prohibiting wage discrimination based upon sex, and the Administrator's own interpretation of that prohibition. Above all, it would require the harmonization of the Equal Pay Act with the later sex provisions of Title VII in the manner suggested in the preceding pages.

For the EEOC, the reconciliation of state protective laws with Title VII requires, among other things, resisting a mechanical application of section 703(h), since to apply that provision uncritically could result in blanket approval of all state protective legislation regardless of its impact on equal employment opportunity for male and female workers. To avoid such a result, the EEOC's position should be that section 703(h) requires it, as well as the Department of Labor, to allow wage differentials where they are truly based on differences.

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226 29 C.F.R. § 800.142 (1968).
228 See text following note 219 supra.
229 See text accompanying note 198 supra.
in skill, effort, responsibility, working conditions, and the like—provided that placement in such jobs was not the result of a past denial of equal employment opportunity, regardless of when that might have occurred.

Both agencies can also follow the same path they have taken with respect to state minimum wage laws, and hold as applicable to men many of the state protective laws presently worded to apply to women only. Where, as in the area of weight-lifting restrictions for women only, they might not choose to do this, they can at least interpret such state laws in the light of their respective Acts as requiring that individual women be permitted to demonstrate that they can lift heavier weights than those permitted by the respective state statutes, without harmful effects. Finally, on the question of maximum-hour legislation, each can begin to engage in lobbying activities addressed to Congress and the states for the enactment of laws making overtime work for both sexes voluntary rather than compulsory.

IV. Conclusion

The sex provisions of the 1964 Civil Rights Act came into being in a most unusual way. Individual members of Congress may have had different reasons for voting them into law. Some may have hoped that it would cause the collapse of the whole gamut of federal equal employment legislation, others may have sincerely wished to extend the Act's guarantees to women as well as to racial, religious and ethnic groups. Some may have been convinced of the need to enact this legislation by the testimony adduced in connection with the Equal Pay Act of 1963; others may have sensed that in the light of increasing agitation for corrective legislation by women's groups and their male allies, political expediency required an affirmative vote. Some may have thought about the effects of the Act on state protective laws; others—probably most—did not think about this problem at all. But when all is said and done, Title VII is with us and is here to stay.

As for the Equal Pay Act, though its legislative enactment proceeded more deliberately than Title VII's sex provisions, the sheer number of exceptions and qualifications in the Act have created the danger of evasion by those covered by it.

This article has attempted to show some ways in which the promise of these two important pieces of legislation can be realized without sacrificing the important social gains that have been achieved over the years or creating a situation in which meaningful individual differences can no longer be separately rewarded in American industry. The means of accomplishing this objective which have been suggested herein may not be the only ones. The important point is that the enactment of these two federal laws marks an important stage
in the development of healthful relations between the sexes in the United States. Not only must every effort be exerted to guarantee that this legislation will not be undone, but it must be assured that the maximum gains for the principle of equal treatment be achieved under these existing laws. Once set in motion, the principle of sexual equality may not this time, as it did after the adoption of the 19th amendment to the United States Constitution, become only a memory for a few. Instead, it may become a goal towards which all Americans, male and female, will strive.