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SEX DISCRIMINATION: STATE PROTECTIVE LAWS
SINCE TITLE VII

Joseph P. Kennedy*

Introduction and Scope

Title VII of the Civil Rights Act of 19641 was enacted in response to social
injustice in employment opportunities for minority groups.2 Thus, Title VII
generally prohibits employment discrimination based upon an individual's race,
color, sex, creed or national origin.3 While not a minority group in exactly the
same sense as Blacks,4 women are included in the protective coverage of Title
VII.5

This article will examine one particular aspect of sex discrimination—the
validity of state protective laws. Such laws restrict in various ways the employ-
ment opportunities and duties of women. This article proposes to provide:

I. A classification of present state protective laws;
II. A summary of judicial treatment of state protective laws prior to the
enactment of Title VII;
III. An analysis of Title VII and the Equal Employment Opportunity
Commission's position in this area;
IV. A survey of recent developments in the law;
V. An analysis of arguments against such laws;
VI. Conferring Laws;

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(The opinions expressed herein are not necessarily those of the International Business Machine
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2 H. R. REP. No. 914, 88th Cong., 1st Sess. (1963). See also Hebert and Reichsel, Title
VII and the Multiple Approaches to Eliminating Employment Discrimination, 46 N.Y.U.L.
Rev. 449, 449-50 (1971); Note, Developments in the Law—Employment Discrimination and
4 E.g., Representative Celler read into the record of the brief debate over the addition of
sex to the Civil Rights Act of 1964 the following statement by the President's Commission on
the Status of Women, contained in a letter from the U.S. Department of Labor, dated
February 7, 1964:

Discrimination based on sex, the Commission believes, involves problems
sufficiently different from discrimination based on other factors listed to make
separate treatment preferable.

In view of this policy conclusion reached by representatives from a variety of
women's organizations and private and public agencies to attack discrimination based
on sex separately, we are of the opinion that to attempt to so amend H.R. 7152
would not be to the best advantage of women at this time.

110 CONG. Rec. 2577 (1964). See also id. at 2581 (remarks of Representative Green): The sex
amendment "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." Cf. 78 Stat. 256 (1964), 42

However, there are striking similarities between racial and sexual discrimination. See
Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 239, 485 P.2d 529, 540 (1971); Murray and East-
VII. A discussion on whether restrictive laws are invalid on their face, or only as applied in certain fact situations.

I. A Classification of State Protective Laws

Today most states have some form of protective laws on the books, although not all are enforced or enforceable for various reasons. These laws may be classified into three types:

1. those which restrict the employment of women (restrictive legislation);
2. those which prohibit the employment of women (prohibiting legislation);
3. those which provide additional benefits to women (conferring legislation).

The most common of the restrictive type are those which generally limit the number of hours all women, or women under a certain age, may work in various industries. Such laws may also limit the shifts or time of day that women may work and the amount of weight women may lift.

The second type (prohibitive) usually provide either a blanket prohibition against women working in certain occupations (most common: bartending and mining), or in various occupations during certain time periods related to childbirth.

The third type (conferring) include laws providing for premium overtime.
pay for women,\textsuperscript{14} or a minimum wage for women,\textsuperscript{15} and laws requiring special facilities\textsuperscript{16} and rest periods\textsuperscript{17} for women.

II. A Summary of Judicial Treatment of State Protective Laws Prior to the Enactment of Title VII

This section examines the most important decisions of the United States Supreme Court and their impact on women's employment rights prior to the enactment of Title VII. While the rationale of these cases may seem outdated today, the decisions still constitute an important part of the law in this area.

In \textit{Bradwell v. State},\textsuperscript{18} decided in 1873, the Supreme Court upheld a law which had been construed by the courts of Illinois as restricting admission to that state's Bar to males only, in the face of an attack under the privileges and immunities clause of the fourteenth amendment. The opinion of the Court merely held that the right to practice law was not a privilege and immunity of a citizen of the United States.\textsuperscript{19} The concurring opinion of three Justices maintained that the privileges and immunities clause does not grant women the right to engage in every profession or occupation.\textsuperscript{20}

On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently un-fits it for many of the occupations of civil life.

\textbf{... The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.}\textsuperscript{21}

\textit{Bradwell} was reaffirmed in 1894 in a similar decision under a Virginia statute.\textsuperscript{22}

The concurring opinion in \textit{Bradwell} presaged the Supreme Court's disposition of

\begin{itemize}
\item \textsuperscript{15} \textit{E.g., Minn. Stat. Ann. }\textcopyright \textsuperscript{177.07(1) (1966).}
\item \textsuperscript{18} \textit{83 U.S. (16 Wall.) 130 (1872).}
\item \textsuperscript{19} \textit{Id. at 139. Cf. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (voting is not a privilege under the fourteenth amendment).}
\item \textsuperscript{20} \textit{Bradwell v. State, 83 U.S. (16 Wall.) 130, 140-41 (1873) (concurring opinion).}
\item \textsuperscript{21} \textit{Id. at 141-42 (concurring opinion). While such a statement would no doubt chagrin the Woman's Liberation movement, Justice Bradley did go on to say that he heartily concurred in the female civil rights movement of that day. \textit{Id} at 142 (concurring opinion). Although woman attorneys have come a long way since \textit{Bradwell}, the opinion also predicted the troubles a woman might encounter even upon admission to the Bar. See Sassower, \textit{Women in the Law: the Second Hundred Years}, 57 A.B.A.J. 329 (1971); see generally L. Kanowitz, \textit{Women and the Law} (1969); Pressman, \textit{The Legal Revolution in Women's Employment Rights}, March 6, 1970, CCH Empl. Prac. Frac. Guide }\textsuperscript{5034 at 3690-92 (1971).}
\item \textsuperscript{22} \textit{In re Lockwood, 154 U.S. 116 (1894).}
\end{itemize}
the protective law restricting the hours of women in the landmark case of *Muller v. Oregon* in 1908.23

Before deciding *Muller*, the Supreme Court encountered protective laws that did not distinguish between the sexes. In 1898 *Holden v. Hardy*24 upheld the states’ police power to limit the hours of workers in underground mines against an equal protection argument. This case was limited to its facts in 1905 by *Lochner v. New York*,25 which invalidated a New York statute limiting the hours of bakery workers. The *Lochner* Court held that liberty of contract, i.e., “the right of the individual to labor for such time as he may choose,”26 outweighed the tenuous state interest in exercising its police power to protect the public and the employee’s health.

*Muller v. Oregon*27 is the Supreme Court’s most important case on female protective laws. At that time nineteen states imposed some type of restrictions on the hours a woman could labor.28 The Oregon statute prohibited women from working more than ten hours per day in a “mechanical establishment, or factory, or laundry.”29 Having required a woman to work in excess of ten hours, the defendant employer was convicted and fined $10.00.30 He contended in the Supreme Court that:

1. Since the statute prevents persons from making their own contracts, it violates the privileges and immunities, the due process and the equal protection clauses of the fourteenth amendment.

2. Since the statute does not apply equally to all persons similarly situated, it is invalid as class legislation.

3. Since there is no necessary or reasonable connection between the statute and the public health, safety and welfare, the statute is not a valid exercise of the police power.31

The Court’s opinion did not address each argument separately. It held that liberty of contract is not absolute and may, in certain cases, be restricted by the states.32 After taking cognizance of matters of general knowledge, i.e., that women are inferior to men, the Court stated that some legislation appears necessary to protect their rights. “Differentiated . . . from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.”33 Thus, since such legislation protects the health of women (and

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23 208 U.S. 412 (1908).
24 169 U.S. 366 (1898).
26 Id. at 54.
27 208 U.S. 412 (1908).
28 Id. at 419 n.1, citing appellee’s brief (the famous “Brandeis Brief”).
29 Id. at 416.
30 Id. at 417.
31 Id. at 417-18.
of the race in general, since healthy women bear healthy offspring), it is a valid exercise of the state's police power. Later cases have noted that Muller's main theme is the validity of these statutes under the due process clause. More important, the Court's statements in Muller on the inferior status of women may support the rationale that the statute was valid under the equal protection clause.

Muller v. Oregon, with its theory that the states have a special interest in protecting this separate, but unequal, class, was the basis for the Supreme Court's upholding of protective laws in later years (under the due process clause); e.g., a Massachusetts statute limiting the hours a woman could work in a factory; a similar Ohio statute; a California law limiting the hours of female workers in factories, hotels and restaurants and an amendment to the California statute to cover hospitals and places of amusement; a New York statute regulating the time of day a woman could work in a restaurant; and a Washington statute creating a minimum wage for women.

The same theory is found in many state court decisions. However, in 1947 the Supreme Court of Florida, sitting en banc, unanimously held contra, declaring a Miami ordinance prohibiting women bartenders invalid as an unreasonable exercise of the police power. The court so held without discussion of the Muller line and its rationale. Indeed, the court did not discuss the issue at all, apparently feeling the conclusion it reached to be obvious.

This case might have served as a basis to reverse the trend of Muller. In 1948, however, the Muller principle that the due process clause does not forbid a state's disparate treatment of the sexes was extended to specifically embrace the equal protection clause. In Goesaert v. Cleary, the Supreme Court affirmed under the equal protection clause the validity of a Michigan statute prohibiting the licensing of women bartenders except for the wife or daughter of the male


36 208 U.S. 412 (1908).

