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ITHACA AND LONDON



REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME

Marc Linder and Ingrid Nygaard



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Sexual Equality or "The Equality of Having No Protective Laws Whatsoever"?

5

There can be no reason why, since a woman is prohibited from working too long hours, similar protection should not be given to a man. In many cases men are as feeble constitutionally as women, although they may be physically stronger in the direction of mere thew and muscle. . . . The man . . . may be worked not only outrageously long hours . . . but kept on at overtime, without pay, till either his strength or his patience is exhausted. . . . If the argument is good that a minimum overtime wage is just for a worker, then it applies to a man as well as a woman; principles of this kind are not affected by sex-difference.

New Zealand Department of Labour, Report (1897)

A ten-minute break during four hours of work, easily available rest room facilities . . . aren't these basic *human* rights? Yet it seems that many middle-class and professional women are seeking to deny these rights to workers—women as well as men.

Joan Jordan, "The Equal Rights Controversy: Present," Up from Under (1970)

The most important turning point in the history of statutory rest periods in the United States has without doubt been the prohibition of sex-based employment discrimination embodied in the Civil Rights Act of 1964. Title VII soon prompted the judicial and legislative repeal of virtually the entire body of gender-based labor-protective legislation. This clean slate created by the new federal law gave the forces that supported unimpeded labor-market competition the opportunity to mobilize public opinion against governmental imposition of substantive labor standards. The almost century-old edifice of gender-biased state statutes was demolished as a relic of an unenlightened era's paternalistic belief in women's frailty and vulnerability. Legislative agendas that from the 1970s on were

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increasingly beholden to business interests proved highly resistant to sporadic calls for more stringent but gender-neutral wage and hours laws. The beleaguered and unorganized labor force had come to fear the involuntary leisure of unemployment far more than the lack of mandatory rest periods.

A Never-Ending Debate on the Meaning of and the Road to Equality

Both groups were trapped by the apparent verity that only women could care adequately for children. The Women's Bureau coalition tried to resolve the conflict between independence for women and motherhood; the NWP did not address it.

Cynthia Harrison, On Account of Sex (1988)

For the first time . . . many trade union leaders began to bargain collectively for such female demands as rest periods, clean washrooms, day care centers, and maternity leaves.

Philip Foner, Women and the American Labor Movement (1979) (referring to the World War II period)

The peculiar political circumstances under which the prohibition on sexually discriminatory employment practices was included in the Civil Rights Act of 1964 meant that "equal employment opportunity for women . . . became a national policy with . . . no 'people's movement' to arouse public awareness, no powerful pressure group to push for such policy, no national debate on the issue's merits, as had been the case with the racial question." Nevertheless, the debate over the tension between special protective legislation for women workers and the achievement of legal equality by women antedated the enactment of Title VII by several decades. As far back as the 1920s, the dispute between the coalition of groups around the Women's Bureau of the U.S. Department of Labor and the Women's Trade Union League (WTUL) on the one hand and the feminist National Woman's Party (NWP) on the other anticipated many of the arguments of the 1960s and 1970s. Although the groups until the early 1920s shared prominent members, the antagonism over sex-based labor standards proved unbridgeable.1

The NWP's libertarian commitment to formal legal equality or procedural freedom over substantive equality was so intense that at congressional hearings on the Equal Rights Amendment (ERA) in 1925 its representative seemed almost indifferent as to whether the states applied the poll tax to women or abolished it for men: "The amendment would provide only for equality. It would be the same for both." As a later historian has pointed



out, in representing "elite, white, affluent, professional, and highly educated women," the NWP, the militant wing of the suffrage movement, had been able to argue plausibly that "women's suffrage would double the vote of the white middle and upper class." To those who "feared being overwhelmed by the swarms of strange and swarthy new immigrants in America, as well as by the enfranchised black masses," such an argument was both plausible and appealing.²

A reasonable basis for the NWP's skepticism toward gendered protective laws is not hard to find. For example, during a high point of debate on the subject—the second Women's Industrial Conference, organized by the Women's Bureau in 1926—those in attendance heard a message from the secretary of labor emphasizing the need to "safeguard women, especially in respect to their racial function" as "mothers of the race" in order "to prevent racial deterioration." Having formulated "the question" as "What is the race to be like, as descended from this new sort of mother who toils and engages in the hard competition for gain?" Secretary James Davis urged the audience to understand that "we must see that she is assured such conditions of work as will permit her to carry on satisfactorily her home-making activities." Such pleas for accommodating the perpetuation of women's dual or even triple burden as wage workers, mothers, and housewives may have prompted a female member of Congress at the conference to warn that "the great danger to be avoided is the perversion of this protective legislation for women; these laws must not . . . be used to discriminate against women."3

Gail Laughlin, an NWP representative at the conference, poignantly expressed her organization's opposition to "so-called protective legislation for women" on the grounds that

it handicaps them in competition with men, because both directly and indirectly it hinders their entrance into profitable and suitable employments, because it tends to perpetuate the idea of woman's inferiority, classing her with children as a weakling who must be cared for by others instead of being able to defend her own interests, and because in placing her on a different footing before the law from men, it opens the door to other legal discriminations against her. Laws restricting the hours of women but not of men not only keep women out of certain occupations in which occasional overtime may be necessary, but hinder their working up from the ranks into administrative positions. The better positions in industry go to people who can do the work, not to those who can work till a certain hour and then must stop.⁴



In contrast, the WTUL, formed in 1903 as "a mixed-class organization . . . of women trade unionists, settlement-house residents, and social reformers," was "a unique coalition of women workers and wealthy women." Within a decade, it shifted from organizing women into unions to advocating for labor legislation, a reflection of the increasing predominance of reformers over unionists.5 In sharply worded ad feminam attacks, the WTUL dismissed opponents as "professional women and women of wealth speaking out of the vastness of their inexperience and individualistic irresponsibility"; it accused these "bourgeoise women" of representing laissez-faire against "the socialized, collective view of life and the welfare of the great masses of working people," for whom they lacked compassion. The flavor of these counterblasts can be sampled in the withering reply by Rose Schneiderman, a worker and president of the New York WTUL, to the demand by Marguerite Mooers Marshall, a newspaper reporter, that women cease "'shrink[ing]' from meeting men on the level ground of equality":6 "I dare say if Miss Marshall had to sort dirty linen for nine hours a day, instead of sitting in a nice, airy office, feeding the minds of working women with a lot of sob stuff . . . or if Miss Marshall had to dip chocolates in a temperature of 63 degrees, using her fingers a certain way, she would realize . . . what a blessing an eight-hour law would be and her strong feminist principles would come into harmony with facts."

Latter-day feminists agree that if the WTUL's leaders took an affirmative action-like view of gendered protective regimes as a way of creating equal opportunity, preoccupied with short-run phenomena and overlooking the long-term perpetuation of inaccurate stereotypes of women as weak and of sex-segregated job structures, "it was because visions of sweatshops and industrial accidents blocked their view." The WTUL's advocacy of protective laws, as Robin Miller Jacoby has noted, "from the standpoint of social reality . . . reflected a more astute assessment of the ways economic equality could be eventually achieved for larger numbers of women." Feminist historians also acknowledge that "The anti-ERA forces were probably correct in asserting that the amendment's supporters often cared little for the well-being of women in industrial jobs." 9

The Women's Bureau grounded its support of gendered labor laws in a "feminism of difference," which valued women's housework and their roles as mothers and caregivers. Whatever their success—and even skeptics conceded that they had "reduced the hours of thousands of women, and also of thousands of men, because of the frequent interdependence of the occupations of men and women"—special laws for women were supposed to diminish the double physiological burden borne by wage-



earning mothers. The Women's Bureau opposed amending the U.S. Constitution to create formalistic, legalistic gender equality because it feared that working-class women would lose their only defense against overwhelming exploitation. In 1923 the Supreme Court in Adkins v. Children's Hospital held that the statute fixing minimum wages for women and children in the District of Columbia unconstitutionally interfered with the freedom of contract of employers and employees that it deemed embedded within the due process clause of the Fifth Amendment. In the wake of this decision, the affected women's wages declined and the national minimum wage campaign collapsed. When the NWP celebrated this invalidation of the minimum wage law, relations between the two wings of the women's rights movement deteriorated further. The decision demonstrated that "individualism and equality . . . could be turned against women by conservative judges. . . . The NWP got what those with power wanted it to have." 10