37 Riley v. Massachusetts, 252 U.S. 671 (1914).


39 Miller v. Wilson, 236 U.S. 373 (1915). This case also involved an equal protection issue, but it was limited to the argument that women in certain industries are treated differently from women in other industries.

40 Bosley v. McLaughlin, 236 U.S. 385 (1915). This case involved an equal protection issue similar to that raised in Miller, supra note 39.

41 Radice v. New York, 264 U.S. 292 (1924). This case involved an equal protection issue similar to that raised in Miller, supra note 39.

42 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).


44 Brown v. Foley, 158 Fla. 734, 29 So. 2d 870 (1947), distinguishing Nelson v. State ex rel. Gross, 157 Fla. 412, 26 So. 2d 60 (1946), on the basis that the party aggrieved was a female rather than an employer.

45 335 U.S. 464 (1946).
owner of the bar. Although it did not cite Muller, the Court opined:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. Thus, Muller and Goesaert provided the general principle that state protective legislation is valid under both the due process and the equal protection clauses. While this principle is widely considered Victorian today, the Supreme Court has not expressly abandoned it to date. Indeed, four federal courts have recently relied on Muller and Goesaert. These and several state court decisions

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46 The Court stated:

It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of a case. Id. at 467.

47 Id. at 465-66.


In the most vulgar and insulting of decisions handed down in this century by the Supreme Court, notable for its lack of legal learning as well as for its arrogant prejudice, the majority of the Supreme Court decided that it was well within the police powers of the State of Michigan for the legislature to draw the most arbitrary and capricious of lines as to who could tend bar in Michigan.

49 However, the Supreme Court has recently held that an Idaho statute mandating that males be given preference to females in appointing estate administrators is invalid under the equal protection clause since it creates an arbitrary classification. Reed v. Reed, 40 U.S.L.W. 4013 (U.S. Nov. 22, 1971), discussed at text accompanying notes 314-21, infra. The Supreme Court has also made a recent statement which may help to reverse the Muller trend in Griggs v. Duke Power Co., 401 U.S. 424, (1971). The Court noted that the EEOC Guidelines "are entitled to great deference." Id. at 494. Accord, Weeks v. Southern Bell Tel. Co., 408 F.2d 228, 233 (5th Cir. 1969). See also Richards v. Griffith Rubber Mills, 300 F. Supp. 333, 340 (D. Ore. 1969). However, as a practical matter, a court may still disregard an administrative interpretation if it is so inclined: e.g., Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219, 1224 (C.D. Cal. 1968), aff'd—F.2d—(9th Cir. 1971), discussed at text accompanying note 134, infra, on the former EEOC Guideline.


Plaintiffs have not distinguished the issue presented in Muller v. Oregon, supra. The principle of stare decisis must ultimately control the decision at the district court level. A Supreme Court decision is as binding as statutory law. The district court, even sitting as a three-judge tribunal, cannot reverse the Supreme Court. When the law has developed through intervening decisions to the point that it has become clear that the Supreme Court has abandoned the reasoning which gave rise to an earlier decision and that the law has in fact changed and all that is needed is recognition, then an inferior court should recognize what is obvious and act accordingly. However, there has been no line of decisions which cast doubt upon the basic holding of Muller. Therefore, this case does not present a substantial constitutional issue. Mere speculation as to what the Supreme Court might do in the light of the changed circumstances will not suffice to take this issue out of the insubstantial category. Id. at 955.

are illustrative of how settled this principle is, or was, until recently.\textsuperscript{52}

Against this background, let us now examine the recent legislative, administrative and judicial activity in this area.

III. Analysis of Title VII and the Equal Employment Opportunity Commission's Position

A. Title VII

Title VII of the Civil Rights Act of 1964 was signed into law on July 24, 1964, and became effective one year later.\textsuperscript{53} Section 703(a) states the basic substantive law for employers:

\begin{quote}
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.\textsuperscript{54}
\end{quote}

This law applies to employers (except governmental units\textsuperscript{55} and religious and educational institutions\textsuperscript{56}) of twenty-five or more employees.\textsuperscript{57} Similar provisions cover labor organizations with twenty-five or more members,\textsuperscript{58} and employment agencies.\textsuperscript{59}

In short, then, employment discrimination based on an individual's race, color, religion, sex, or national origin is generally prohibited. No exceptions are provided for discrimination based on race or color. However, a specific exception permits discrimination where sex, religion or national origin is a bona fide occupational qualification [hereafter b.f.o.q.] reasonably necessary to the normal operation of an employer's business.\textsuperscript{60} While not always so, it is now fairly well

\begin{itemize}
\item See Section IV, infra.
\item 78 Stat. 256, 42 U.S.C. § 2000e-2(e) (1964) provides in pertinent part:
\begin{quote}
Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .
\end{quote}
\end{itemize}
settled that this exception must be strictly construed and may be allowed only after the employer presents sufficient evidence to warrant its application.\(^{61}\)

In enacting the Civil Rights Act of 1964, Congress did not intend to preempt all state laws. The general antipreemption section of the Act provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.\(^{63}\)

Neither did Congress intend to sanction compliance with any state law which would result in an unlawful employment practice. The specific antipreemption section of Title VII, Section 708, provides:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future 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 employment practice under this title.\(^{64}\)

By its terms, by its timing, and by its legislative history, this section does not expressly mean to preserve state protective laws. However, the legislative history surrounding the addition of the sex discrimination prohibition is not conclusive as to whether Congress specifically intended to repeal state protective legislation. Congressman Celler first raised the issue:

Would the many State and local provisions regulating working conditions and hours of employment for women be struck down? You know the biological differences between the sexes. In many States we have laws favorable to women. Are you going to strike those laws down? This is the entering wedge, an amendment of this sort. The list of foreseeable consequences, I will say to the committee, is unlimited.\(^{67}\)

Representative Griffiths took a strong stand that such laws ought be stricken, since "[m]ost of the so-called protective legislation has really been to protect men's rights in better paying jobs."\(^{68}\) Representative St. George implied the same when


\(^{65}\) Section 708 was in the bill before sex was added. Note, supra note 2, at 1191 n.115: "The Bill as originally described in a House report appearing in November, 1963, contained [sic] an antipreemption section. H.R. Rep. No. 914, 88th Cong., 1st Sess. 13 (1963). Sex was added to the Act on Feb. 8, 1964. 110 Cong. Rec. 2577 (1964)."

\(^{66}\) Section 708 was added to preserve the validity of state fair employment laws. 110 Cong. Rec. 7243 (1964) (remarks of Senator Case); 110 Cong. Rec. 12,721 (1964) (remarks of Senator Humphrey).

\(^{67}\) 110 Cong. Rec. 2577-78 (1964).

\(^{68}\) Id. at 2580.
she noted that "... women do not get equal pay for equal work." Even one opponent to the amendment expressed concern that protective laws "may be repealed by implication." However, one proponent felt "sure the acceptance of the amendment will not repeal the protective laws of the several States." While the House debate has been read by some to evidence congressional intent to supersede state protective laws, such an intent was not clearly expressed.

The prohibition against sex discrimination was added to the Bill at the eleventh hour by the House, and without the benefit of a committee report or a complete debate on this issue. Indeed, the sponsor of the sex amendment was the leader of the House opposition to the Act, who apparently hoped that the amendment would gain opposition to the Act, or, alternatively, if the Act were passed, that white females would not be placed in a position inferior to black women. In short, then,

The sex amendment consisted of inserting the word "sex" in appropriate places in the bill. It was introduced without the benefit of further explanation or committee consideration. Many of the members voting on the amendment had not been present for the immediately preceding debate. Accordingly, it seems unrealistic to speak of an intent of Congress in the sense of an actual consensus among the supporters of the amendment that it would accomplish any particular result not plainly inferable from the language of the amendment and the logic of the title as a whole.

B. Administrative Interpretation

The Equal Employment Opportunity Commission has the responsibility for administering the Civil Rights Act of 1964. For various reasons, the Commission took no immediate position on the validity of state protective laws. Its former Acting General Counsel felt it "was difficult, from a legal point of view, to assume that Congress intended to overthrow the laws and regulations of over forty states." Moreover, the Commission found disagreement among female civil rights groups on this issue. Women covered by a collective bargaining agreement

69 Id. at 2732 (remarks of Representative Multer).
70 Id. at 2583 (remarks of Representative Kelly).
71 Rosenfeld v. Southern Pacific Co., — F.2d — (9th Cir. 1971); Murray and Eastwood, supra note 4, at 248-49.
72 House Report No. 914, supra note 2, stated that the purpose of the Legislation, in part, was to "eliminate . . . discrimination in employment based on race, color, religion, or national origin." 1964 U.S. CODE CONG. AND ADM. NEWS, p. 2401. Sex was added to the bill on February 8, 1964. 110 Cong. Rec. 2577 (1964) (remarks of Representative Smith). For a concise history of the addition of sex see Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 879-83 (1967). For the legislative history of Title VII in general see Vaas, Title VII: Legislative History, 7 B.C. IND. & COM. L. REV. 431 (1966).
or by the Fair Labor Standards Act\textsuperscript{80} looked at such laws as discriminatory, while women not so situated desired their protective features.\textsuperscript{81}

After receiving no response to its invitation to Congress to clarify its intention,\textsuperscript{82} the EEOC issued Guidelines on Discrimination Because of Sex in November of 1965. These first Guidelines stated, in pertinent part:

\begin{quote}
\textbf{(C)} The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.\textsuperscript{83}
\end{quote}

Thus, the Commission initially felt that the b.f.o.q. section of the Act\textsuperscript{84} could reconcile the paradox on a flexible, case by case basis. However, in the three years following this Guideline, the Commission never issued an opinion that a particular state law was invalid.\textsuperscript{85} A former Acting General Counsel of the EEOC explains:

\begin{quote}
Fairness to the Commission, however, requires recognition of the fact that the circumstances required it to take some public position at a time when neither the Commission itself nor those it consulted had sufficient knowledge or expertise to resolve the difficult legal and policy questions that it confronted. Therefore, it had to buy time by adopting a position that would postpone the most difficult questions, and this the guideline certainly did. Furthermore, the Commission had hoped that the call for state legislative action would bring some response, especially where it was coupled with the threat that arbitrary and outdated legislation might be set aside in later actions by the Commission and the courts. Finally, the guideline did provide that where state laws or regulations permitted administrative exceptions, an employer could not justify discrimination as compelled by state law unless he had sought in good faith to obtain an exception. Thus, the Commission intended to resolve those cases capable of solution within the existing legal framework, and to generate more pressure for flexibility on the authorities administering state laws. [Footnotes omitted.]\textsuperscript{86}
\end{quote}

The EEOC was also not unmindful of the problem a more definitive position would have created for employers, since such a position could not force the states

\begin{thebibliography}{9}
\bibitem{85} Berg, \textit{supra} note 51, at 334.
\bibitem{86} \textit{Id.} at 334-35.
\end{thebibliography}
to refrain from enforcing their protective laws. Since blanket repeal by the states or further action by Congress was unlikely, the Commission came to realize that the only effective resolution of the issue would be litigation. Thus, in 1966 it issued a policy statement that, in the event of a seemingly unresolvable conflict between federal and state law, the EEOC would make no determination of reasonable cause, but would merely advise the charging party of her right to secure a judicial determination thereof. The Commission also gave notice that it might appear as amicus curiae to present its views on the proper construction of Title VII. Some litigation followed this policy statement, one court holding a Georgia weight-lifting restriction valid (this decision was subsequently reversed in 1969).

In early 1968, the EEOC retracted the 1966 policy statement, referring to its original 1965 Guideline. The Commission stated that it intended to process such cases to a conclusion and rule on whether the state law had been nullified by Title VII.

The first case holding a protective law invalid because of Title VII was decided in November of 1968. The Commission had appeared as amicus curiae and urged the result. After additional judicial authority to the same effect, the Commission decided that the adoption of a firm position would be appropriate. The present Guideline was published on August 19, 1969:

(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.
Since the promulgation of this Guideline, the EEOC has consistently found state protective laws invalid in individual cases.\(^94\) (The United States Department of Labor's Office of Federal Contract Compliance has also issued Guidelines, effective June 9, 1970, which prohibit a government contractor from denying a woman a job she is qualified to perform on the basis of a state protective law.\(^95\))

### IV. A Survey of Recent Developments in the Law

#### A. Recent Legislative and Administrative Developments

Even before Title VII was enacted, Indiana repealed its hour restriction for women.\(^96\) Since the enactment of Title VII, nine states have followed suit.\(^97\) Two of these, Delaware and Nebraska, went one step further and repealed their laws providing benefits for women.\(^98\) Other states have severely modified their hour restrictions; e.g., New York's hour and shift law\(^99\) now governs only women under twenty-one years of age; a few states' hour restrictions\(^100\) now exempt women employees covered by the Fair Labor Standards Act; and Texas' law is now conditioned upon the employee's consent.\(^101\)

Other states have recently amended their Fair Employment Practices Acts to include a ban on sex discrimination.\(^102\) This recent legislative action could be reasonably construed to have impliedly repealed these states' protective laws.

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\(^95\) Ch. 68, \S 1 [1933] Ind. Acts 435, \(\textit{repealed by ch.} \ 51, \ \S 1 [1959]\) Ind. Acts 119.


Three state courts have so held. 103 The Arizona Civil Rights Commission 104 and the Attorney General of Pennsylvania 105 have made similar rulings. It should be noted, however, that many of these laws specifically provide that they are not intended to disturb the state’s protective legislation; 106 others have been so interpreted. 107 The Attorneys General of several states have issued opinions to the effect that their states’ protective legislation is invalid in light of Title VII. 108 One, however, added a reservation that employers should not ignore such laws without regard for the employee’s health. 109 Furthermore, some of these opinions have indicated that the state protective legislation still applies to employers not covered by the federal law. 110

The Washington State Human Rights Commissions has recently ruled that it will generally follow interpretations under Title VII, in particular the EEOC Guidelines. However, it also stated that it will not follow federal precedents where it believes a different interpretation will better carry out the purposes of the state law. 110a

The foregoing developments, when coupled with the recent decisions in this area, certainly indicate a trend toward invalidating state protective laws. However, the recent actions of some states indicate that traditional concepts about the “weaker sex” are not entirely dead. For example, several states have recently amended their protective laws. 111 While these amendments have generally restricted their application, that they were not entirely repealed when the legislature was on the subject indicates some continued interest in the working condi-

tions of women employees by the states. The Attorney General of Kentucky has taken the stand that, despite the recent trend, the state's protective legislation will remain in effect until the United States Supreme Court holds otherwise. The North Carolina Commissioner of Labor has taken a similar stand.

As noted above, several other Attorneys General have stated that their "protective" state laws still apply to employers not covered by Title VII. The Ohio Department of Industrial Relations stated on September 4, 1969, that it would not prosecute alleged violations of Ohio's protective laws. However, one year later it reversed this opinion, noting that the legislature's inaction during the interregnum mandated continued enforcement.

In short, then, the modern trend toward invalidating state protective laws has not developed into a nationwide repeal of such laws, nor is such a result probable.

B. Recent Judicial Developments

This section will survey the many cases decided in recent years relevant to state protective laws, emphasizing the different legal theories employed to attack such laws. The cases are organized according to the types of legislation at issue. However, theories applicable to one type may also be applicable to another type. Section V will summarize and analyze the different theories contained in the following cases.

1. Litigation Involving Restrictive Legislation

Most of the recent decisions address statutes restricting the employment of women in certain occupations.

*Weeks v. Southern Bell Telephone and Telegraph Company*, decided at the district court level on November 9, 1967, was the first case to pass on the validity of a State protective law under the Civil Rights Act of 1964. Plaintiff alleged that a Georgia regulation limiting the amount of weight a woman could lift to 30 pounds was invalid, since it denied her an opportunity for a better employment position. The court phrased the issue in terms of whether the regulation created a b.f.o.q., finding nothing in the Civil Rights Act "to indicate that Congress intended to nullify or limit the application of such laws or regulations."

While the court's statement is not entirely correct, it did properly find support in the then current EEOC Guidelines, which specifically stated that reasonable weight restrictions establish a b.f.o.q. Thus, the court held: (1) the

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114 CCH EMPL. PRAC. GUIDE ¶ 5129.
116 Id. at 118.
118 29 C.F.R. § 1604.1(c) (1967).
regulation was valid on this basis, and (2) that, apart from the regulation, the nature of the position created a b.f.o.q. 119

Pending appeal to the Fifth Circuit, Georgia amended its regulation to prohibit the lifting of weights by either gender that might cause strains or undue fatigue. 120 As a result, the Fifth Circuit stated that "the issue of protective state legislation disappears from the case." 121 The court did, however, disapprove of the reasoning of the district court. It first stated that Congress intended the b.f.o.q. section to be narrowly construed 122 and that the EEOC Guidelines so construe it. 123 The court then cited the specific Guidelines relied on by the district court (that reasonable weight restrictions will be honored), but noted that plaintiff contended the 30-pound limit was unreasonable and ineffectual, and violated the due process and supremacy clauses. On this point, the court cited the first case invalidating a state weight restriction for women because of a conflict with Title VII. 124 Without expressly approving or disapproving that case, the court cited it to demonstrate that the Commission appeared therein as amicus curiae and urged the ultimate result. 125 This appearance indicated that the Commission gave a stricter interpretation to its Guideline on weight restrictions than the district court supposed.