In defense of the general interventionist principle that "the final deciding factor is not 'freedom' but health," prominent women in the labor movement vigorously opposed the more theoretical arguments of the middle- and upper-class NWP. ¹¹ In a debate with a leading feminist in the 1920s, Mary Anderson, director of the Women's Bureau from 1920 to 1944, cautioned the business and professional woman to "leave it to the industrial worker to say what she needs for herself. . . . The industrial workers' problems are the collective problems of a great mass of women doing similar or identical work. . . . Their jobs are usually dull, monotonous toil, not stimulating to mind or body, and lacking almost entirely the creative interest that goes with the job of the business or professional woman. The only compensation for a life of this kind is a workday sufficiently short to permit relaxation and self-development." ¹²

The business or professional woman, whose "individualized job" and "individualistic viewpoint" frequently prompted her to oppose labor laws for women, Anderson argued, at times tried "to impose her own individualism upon the women in industry, upon whom it inflicts a serious hardship." The reason for this conflict of interest between the two groups was rooted, according to Pauline Newman, an organizer with the Philadelphia WTUL, in the reality of limited upward mobility: "we can[not] have a world of foreladies. . . . We cannot all be managers and superintendents. Somebody has got to do the work. And it is that 'somebody' who needs protection from all sorts of exploitation." But even though the majority of women workers would never leave the working class, opponents of protective statutes warned those pleading for them that they would find that they had "fastened a yoke upon women which will . . . interfere with



their advance into better-paid executive positions." In contrast to social feminists, who in the 1920s pressed for protective legislation to alleviate "exploitation of store clerks[,] . . . business women viewed these same women as business women, potential executives, and managers. Hence a law to limit the hours of clerks would be seen as . . . a hindrance by the business women." ¹³

While recognizing that single-sex protective laws "ameliorate the worst abuses against women," feminist critics have also forcefully contended that insofar as such a regime "divided workers into those who could and could not perform certain roles," it must share "responsibility for successfully institutionalizing women's secondary labor force position." This historical ambiguity helps explain women's ambivalence in the 1960s and 1970s toward the vestiges of such laws. According to an even more far-reaching argument, labor unions supported protective legislation for women because it "would limit women's access to jobs by discouraging employers from hiring them." 14 There is some support for the quasiconspiratorial view of these laws as "keeping some women from competing with men at the male standard of exploitation": some laws did cause some women (for example, in the aftermath of World War I) to lose their jobs by prohibiting women outright from working, especially at night, in certain occupations, such as printer, streetcar operator, and subway worker. Nevertheless, those espousing this view must at the very least address the venerable claim that the paucity of laws regulating men's labor was due to the judiciary's penchant for invalidating them as contravening freedom of contract. For the thesis that special legislation for female workers and the court decisions upholding it were "demeaning, paternalistic" overlooks the fact that nineteenth-century market-knows-best judges adopted the same attitude toward "grandmotherly legislation . . . as standing proof that men . . . need the protection of the State in some of the simplest transactions of life." With alacrity the judiciary struck down such "legislative tutelage" of the male worker where it was deemed "degrading to his manhood." 15

The NWP, though ambivalent, tended over time to welcome abolition of such labor statutes both because it believed that they restricted women's employment opportunities and because the party's wealthy and professional members identified with Hooverite opposition to government intervention in the labor market. By accepting the substantively threadbare arguments of freedom of contract in attacking labor protective legislation, the NWP both "admitted the competitive, exploitative nature of work under capitalist industry" and aligned itself with employers. The NWP's



position was all the more extraordinary because it admitted "there [wa]s no doubt" that women's protective laws served "to shorten and increase wages for women in the lower registers" and "to help men by the establishment of higher standards for women in industry." Nevertheless, as social investigator Mary Van Kleeck noted, "feminists . . . in occupations not affected by the law . . . are ready to give the employer the convenience of overworking women, in the confident hope that they are thereby setting them free to compete successfully with men." ¹⁷