The Fifth Circuit next proceeded to expressly reverse the district court's second holding, concluding that the employer had a heavy burden of proof in order to have a restrictive policy held valid as a b.f.o.q. Stereotyped characterizations about women in general were not sufficient. 126 This decision is clearly a landmark for this principle. It is not clear, however, that Weeks stands for the proposition that state protective laws are generally invalid under Title VII. Nevertheless, such a conclusion has been suggested. 127

In Ward v. Luttrell, 128 decided on October 4, 1968, plaintiffs brought a class action (representing all female workers in Louisiana) alleging every Louisiana protective law 129 invalid under the due process, equal protection and supremacy clauses. A three-judge court dismissed the first two arguments as insubstantial in light of Muller v. Oregon 130 and remanded the third to the single judge. 131 The single judge never reached the merits, dismissing the case partially on the

121 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 233 (5th Cir. 1969).
122 Id. at 232. The court cited the following authority in N. 3: "For an interpretative memorandum by Senators Clark and Chase, floor managers of the bill, suggesting that Section 703(c)(1) creates a 'limited exception,' see 110 Cong. Rec. 7213 (1964)."
123 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969), citing 29 C.F.R. § 1604.1(a) (1968).
125 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 233 (5th Cir. 1969).
126 Id. at 233-36.
130 208 U.S. 412 (1908).
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ground that plaintiffs did not adequately represent the class. The court's rationale is noteworthy:

Nor can we conceive that plaintiffs' position represents the will of many other women workers, even if similarly situated. Removing the work hour limitation for women would place women on an equal basis with men in the matter of overtime pay and make available to them some, if not all, the opportunities offered men which plaintiffs urge they are being denied. However, it would not then be just a matter of allowing women to work overtime when they choose to do so, but they would be subjected to the obligation to work more hours whether they want to or not under the penalty of being discharged. We are not convinced that all women would want such obligation.

The first court holding a state protective law invalid under the supremacy clause was the United States District Court for the Central District of California in *Rosenfeld v. Southern Pacific Company*, decided on November 22, 1968. Plaintiff was denied promotion to a position that would occasionally require long hours and the lifting of heavy weights in violation of the California Labor Code. The court found that the California laws did not create a b.f.o.q., that they discriminate against women, that they violate Title VII, and that they are "void of no force and effect" under the supremacy clause. This decision is significant in that this is the first case so holding under Title VII and was decided even before the present EEOC Guidelines were promulgated. Indeed, to the extent that the then current Guidelines were inconsistent with the court's opinion, they were void. (It should be noted, however, that the EEOC appeared as amicus curiae and urged the result reached in this case.) This case was affirmed last spring by the Ninth Circuit. After his unsuccessful appeal, California's Attorney General announced that henceforth only laws that provide benefits to women will continue to be enforced. The second case holding a state protective law invalid under the supremacy clause was *Richards v. Griffith Rubber Mills*, decided May 5, 1969. The plaintiff was denied a promotion to a position occasionally requiring the lifting of heavy weights in part because of an Oregon Wage and Hour Commission Order. The court held the Oregon law invalid under the supremacy clause because it conflicted with Title VII. The court also answered the argument that

133 Id.
134 293 F. Supp. 1219 (C.D. Cal. 1968), aff'd, 620 F.2d 8 (9th Cir. 1971).
135 CAL. LABOR CODE §§ 1251 and 1350 (West 1971).
140 Id. 620 F.2d (9th Cir. 1971).
141 CCH EMPLOYMENT GUIDE ¶ 5176 (1971).
under the equal protection clause a state may constitutionally restrict the employ-
ment of women.

This is correct, Muller v. Oregon, 208 U.S. 412 . . . (1908), but it is not the issue. Except in rare and justifiable circumstances, 42 U.S.C. § 2000e-2(e), the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. 29 C.F.R. § 1604.1 (a) [1970]. Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups. The particular classification in Order No. 8 may be reason-
able under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act. 42 U.S.C. § 2000e-7.44

Since the employer could not show its refusal to promote plaintiff was based on a bona fide occupational qualification, it had violated Title VII in following the state law.

Bowe v. Colgate-Palmolive Co., decided in September, 1969, passed on an employer's self-imposed weight limitation.44 However, the decision declaring the employer's policy invalid contains some relevant dictum on state protective laws. The court agreed with the then current EEOC Guidelines44 which stated that the Commission did not believe Congress intended to disturb all protective laws.44 Nevertheless, a b.f.o.q. on weight lifting must be strictly construed and does not mean all weight lifting statutes are valid. Rather, most current state laws have such low limits that they are unreasonable in light of the physical abilities of most American women.44 It is interesting to note that, on the issue of the employer's policy, the court held that Colgate could retain its 35-pound restriction for both male and female employees if it provided individual excep-
tions.44

Caterpillar Tractor Co. v. Grabiec45 involved a novel procedural situation in that two employers (Caterpillar and Illinois Bell) took the initiative and sought a declaratory judgment that Illinois' hour and weight restrictions45 were invalid. The court found a justiciable controversy in which the plaintiffs had standing because the Illinois Director of Labor was actively enforcing the state law and that the employers were threatened with actions by their employees.45 The court then held in its conclusions of law that the Illinois statutes did not create a b.f.o.q., that they violated Title VII, and thus were "void and of no force" under the supremacy clause.45

In Local 246, Utility Workers Union of America v. Southern California Edison Co.,456 the employer denied a woman promotion to a position requiring

145 416 F. 2d 711 (7th Cir. 1969).
146 29 C.F.R. § 1604.1(c) (1969).
147 Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 716 (7th Cir. 1969).
148 Id. at 717.
149 Id. at 718.
151 ILL. STAT. ANN. Ch. 48, § 5 (Smith-Hurd 1969).
153 Id. at 1307.
the lifting of 50-pound objects on a regular basis. The employer contended that the relevant California statute\textsuperscript{155} was valid under the antipreemption sections of the Civil Rights Act of 1964\textsuperscript{166} and that it created a b.f.o.q. under Section 703 (e) of the Act.\textsuperscript{157} The court quickly rejected the first argument, holding that the antipreemption sections were intended to preserve only state laws similar to the Civil Rights Act.\textsuperscript{158} It then found that being a male was not a reasonably necessary prerequisite to being able to lift 50 pounds. "On the contrary, there are without doubt a substantial number of women who could lift over 50 pounds and a large number of men who could not."\textsuperscript{159} Upon review of the EEOC Guidelines and other decisions on point,\textsuperscript{160} the court found the California law invalid under the supremacy clause.\textsuperscript{161}

In \textit{Garneau v. Raytheon Co.},\textsuperscript{162} eight female employees brought a class action to declare the Massachusetts statute limiting the hours a woman could work\textsuperscript{163} invalid under the supremacy clause, and for an injunction against its enforcement by the Massachusetts Commissioner of the Department of Labor. The court noted that at oral argument all parties conceded the "head-on and irreducible conflict" between the state law and Title VII. Then, without further discussion, it cited \textit{Gibbons v. Ogden}\textsuperscript{164} for the proposition that the state law must yield to the federal, and thus granted plaintiffs the relief requested.\textsuperscript{165}

In \textit{Kober v. Westinghouse Electric Corp.},\textsuperscript{166} plaintiff sued for a declaratory judgment that the Pennsylvania law restricting hours for women workers\textsuperscript{167} was invalid, for an injunction against her employer from denying her a promotion in reliance thereon, and for back pay. The court felt the injunctive relief unnecessary as, subsequent to the filing of the suit, Pennsylvania amended its Human Relations Act to forbid employment discrimination because of sex,\textsuperscript{168} the Pennsylvania Attorney General issued an opinion that the amendment impliedly repealed the labor law,\textsuperscript{169} and defendants agreed to comply with Title VII.\textsuperscript{170} (Since no party asserted the validity of the labor law, it is questionable whether declaratory relief was necessary. However, the court felt that this would be appropriate to give a "controlling judicial construction" of the employer’s actions under the state and federal law.)\textsuperscript{171} The court then stated its conclusion that

\textsuperscript{155} CAL. LABOR CODE § 1251 (West 1971).
\textsuperscript{159} Id. at 1265.
\textsuperscript{163} MASS. ANN. LAWS ch. 149, § 36 (Supp. 1970).
\textsuperscript{164} 22 U.S. (9 Wheat.) 1, 211 (1824).
\textsuperscript{166} 325 F. Supp. 467 (W.D. Pa. 1971).
\textsuperscript{167} PA. STAT. ANN. § 103 (Supp. 1971).
\textsuperscript{168} PA. STAT. ANN. §§ 951-63 (Supp. 1971).
\textsuperscript{171} Id. at 472.
the Pennsylvania law was invalid under the supremacy clause.\(^{172}\)

In *Ridinger v. General Motors Corp.*,\(^ {173}\) the United States District Court for the Southern District of Ohio considered the validity of Ohio's hour and weight restrictions\(^ {174}\) at the request of two women who were allegedly denied promotions because of their sex. The court held that Title VII's antipreemption sections\(^ {175}\) make it clear that Congress intended to supersede all state laws which require an act amounting to an unfair employment practice under Section 703(a) and (b). The court found that the state laws did not create a valid b.f.o.q., since they were based on stereotyped characterizations rather than individual capacities. Thus, because these laws denied women employment opportunities, they were "void and of no force and effect" under the supremacy clause.\(^ {177}\)

The court next felt constrained to comment upon a conflicting Ohio intermediate appellate court decision on the same issue decided two weeks earlier.\(^ {178}\) This decision held the same Ohio laws valid on the theories that they created a b.f.o.q. and that the employer could place the same restrictions on males. The federal court euphemistically disapproved this decision, finding support for its holding in several federal court decisions that found similar laws superseded by Title VII.\(^ {179}\)

The employer took the initiative again in *General Electric Co. v. Hughes*,\(^ {180}\) decided on May 3, 1971. General Electric sought a preliminary injunction against the Ohio Director of Industrial Relations from enforcing Ohio's law imposing hour and weight restrictions on women.\(^ {181}\) The court granted the preliminary injunction pending a final hearing on the merits,\(^ {182}\) citing its earlier decision on the same statutes in *Ridinger v. General Motors Corp.*\(^ {183}\) Had the court stopped there, this case would not be unique. However, the case is significant in that the court refused to grant a preliminary injunction to bar the state's investigation of complaints to determine whether any woman was required against her will to work longer hours or lift heavier weights than permitted by state law.\(^ {184}\)