When militant suffragist Harriot Stanton Blatch bitingly remarked in 1923 that because not all males were "tireless, self-reliant, unionized supermen," they, too, needed "the protective aegis of the state," the Women's Bureau alliance responded that to the extent that the NWP urged extension of protective laws to men, its position was not only opportunistic but calculated to bring about repeal, since it was generally believed that courts would not uphold such interference with men's freedom to contract. That the WTUL found it "impossible to take as serious, or sincere" the NWP's position is not difficult to understand, given the statement of the party's leader, Alice Paul, to the *New York Times*: "If the laws had not been made women would have been forced to organize and make the same kind of agreements that men make." 18

For example, in her debate with Mary Anderson, Rheta Childe Dorr criticized the government's use of the police power to take away from women workers "the right 'freely to contract' . . . to earn the highest possible wage." The elite stratum that Dorr had in mind embraced "the more intelligent women, especially those who are 'unprotected' and can there fore earn higher wages in superior jobs, [who] never dream of carrying this double burden [of wage labor and housework]. They either hire their heavy work done, or they invest in labor-saving devices—vacuum cleaners, electric washing machines, and the like." What kept the rest of the female proletariat poorly paid was in part gender-biased bans on overtime and night work, about which there was "nothing horrible. . . . One sleeps as well by day as by night." This approach, wrote the Progressive historian, Mary Beard, "ran the risk of positively strengthening anachronistic competitive processes; of supporting . . . ruthless laissez-faire." 19

Anderson, in contrast, argued that feminists' devotion to freedom of contract was misguided because it was "meaningless" to wage workers, whose freedom was curtailed by a hand-to-mouth existence. Moreover, anticollectivist feminists overlooked the crucial fact that male workers "think so little of their legal freedom of contract . . . that they voluntarily surrender it by joining trade unions. That is the essential principle of a



trade union—the collective bargain as a substitute for individual freedom of contract." To be sure, Crystal Eastman, a feminist and a socialist, declared bluntly that "the modern woman can have but one attitude" toward bans on night work, which interfered with her working life: "I am not a child. I will have none of your protection." But despite rejecting paternalistic intervention as based on claims of women's physical inferiority, Eastman conceded that because "woman's labor is the least adapted to organization and therefore the most easily exploited," there was some justification for wage and hour laws for women.²⁰

This intrafeminist debate is especially illuminating because Dorr herself had once been a militant advocate of women's protective legislation as part of the struggle by "women of all classes . . . to humanize the factory . . . to make over the factory from the inside." Sharply criticizing judges as "men to whom manual labor is known only in theory," she had written in 1910 that judges who held women's protective laws unconstitutional believed "that the State fulfilled its whole duty to its women citizens when it guaranteed them the right freely to contract—even though they consented, or their poverty consented, to contracts which involved irreparable harm to themselves, the community, and future generations." But Dorr's experience as a reporter observing the Bolshevik Revolution in 1917 apparently prompted her to join other middle-class feminists in embracing laissez-faire and campaigning for Harding and Coolidge in 1920.²¹

Critical feminism would later acknowledge that the Women's Bureau coalition both "kept alive a critique of the class division of wealth" and correctly argued "that protective laws meant the greatest good to the greatest number of women workers (at least in the short run)." The labor coalition's chief weakness, on this view, was its failure to adopt "the NWP's emphasis on the historical and social construction of gender roles"—though that emphasis was linked to the party's "blinking at existing exploitation." Within the NWP, the optimistic conviction that equal opportunity would suffice to enable women to protect themselves organizationally was paired with the speculation that the courts would uphold gender-neutral protective laws. Precisely such lack of realism prompted a group of female trade unionists in 1926 to respond that "to take the position that there should be no labor laws for women which do not apply also to men is to say, in effect, that women's conditions of employment shall not be improved by law until Legislatures are ready to enact similar laws for men—a time which, when current economic facts are faced, is clearly far in the future." 22