The court stated:

> We find substance to the claim of the state officials that no employer should turn the clock backward, i.e., that they should guard against employers trying to turn the situation to their advantage by forcing female employees to work long hours and lift more than they should.\(^ {185}\)

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172 Id. at 474.
177 Id. at 1096.
181 Ohio Rev. Code Ann. §§ 4107.43, 4107.45(C), and 4107.46 (Page 1965).
185 Id.
In *Mengelkoch v. Industrial Welfare Commission*\(^{186}\) the Ninth Circuit was asked to reverse a dismissal by a three-judge court of the Central District of California\(^{187}\) of equal protection and due process attacks against the California statute limiting the hours women could work in certain occupations. The district court dismissed these constitutional attacks as insubstantial in view of the *Muller v. Oregon* line of cases.\(^{188}\) The Ninth Circuit affirmed as to the due process attack,\(^{189}\) but remanded the case for a fuller consideration of the equal protection attack.\(^{190}\) The court made several comments about *Muller*:

(1) While some of the conditions discussed in *Muller* as warranting exertion of the state’s police power still exist (women still differ physically from men and still bear children), their relevance and importance today may not be the same. However, it may be seriously doubted whether the other conditions in *Muller* still exist. Even if they do, their importance may not be the same today.\(^{191}\)

(2) All the conditions relied on by *Muller* were considered to determine the wisdom of the legislation under the due process clause. Such a determination is no longer made today.\(^{192}\)

(3) Unlike *Muller*, the present attack is made by an employee, rather than an employer, and is based on the equal protection clause. The attack alleges the statute discriminates in favor of males, while in *Muller* the Supreme Court felt that the statute was necessary to safeguard a woman’s competitive position.\(^{193}\)

(4) In *Muller*, the Supreme Court was required to emphasize differences between the sexes to escape the holding of *Lochner v. New York*.\(^{194}\) This is no longer required today.\(^{195}\)

(5) Similar factors distinguish *Muller*’s progeny, but *Goesaert v. Cleary* is worthy of special comment. *Goesaert*’s statement that “Michigan may deny to all women opportunities for bartending” was made in the context of traditional legislative power to regulate liquor traffic. “We do not regard *Goesaert* as establishing, beyond reasonable debate, that a

\(^{186}\) 3 CCH EPD ¶ 8097 (9th Cir. Jan. 11, 1971). The opinion on this case has been withdrawn from the official reporting system, 437 F.2d xxxix (1971).
\(^{188}\) Id.
\(^{189}\) Id. at 6271-72 (9th Cir. Jan. 1971).
\(^{190}\) Id. at 6272-73.
\(^{191}\) Id. at 6272.
\(^{193}\) Mengelkoch v. Indus. Welfare Comm’n, 3 CCH EPD ¶ 8097 at 6272 (9th Cir. Jan. 11, 1971).
\(^{194}\) 198 U.S. 45 (1905).
\(^{195}\) Mengelkoch v. Indus. Welfare Comm’n, 3 CCH EPD ¶ 8097 at 6272 (9th Cir. Jan. 11, 1971), citing Bunting v. Oregon, 243 U.S. 426 (1917) for the proposition that states have the police power to prescribe maximum hours for even male employees.
statute limiting the hours of labor of women in general occupations may not be so discriminatory against females as to offend the Equal Protection Clause.\textsuperscript{196}

Thus, the Ninth Circuit did not express a firm opinion on the current validity of the \textit{Muller} line, but felt that the above factors warranted a full consideration of a novel attack on a similar statute.\textsuperscript{197} The court's comments do suggest very good arguments against the modern application of \textit{Muller} and \textit{Goesaert}.

The Ninth Circuit next considered the propriety of the single judge's dismissal of the claim that the California statute was invalid under the supremacy clause as inconsistent with Title VII.\textsuperscript{198} The district court had dismissed this argument on the ground of abstention, since it felt a California state court might find the law invalid under the California Constitution. The Ninth Circuit recognized that this reason is a ground for federal abstention in some cases. However, it did not feel the abstention doctrine precluded a federal court determination where a federal policy has been established, as here, by enactment of the Civil Rights Act of 1964.\textsuperscript{199} The equal protection and supremacy issues were thus remanded to the district court for further consideration.

While this opinion did not expressly hold the state law invalid, it foreshadowed the Ninth Circuit's recent affirmance of \textit{Rosenfeld}.\textsuperscript{200} In affirming the district court's opinion in \textit{Rosenfeld}, the court rejected the argument that sex was a b.f.o.q. for the position in issue either because of the nature of the job or the California Labor Code.\textsuperscript{201} The court then noted that the current EEOC Guidelines take the position that state protective laws are invalid and that the United States Supreme Court has recently noted that this administrative interpretation of the Act is "entitled to great deference" by the courts.\textsuperscript{202} The Ninth Circuit affirmed the finding of the district court\textsuperscript{203} that the state laws were invalid under the supremacy clause insofar as they discriminate between men and women.\textsuperscript{204}

\section*{2. Litigation Involving Prohibitive Legislation}

All of the cases addressing statutes that prohibit women from engaging in certain occupations have dealt with barmaids. In \textit{Longacre v. State}, decided on December 31, 1968,\textsuperscript{205} the Supreme Court of Wyoming was presented with a

\begin{thebibliography}{99}
\bibitem{196} \textit{Id.} at 6272-73.
\bibitem{197} \textit{Id.} at 6273, \textit{citing} Quong Wing v. Kirkendall, 223 U.S. 59, 64 (1912): "[[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way."
\bibitem{199} Mengelkoch v. Indus. Welfare Comm'n, 3 CCH EPD ¶ 8097 at 6274 (9th Cir. Jan. 11, 1971).
\bibitem{200} \textit{Rosenfeld v. Southern Pacific Co.}, \textit{—— F.2d} \textit{——} (9th Cir. 1971), aff'd 293 F. Supp. 1219 (C.D. Cal. 1968).
\bibitem{201} \textit{Rosenfeld v. So. Pac. Co.}, \textit{—— F.2d} \textit{——} (9th Cir. 1971).
\bibitem{203} \textit{Rosenfeld v. So. Pac. Co.}, \textit{—— F.2d} \textit{——} (9th Cir. 1971).
\bibitem{204} \textit{Rosenfeld v. So. Pac. Co.}, \textit{—— F.2d} \textit{——} (5th Cir. 1968).
\bibitem{205} 448 P.2d 832 (Wyo. 1968).
\end{thebibliography}
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conflict between Wyoming’s law prohibiting women bartenders (without exception)\(^{206}\) and Wyoming’s later enactment of its Fair Employment Practices Act, which prohibits employment discrimination on account of sex.\(^{207}\) The court felt the rule of construction that the specific governs the general should not apply where the two laws are completely repugnant to each other. “How could they possibly stand together when the state would be telling a liquor dealer on one hand that he dare not employ a woman bartender, and on the other hand that he dare not discriminate as to sex?”\(^{208}\) Therefore, the bartending statute has been impliedly repealed.\(^{209}\) Two lower courts in other states have reached the same conclusion.\(^{210}\) One of these courts went even further and held an ordinance invalid under the equal protection and due process clauses of both the Minnesota and the United States Constitutions.\(^{211}\)

In *McCrimmon v. Daley*,\(^{212}\) plaintiffs brought a class action alleging that a Chicago ordinance prohibiting women from tending bar, except for a woman licensee or a wife or daughter of a male owner, was invalid under “the Constitution and laws of the United States.”\(^{213}\) The district court dismissed the claim on the ground that the complaint failed to state a substantial federal question,\(^{214}\) relying on *Goesaert v. Cleary*.\(^{215}\) The Seventh Circuit agreed that *Goesaert* was controlling “unless and until the Supreme Court determines its rationale to be no longer compelling.”\(^{216}\) However, it did not feel *Goesaert* was necessarily dispositive of the present case, since the statute in *Goesaert* did not except women licensees. Thus, the *Goesaert* rationale of a male protective presence is inapplicable. Furthermore, the court noted that *Goesaert* was decided before the Civil Rights Act of 1964. Thus, the separate issue under the supremacy clause should also be addressed today.\(^{217}\)

On remand, the district court found that sex is not a b.f.o.q. for bartending and that no reasonable relationship exists between the objects of the state’s police power and the ordinance. Therefore, the court found the ordinance void insofar as it conflicts with Title VII and void on its face under the fourteenth amendment since it deprives plaintiffs of property rights without due process.\(^{218}\) It is interesting to note that the district court so found without any discussion of *Goesaert v. Cleary* or *Muller v. Oregon*.

In *Krauss v. Sacramento Inn*, decided on June 15, 1970,\(^{219}\) the United States

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209 Id.
212 418 F.2d 366 (7th Cir. 1969).
213 Id.
214 Id. at 368.
215 Id. at 369.
216 Id.
217 Id. at 369-71.
District Court for the Eastern District of California considered the validity of California's law prohibiting women (except the owner, licensee, or wife of either) from tending bar.\(^{220}\) Plaintiff's attack was based solely on Title VII. The court framed the issue in terms of whether the twenty-first amendment immunizes this law from federal interference via the commerce clause.\(^{221}\) The court first held that the twenty-first amendment grants the state power to regulate the sale of liquor within borders.\(^{222}\) Then it declined to examine the reasonableness of the statute under the fourteenth amendment.\(^{223}\) Even if it were to do so, the court noted that \textit{Goesaert v. Cleary}\(^{224}\) had upheld an almost identical Michigan statute.\(^{225}\) The court then concluded that Title VII does not apply to bar-tenders.\(^{226}\)

One limitation on this decision is, however, that the court was not specifically asked to review the statute in relation to the fourteenth amendment. In a footnote, the court stated:

> But plaintiff does not contend that this statute violates the Fourteenth Amendment. Therefore I need not decide whether the holding of \textit{Goesaert} has been undermined by developments since 1948; \textit{e.g.,} the 1964 Civil Rights Act, or whether this statute sufficiently differs from that in \textit{Goesaert} to require a different result. \textit{See McCrimmon v. Daley}, 418 F.2d 366, 369-70 (7th Cir. 1969).\(^{227}\)

A further limitation on this decision is the opposite conclusion on the same issue reached by the California Supreme Court in 1971.\(^{228}\)

In \textit{Paterson Tavern & Grill Owners Association, Inc. v. Borough of Hawthorne},\(^{229}\) the Supreme Court of New Jersey considered the constitutionality of an ordinance prohibiting licensed taverns from employing women bartenders, except women licensees and wives of licensees. Since Title VII\(^{230}\) and the New Jersey Civil Rights Act\(^{231}\) did not apply to the facts, the court phrased the issue in terms of whether the law was a reasonable exercise of the police power.\(^{232}\) However, it never considered whether this issue involved the New Jersey or the Federal Constitution, or both. In reviewing earlier cases on this issue, the court acknowledged that it had relied on \textit{Goesaert v. Cleary} in a former case\(^{233}\) and that \textit{Goesaert} had not been overruled, but stated that \textit{Goesaert} has been subject to academic

\(^{220}\) \textit{CAL. BUS. \\& PROF. CODE} § 25656 (West Supp. 1971).

\(^{221}\) \textit{Id.} at 175-77.

\(^{222}\) \textit{Id.} at 177.

\(^{223}\) \textit{Id.} at 335 U.S. 464 (1948).


\(^{226}\) \textit{Id.} at 178.

\(^{227}\) \textit{Id.} at 177-78 n.5.

\(^{228}\) \textit{Id.} at 177-78 n.5.


criticism\textsuperscript{234} and later cases had limited its broad statement that the states are not constitutionally precluded "from drawing a sharp line between the sexes."\textsuperscript{235} However, the court felt it wise to pursue further the constitutional issue raised in \textit{Goesaert}, since it was "satisfied that, in the light of current customs and mores, the municipal restriction against women bartending may no longer fairly be viewed as a necessary and reasonable exercise of the police power; it must therefore be stricken."\textsuperscript{236} Thus, the court simply refused to follow \textit{Goesaert}.

One of the most recent cases invalidating a protective law is \textit{Sail'er Inn, Inc. v. Kirby}, decided on May 27, 1971.\textsuperscript{237} This case involved the same statute\textsuperscript{238} upheld in \textit{Krauss}.\textsuperscript{239} The Supreme Court of California invalidated this law as repugnant to the California Constitution, Title VII and the equal protection clause. Since the California Constitution provides that a "person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation or profession,"\textsuperscript{240} the court held the statute invalid, despite the state's arguments that women cannot keep order in a bar, that women are subject to danger behind a bar, and that women may commit improprieties and immoral acts in a bar.\textsuperscript{241} On the Title VII issue, the court first addressed the question of whether the twenty-first amendment precludes federal interference with the state regulation of liquor. It held that the twenty-first amendment does not cover the retail sale of liquor; and even if it does, Title VII does not conflict with that amendment.\textsuperscript{242} The court did not squarely address the contrary result reached by a federal court in \textit{Krauss},\textsuperscript{243} but merely stated in a footnote that it cannot agree with \textit{Krauss}' reasoning and is not bound by its holding.\textsuperscript{244} The court then proceeded to the merits of the Title VII issue. Relying on the present EEOC Guidelines\textsuperscript{245} and recent cases,\textsuperscript{246} the court held that the statute did not create a...

\textsuperscript{234} Paterson Tavern & Grill Owners Ass'n, Inc. v. Bor. of Hawthorne, 57 N.J. 180, 185, 270 A.2d 628, 630-31 (1970), citing Kanowitz, Sex-Based Discrimination in American Law, I. 1
\textsuperscript{237} \textit{Sail'er Inn, Inc. v. Kirby}, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).
\textsuperscript{240} \textit{Cal. Const. art. XX}, § 18 (West Supp. 1971).
\textsuperscript{241} \textit{Sail'er Inn, Inc. v. Kirby}, 95 Cal. Rptr. 329, 485 P.2d 529, 533-34 (1971).
\textsuperscript{242} \textit{Id.} at 535-36.
\textsuperscript{244} \textit{Sail'er Inn, Inc. v. Kirby}, 95 Cal. Rptr. 329, 485 P.2d 529, 538 n.12 (1971).
\textsuperscript{245} 29 C.F.R. § 1604.1 (1970).
b.f.o.q. "[O]nly an individual inquiry into a particular woman applicant's qualifications, or, at most, a clearly justifiable general classification with respect to a particular job category meets the requirements of section 2000e-2." Since today bars are unlike those of the "Wild West," a general classification based on strength to keep order is not justifiable. Thus, the statute is invalid under the supremacy clause for employers of 25 or more employees.

While Sail'er Inn is a landmark case for each of its three theories, the equal protection theory is especially significant. The California Supreme Court followed a two-level test employed by the United States Supreme Court in reviewing the validity of this statute under the equal protection clause:

In the area of economic regulation, the high court has exercised restraint, invest ing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some reasonable relationship to a conceivable legitimate state purpose. [Citations.]

On the other hand, in cases involving "suspect classification" or touching on "fundamental interests," the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.

The court then stated that this statute warranted the second test, i.e., strict scrutiny, since (1) the statute limited a fundamental right, and (2) classifications based on sex should be treated as suspect.

It is difficult to gainsay the first premise. The court cited the vintage United States Supreme Court decision, *Truax v. Raich,* for the proposition that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure." The court also noted that the state Labor Code declares the right to seek and hold employment a civil right.

The California Supreme Court found no specific support in United States Supreme Court decisions for the second premise that classifications based on sex are suspect. Nevertheless, it did find some support in lower court decisions. The court analyzed other classifications which the United States Supreme Court has declared suspect—race, national origin, alienage, poverty, and stated that the same rationale applies to sex-based classifications.

248 *Id.* at 538.
249 *Id.* at 538.
251 299 U.S. 33 (1915).
252 *Id.* (Arizona statute restricting the employment of aliens is invalid as denying equal protection under the fourteenth amendment.)
254 *Id.*
Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: Developments in the Law—Equal Protection, supra, 82 Harv. L. Rev. 1065, 1173-74.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. (See Karczewski v. Baltimore and Ohio Railroad Company (D.C. 1967) 274 F. Supp. 169, 179.) Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. (See Note: Developments in the Law—Equal Protection, supra, 82 Harv. L. Rev. 1065, 1125-27.) Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as “protective” and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment. [Footnotes omitted.]

The court then had to balance the foregoing against the state’s interest in keeping women from tending bar. It found two asserted state interests served by the statute: (1) that women with no interest in the liquor license will not be sufficiently restrained from committing improprieties; and (2) that women bartenders would be an unwholesome influence on young people and the general public. The court discounted the first interest as “wholly arbitrary and without support in logic or experience.” The court found the second to be “even weaker than the first.” Such a claim is contradicted by statutes that permit women to work as cocktail waitresses and to tend bar if their husbands hold the liquor license.

Finally, the court considered Goesaert v. Cleary. While it acknowledged

that *Goesaert* is still precedent, the court stated that its holding has been subject to academic criticism\(^{263}\) and that later cases have limited its general statement that states are not constitutionally precluded from "drawing a sharp line between the sexes."\(^{264}\) However, rather than speculate as to *Goesaert's* continued validity, the court stated that "the rationale for upholding the statute in that case cannot sustain our statute."\(^{265}\) Since the California statute permits a woman owner to tend bar, the protection of women by a male relative rationale did not apply.\(^{266}\)

No court has yet considered the validity of statutes prohibiting women from working during certain periods related to childbirth. However, three courts have considered administrative policies and regulations.

In *Schattman v. Texas Employment Commission*,\(^{267}\) decided on March 4, 1971, plaintiff clerical worker challenged under Title VII the Texas Employment Commission's policy that pregnant women must leave work two months prior to the projected date of birth. The court noted that defendant had not shown reasonable criteria to prove that all or substantially all women were unable to perform their duties safely and efficiently at that specific time during pregnancy. Thus, this policy could not qualify as a b.f.o.q. and was invalid.\(^{268}\)

On May 12, 1971, in *La Fleur v. Cleveland Board of Education*,\(^{269}\) the United States District Court for the Northern District of Ohio considered a school board regulation prohibiting teachers from working after the fourth month of pregnancy. There, however, plaintiffs alleged the policy violated "their rights, privileges and immunities secured by the Constitution and laws of the Civil Rights Act of 1871,\(^{270}\) rather than Title VII. The court read this as an equal protection attack.\(^{271}\) While the theories of relief are different, the issues of whether a rule is valid under the equal protection clause or whether it establishes a b.f.o.q. are analogous. Thus, the court required evidence that the rule was reasonable. Since defendant presented some convincing evidence\(^{272}\) the court upheld the regulation, citing *Muller v. Oregon*.\(^{273}\) Another equal protection attack was made in *Cohen v. Chesterfield County School Board*,\(^{274}\) decided five days after *La Fleur*. The district court struck down a regulation requiring teach-


\(^{266}\) Id., citing McCrimmon v. Daley, 419 F.2d 365, 369-70 (7th Cir. 1969), which distinguishes *Goesaert* on a similar basis.


\(^{268}\) Id. at 6460.


\(^{272}\) Defendant showed that the regulation was adopted in response to impolite student reaction to pregnant teachers, such as giggling, pointing, snide remarking, taking bets on whether the child might be born in the classroom or in the hall. Defendant also showed that violence had increased in its schools during the last decade. Id.

\(^{273}\) Id. at 1212.

ers to leave after the fifth month of pregnancy despite presentation of evidence of the reasonableness of the regulation. The court felt such evidence did not warrant the regulation and that the decision on when a pregnant woman should cease work is “best left up to the woman and her doctor.” Next, it reviewed the Muller line and Goesaert v. Cleary. The court limited Goesaert to its facts and relied on it for the statement that “[t]he Constitution in enjoining equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law.” In short, the court felt that because pregnancy was “like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause. . .” Cohen is quite significant in that it partially relied on Goesaert to invalidate a state protective law.

3. Litigation Involving Conferring Legislation

Only two cases have considered the validity of laws conferring special benefits on women. Potlatch Forest, Inc. v. Hays, decided on October 12, 1970, involved what the court termed a “discouraging,” rather than a prohibitory, law that required, inter alia, an employer to pay time and one half to women working in excess of eight hours per day. Plaintiff employer contended that this law was invalid under the supremacy clause since it allegedly conflicted with Title VII. Although some question existed as to the justiciability of this case (the plaintiff was complying with the state law), the court found a real enough controversy to decide on the merits. It noted that “conflict[s] between federal and State legislation are not to be presumed, and that both bodies of legislation should be construed, if possible, so as to avoid conflicts between them.” The court distinguished previous cases invalidating protective laws on the ground that such laws were “prohibitory.” Since the Arkansas statute does not prevent the employer from paying daily overtime to males, it does not conflict with, nor

275 The court found the argument that women were frequently incapacitated after the fifth month to be without medical reason, and the arguments that the pregnant woman and the fetus may be injured by being pushed and that pregnant females cannot perform all their duties “nugatory, and based on no empirical data whatsoever.” Id. at 1160.

276 Id.

277 Id. at 1161.


281 Id. at 1373.

282 Ark. Stat. Ann. § 81-601 (1960). This law also provides for time and one half pay for women working more than forty hours per week. This aspect was not in issue since the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1965), provides the same. Were the employer covered by the Walsh-Healy Act, there would have been no issue on daily overtime either, since it provides the same for both sexes. 41 U.S.C. § 35(c) (1964).


284 Id. at 1374.


impede or frustrate the purpose of, the Civil Rights Act of 1964 and is valid.287

The reader should note that Potlatch, in upholding the validity of this law, did not imply any disagreement with the cases invalidating other types of protective laws. The court stated:

It is clear that a State statute which forbids the hiring of a woman for a particular job or under certain conditions cannot stand in the face of a federal statute that says that she must be hired for that job or in those conditions if she is otherwise qualified and wants to do the work.288

The second case involved Ohio's statute requiring a suitable rest seat and separate lunchroom for women.289 Plaintiffs did not challenge its validity in Ridinger v. General Motors Corp.290 However, defendant General Motors requested a declaratory judgment that the statute was valid. Since there was no showing that this law resulted in a denial of employment opportunities for females, the court found that it did not conflict with Title VII.291

V. An Analysis of Arguments Against Such Laws

The above cases develop the following arguments which may be made against restrictive and prohibitive laws:

a. They are invalid under the supremacy clause.

b. They are unconstitutional under the fourteenth amendment as denying due process.

c. They are unconstitutional under the fourteenth amendment as denying equal protection of the laws.

d. In some states that they may have been impliedly repealed by subsequent state Fair Employment Practice legislation.

A. Supremacy Clause

Clearly, the most effective theory for invalidating protective laws is conflict with Title VII of the Civil Rights Act. While the legislative history on sex discrimination is meager, what history exists may support this theory.292 Also, the EEOC Guidelines, albeit not always so, now clearly state that such laws are invalid.293 Although the Guidelines do not have the force of legislation or judicial decision, the United States Supreme Court has held that they are "entitled to

287 Id.
288 Id.
291 Id. at 1098.
292 See text accompanying notes 72-77, supra.
293 See text accompanying note 93, supra.
great deference” by the courts. The opinions of several state attorneys general contribute to this trend, as does the recent action by many state legislatures. Since it is now well established that state protective laws do not constitute a b.f.o.q., the supremacy clause theory has a great advantage because a court may invalidate a protective law without much discussion or difficulty in distinguishing the Muller line of cases. Also, since an attack based on the supremacy clause is not such a constitutional attack requiring a three-judge court, that procedural hurdle is avoided. In short, the only deficiency in this theory is that Title VII does not affect the validity of a state statute as applied to employers not covered by Title VII. This fact has not gone unnoticed.

B. Due Process

While good authority exists holding that federal courts no longer appraise the reasonableness of a state’s exercise of its police power under the due process clause, some authority to the contrary exists. Even assuming such an attack would be dismissed by a federal court, one could assert such an argument in a state court. There, however, one runs the risk that the state court may be more sympathetic to the acts of its legislature than a federal court might be. Nevertheless, such attacks have been successful.

C. Equal Protection

Federal courts should have no reservations about examining a state law under an equal protection attack, except perhaps by applying the abstention doctrine. However, with a view toward the Ninth Circuit’s recognition that

295 See text accompanying notes 105, 108-09, supra.
296 See text accompanying notes 96-103, supra.
299 See note 198, supra.
301 See text accompanying note 110, supra.
Title VII has created a federal policy in this area,\textsuperscript{306} abstention should no longer present a barrier to an equal protection argument. Two state courts\textsuperscript{307} and one federal court\textsuperscript{308} have accepted an equal protection argument. Other courts have not passed on this issue, either because it was not raised or because the court invalidated the statute under the supremacy clause.\textsuperscript{309} This is unfortunate because it has not contributed to the modern decisional law on this theory. A party asserting an equal protection attack needs all the precedent he can marshal to attack head on \textit{Muller} and \textit{Goesaert}. While this legal theory is the most difficult to advance successfully, it may be the sole ground available if the case is not covered by Title VII. Several good precedents support this theory. One can tenably argue that \textit{Muller} is irrelevant to this attack, since \textit{Muller} involved a due process rationale.\textsuperscript{310} One can also argue that the federal policy created by Title VII has discredited the rationale of both \textit{Muller} and \textit{Goesaert}.

In cases not involving barmaid statutes, another approach would be to distinguish \textit{Goesaert} on the facts and then cite it as authority that irrational distinctions are prohibited by the equal protection clause, as was done in \textit{Cohen v. Chesterfield County School Board}.\textsuperscript{311} If the case involves a statute slightly different from that in \textit{Goesaert}, one can cite good authority to hold its rationale inapplicable.\textsuperscript{312} Even if the case involves a statute \textit{exactly} the same as the statute upheld in \textit{Goesaert}, some authority can be cited to support invalidation.\textsuperscript{313} However, this would clearly be the most difficult case, especially in a federal court. On the other hand, the most recent United States Supreme Court decision involving the equal protection clause may indicate that \textit{Goesaert} is no longer controlling. In \textit{Reed v. Reed}, decided on November 22, 1971,\textsuperscript{314} the Court unanimously declared invalid under the equal protection clause an Idaho statute declaring that males be given preference over females in appointing an estate administrator in certain situations. The Supreme Court noted that the equal protection clause “does not deny to States the power to treat different classes of persons in different ways.”\textsuperscript{315} (The Court cited four cases to support this principle,\textsuperscript{316} none of which involved sex classifications. \textit{Goesaert} seems conspicuous by its absence.) The equal protection clause does, however, mandate that a classification “be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the

\begin{footnotesize}
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  \item 306 Mengelkoch v. Indus. Welfare Comm’n, 3 CCH EPD ¶ 8097 (9th Cir. Jan. 11, 1971).
  \item 310 See text accompanying note 36, supra.
  \item 311 326 F. Supp. 1159, 1161 (E.D. Va. 1971).
  \item 312 Sail’er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); Mengelkoch v. Indus. Welfare Comm’n, 3 CCH EPD ¶ 8097 (9th Cir. Jan. 11, 1971).
  \item 314 40 U.S.L.W. 4013 (U.S. Nov. 22, 1971).
  \item 315 Id. at 4014.
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legislation, so that all persons similarly circumstanced shall be treated alike. The Supreme Court of Idaho had upheld the law on the theory that its objective was to eliminate the necessity for a hearing where two or more persons are equally entitled to act as an administrator. The United States Supreme Court stated that the objective of reducing a probate court’s workload by eliminating such hearings is “not without some legitimacy.” However, the Court then held that accomplishing such an objective by giving a mandatory preference to one sex “is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”

The extent to which Reed will be read by lower courts to circumvent Goesaert remains to be seen. On the one hand, one might argue that the Court would have expressly overruled or limited Goesaert if that was its intent. Its holding in this case does not necessarily apply to a protective labor law. On the other, one might argue that Goesaert was an important precedent argued before the Court and that this decision impliedly overruled Goesaert.

D. State Fair Employment Acts

Today, most states have some type of fair employment legislation which includes a prohibition against sex discrimination. While many of these laws specify that they are not intended to disturb protective laws, one can argue that such laws have impliedly repealed the protective laws. Three state courts have so ruled. One state attorney general, one state civil rights commission, and the EEOC have also employed this theory.

VI. Conferring Laws

Laws which do not restrict a woman’s employment opportunity, but which grant her additional benefits have not been challenged by women. No doubt,
women feel such a challenge is unnecessary. Only two cases have dealt with the validity of this type law, and in each the issue was raised by the employer. Both cases upheld the validity of such legislation. Indeed, in one the employer did not contest the validity of an Ohio law providing special facilities for women, but merely wished a declaration that it was valid. The court found the law valid on the theory that it did not discriminate against women; it did not address whether such a law discriminates against males. This issue was addressed in the other case, which involved a statute providing for premium overtime pay for women. The court felt the law was valid since the employer could give the same benefit to males. Thus, these two precedents suggest no arguments against such laws, but rather indicate they are generally valid.

It is possible, however, that some of these laws may yet be attacked by women; e.g., if an employer forces a woman to take a rest period and refuses to pay her for that time, she might attack such a law on the same theories applicable to restrictive and prohibitive laws. Also, a male might attack any law providing special benefits for women on the theory that it discriminates against males.

VII. Are Restrictive Laws Invalid on Their Face?

The foregoing legislative, judicial and administrative developments indicate a trend toward invalidation or repeal of prohibitive and restrictive legislation. The author feels a clean sweep is likely in regard to prohibitive legislation. However, before reaching a conclusion in regard to restrictive laws, this section will consider whether such legislation is valid in every situation.

Clearly, those states that have repealed their hour and weight restrictions feel such laws are no longer relevant to today's working woman. Likewise, every decision invalidating such laws has held them unconstitutional on their face, rather than as applied. The author agrees with such results where women do not desire the protection of such laws, but questions what a court might do if female workers seek the protection of these laws. In such cases the state's labor department might advance the following arguments:

332 See text accompanying notes 96-97, supra.
333 See cases discussed in Section IV. B, supra.
334 Consider the following hypothetical cases involving female employees of the Frantin Belt and Strap Factory, Inc.: 

Case 1. Mary Smith is a widow with three young children. She leaves her children with a local day care center while she works the 9:00 A.M. to 5:00 P.M. shift. She has no one to care for the children after 6:00 P.M. when the day care center closes. Mary is told by her supervisor that she must work three hours overtime per day for the next two weeks. She declines, citing the state's labor code which prohibits her working over eight hours per day. Her supervisor, however, sympathizes with "Women's Lib" and tells her that the state law is no longer valid since it denies her an employment opportunity. Mary states that she is not "into Women's Lib" and that she knows her place in society. She again declines and is fired.

Case 2. Sally Jones is a petite, and not overly strong, worker. She is transferred into a position requiring the occasional lifting of 35-pound objects. Sally requests a transfer back to her old job, citing the state's labor law on weights for females. She is then told that her old position no longer exists, and that if she desires to remain with the company, she must do her
1. The application of the state law in this case is clearly to protect women. Congress could not have intended to invalidate the law in this case. Title VII should not be construed to permit employers to take advantage of women.

2. Despite what the EEOC Guidelines say, the protective law is not archaic and is still relevant in this case.

3. Conflicts between state and federal law are not to be presumed and both laws should be construed, if possible, to avoid conflicts. No overriding federal policy will be restrained if the state law is upheld in this situation. The woman is not being denied an employment opportunity.

Unless chivalry is completely dead, such arguments would not be lightly dismissed. On the other hand, the employer could assert:

1. All the recent cases invalidating state protective legislation have found them invalid on their face, rather than as applied. This generally accords with the EEOC's position. If a law has previously been held invalid on its face, it should not be resurrected by a party hoping to claim its protection.

2. Following the state law discriminates against males, since males do not have the option to claim its coverage. This could adversely affect a male employee’s “status” and “privileges of employment,” if, for example, a male of greater seniority were placed on second shift or required to work more overtime than he desired, or assigned to a job requiring lifting of heavy objects. Clearly, Title VII protects males also.

Finally, the strain becomes too much for Sally and she refuses to lift any more heavy objects. Sally is fired.

Case 3. Peggy Brown is twenty years old and works the same shift as Mary Smith. Peggy is asked to transfer to second shift to accommodate the needs of the business. The second shift ends at 1:00 A.M. Peggy declines the transfer, citing the labor law prohibiting the employment of females under twenty-one (or females of any age) after midnight. The employer tells her she has the option of working second shift or of leaving. Peggy refuses and is fired.


336 See text accompanying note 93, supra.

337 Many states have recently amended their protective laws. See text accompanying note 111, supra.


339 To avoid the exposure of becoming a party to a landmark case reversing the present trend where the facts warrant it, an employer might wish to consider alternatives for the above employees. For example, in case 1 (footnote 326), he could ask male employees, or women who so desired, to work a little extra overtime. In case 2, he could rearrange the duties of the job as far as practicable. In case 3, he could schedule his shifts so that the second shift ends at midnight or merely assign only males to that shift. Of course, such alternatives may not always be practicable for many reasons. For example, an employer might not wish to incur the exposure of a complaint by a male on a reverse discrimination theory. Thus, the employer must consider meeting the likely arguments of the state labor department.

340 See Section IV. B., supra.

341 See text accompanying note 93, supra.


344 See Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971); Roberts v.
3. Following the state law might tend to make employers generally reluctant to hire women. Even though this would clearly be unlawful, every violation of Title VII will not become redressed. Thus, by abolishing special treatment for women, the policy of equal employment opportunity for women will be furthered.

Under the present state of the law, the employer's arguments would probably prevail.

CONCLUSION

A. Summary of the Present State of the Law

Prohibitive laws in conflict with Title VII are generally no longer valid. While there remains some doubt when a case is not covered by Title VII, there are certainly good arguments against such laws on grounds other than Title VII. The same is true of restrictive laws. Even if a woman desires the protection of a restrictive law, such legislation is generally invalid, especially in those jurisdictions where such legislation has previously been declared invalid on its face. In other jurisdictions the question is more difficult. However, since the better legal theory indicates such laws are invalid even in this situation, it is likely that these jurisdictions will follow this theory. While no conferring legislation has yet been declared invalid, many or all of such laws may yet be so declared.

B. Some Observations

The author sees no justification for any law that forbids women from engaging in any occupation they choose or working at their jobs late in pregnancy or after having recently given birth to a child. A woman's right should be equal to a male's.

Nor does present justification exist for restricting a woman's employment opportunities where she does not desire such restrictions. While there is a harder policy question where a woman actually desires the protection of a restrictive law, that law should nevertheless be declared invalid. If equal employment opportunity for women is to become a reality, they will have to work under the same conditions as men, and cannot claim unique employment prerogatives. While some hardship may result, the common good of all women necessitates this conclusion. The hardest of such cases involves forcing a woman to lift heavy objects. The author does not feel that women should be forced to lift weights beyond their capability. Neither, however, should males. Here the Federal

Occupational Safety and Health Act of 1970\textsuperscript{345} and many state laws on the same subject\textsuperscript{346} might and should be interpreted to prevent this abuse.

Many conferring laws may remain in force since no precedents invalidate them, they do not create major problems, and they may be unlikely to be challenged by women. Nevertheless, the author sees little usefulness in them. To the extent that they support the theory that women are "the weaker sex," they should be repealed or invalidated. If a legislature is concerned about seats and rest periods, it can pass legislation covering both sexes.

The foregoing survey and discussion show that in many cases and in many states an employer may properly disregard state protective laws on several different theories. Hopefully, this article will assist an employer in making his decisions in his particular case. However, since the present state of the law in each state is unique and since new developments occur quite frequently, the employer should thoroughly research the law in his state before making his decision. While there appears to be a trend toward total abolition of these laws, it may be a mistake to rely on this generality in every situation at this time.

\textsuperscript{345} 29 U.S.C. § 651-678 (Supp. May, 1971). Section 654 provides:

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

(2) shall comply with occupational safety and health standards promulgated under this chapter.

While no standard on weight lifting has issued as yet, subsection (1) is broad enough to cover it.\textsuperscript{346} E.g., HAWAII REV. LAWS §§ 96-5 to 96-8 (1968); ILL. ANN. STAT. ch. 48, §§ 137.2, .7, .17, .18 (Smith-Hurd 1969); MICH. COMP. LAWS §§ 408.352-53 (Supp. 1971).