In the same vein, Alice Hamilton, a founder of occupational medicine in the United States, observed in the 1920s that the absence of women's



laws in many states made it unnecessary to speculate whether repeal, "far from benefiting the woman wage earner . . . simply hands her over to the exploiting employer." Two decades later she underscored the implausibility of the beneficence of unfettered labor market competition even more graphically: "I can assure you that when Ohio passed laws for the protection of women workers, Ohio women did not envy the freedom of the women of Kentucky to work as long hours and for as low a wage as they pleased." Not surprisingly, then, even feminist historians who are critical of single-sex labor laws concede that "few female trade unionists . . . opposed the strong consensus for protection. And their voices were lost in the din of approval that arose from women reformers both before and after suffrage was achieved in 1920." 23

The "peculiar alliances" that the controversy over protective legislation continued to generate were once again evident in the 1940s, when "probusiness Republicans and antilabor Southern Democrats" became chief advocates of the ERA. The issue was particularly attractive to racist congressmen who believed that white women took precedence over blacks of either sex with regard to gaining legal equality—a view shared by the NWP, which "responded in anger to the notion that blacks would have rights denied to women." ²⁴

Title VII: Gender Equality or a Race to the Bottom?

There is no compulsion in the equal rights amendment for a legislature to go in one direction or the other, so long as it ended up with formal equality. That formal equality might be: no minimum wage law, no seating law, no maximum hour law. And certainly if there were powerful employer opposition to extending the law across-the-board, that would be the likely consequence.

So that women would have achieved equality, but what price equality? No one, in other words, would have the benefit of a seating law or a maximum hour law.

Testimony of Prof. Paul Freund, in Equal Rights 1970 (1970)

The complex political and intergovernmental controversy over congressional passage of the ERA also led to President Kennedy's creation in 1961 of the President's Commission on the Status of Women, "the beginning of governmental recognition of women's status as a legitimate matter for policy consideration," as an alternative to constitutional action. Formally designed as a vehicle to end the institutionalization of "prejudices and outmoded customs [that] act as barriers to the full realization of women's basic rights" and "to promote the economy, security, and national defense through the most efficient and effective utilization of the skills of



all persons," the commission was charged with making recommendations regarding "Federal and State laws dealing with such matters as hours, night work, and wages, to determine whether . . . they should be adapted to changing technological, economic, and social conditions." ²⁵

ERA supporters had traditionally urged universalization or elimination of women's labor laws because employers had used them to justify their practicing sex discrimination. Just as predictably, the Women's Bureau coalition, "fearing that the amendment would result not in extension but in obliteration of the labor laws, fought the amendment vigorously." In particular, the Committee on Protective Labor Legislation of the President's Commission on the Status of Women, skeptical that the ERA would bring about universalization of women's labor laws, was convinced that they should not be repealed until their protections were extended to men.²⁶

Although the Committee on Protective Labor Legislation did not take a position specifically on rest or meal periods, it did urge gradual extension of maximum hours limitations to men, if for no other reason than to avoid adversely affecting employment opportunities for women. Until the goal of avoiding "excessive hours for all workers" could be attained through comprehensive federal legislation, however, the committee recommended that state maximum hours laws for women "be maintained, strengthened, and expanded." The commission as a whole adopted this recommendation verbatim, adding that "the welfare of all workers requires that where special hour protection for women represents the best so far attained," such regimes be preserved. Perhaps as a means of propitiating feminists who had long complained that protective laws impeded women's upward mobility, the President's Commission also recommended exemption of women in executive, administrative, and professional positions from state maximum hours laws, which such employees "frequently find . . . adversely affect their opportunities for employment and advancement." 27

Extreme views of the legislative intent behind the inclusion of sex discrimination in Title VII—seen as ranging from the desire to destroy the bill altogether to intentless serendipity—may seem inappropriate tools of historical analysis, but there is little doubt that, once again, peculiar alliances and arguments were arrayed for and against the legislation, which must also be seen in the context of the almost continuous post—World War II rise in women's labor force participation rates, from 31.8 percent in 1947 to 39.3 percent in 1965. The reaction of the NWP, whose "overwhelmingly and perhaps exclusively white membership evinced little concern for racial or economic equality," to the original, sexless version of the



omnibus civil rights bill in 1963 was "implicitly racist, anti-Semitic, and xenophobic" in bemoaning the lack of protection for native white Christian women. That Howard Smith, "one of the most intransigent defenders of states' rights and segregation," offered the amendment at the urging of an NWP that expected him to use it to ridicule the bill, and in doing so had to emphasize that he was "very serious about" it, is just one of the oddities of its legislative history. Smith and other southern Democrats, together with many NWP members, opposed the bill as an example of federal government interference with private enterprise and would have been satisfied if the insertion of sexual equality had destroyed the entire bill. Indeed, the NWP members who initially contacted Smith were "opposed to the civil rights movement." ²⁸ An alternative political-economic logic has also been conjectured to explain southern support for the amendment in case the bill passed:

Much of Southern industry, notably textile manufacture, depended on cheap female labor, and strong protective legislation for women threatened the economic setup. Because Southern employers believed, along with the Women's Bureau, that the ERA would outlaw protective laws, they looked favorably on it, and their representatives in Congress were not averse to blending the arguments of feminism and chivalry in support of an antilabor position. Thus, pedestal-ensconced white women were said to need protection from Negroes, but not from sweatshop conditions.²⁹

Peculiar, too, was the fact that the leading congressional proponent of legal equality between the sexes-Representative Martha Griffiths, a liberal Democrat from Detroit—not only expressly based her support on the perceived need to aid white women but was joined in this effort by southern racists, who declared their solidarity with the "Anglo-Saxon or Christian heritage" of those excluded from "this monstrosity" of a bill. In taking up the cudgels for white women who "work in the greasy spoon, drive the schoolbus, and do other underpaid jobs," the generally pro-labor Griffiths showed little concern for the fate of women's labor laws because "most of the so-called protective legislation has really been to protect men's rights in better paying jobs." Griffiths's judgment was, nevertheless, temperate in comparison with that of the NWP, which insisted that "Working women ... are well aware of the fact that these restrictive laws have been perpetuated solely to exclude them from better jobs and to keep them locked in low-paid, sex-segregated positions." Whatever the historical accuracy of this absolutist claim as to maximum hours and minimum wage laws,



its applicability to rest periods should have been regarded as questionable at best.³⁰

That the Women's Bureau coalition opposed banning sex discrimination lest it lead to the demise of labor-protective laws was, by this time, hardly surprising. That nine of the ten male members of the House of Representatives from the South who had spoken in favor of the sex amendment voted against the bill, however, must give at least as much pause as the very enactment of the amendment without the support of a strong national women's movement. Not surprisingly, a Justice Department attorney observed at the time that the amendment could "best be described as an orphan, since neither the proponents nor the opponents of Title VII seem to have felt any responsibility for its presence in the bill. It is somewhat misleading, therefore, to speak of an 'intent' of Congress with respect to its application." ³¹

Union women were, in general, opposed to the repeal of gender-specific protective laws, recognizing that legislation mandating universal protection would be unlikely. Unions, however, were not quiescent, and they strove to extend more humane working conditions through strikes and collective bargaining. Thus at precisely the same time that Congress was debating the inclusion of sex in the Civil Rights Act of 1964, for example, the United Automobile Workers (UAW) announced that the focus of its negotiations with the extraordinarily profitable automobile manufacturing firms would be "humanized" working conditions. In particular, the union, whose members then received only twelve-minute relief periods in the morning and afternoon in addition to thirty minutes for lunch, was pushing for a reduction in the speed of the production line and two coffee breaks. In explaining why the union was demanding an additional thirty minutes of free time to escape fatigue, UAW president Walter Reuther stated: "The union will 'assert the sovereignty of the person over the machine' by seeking benefits that will unchain workers from their work stations." The companies were not "kindly disposed" toward the proposal, which not only was estimated to cost \$100 million but would also "interfere with their right to run the plants as they choose; they feel that while the assembly line may be monotonous, that is the incontestable price of efficiency."32

Once the Civil Rights Act went into effect, the Equal Employment Opportunity Commission (EEOC) vacillated on the issue of the validity of the state protective laws. This attitude was not surprising in light of the commissioners' and staff's belief "that the addition of sex to the law had been illegitimate—merely a ploy to kill the bill—and that it did not there-



fore constitute a mandate to equalize women's employment opportunities." ³³ In the introduction to its 1965 *Guidelines on Discrimination Because of Sex*, the agency, faced with a sparse history of legislative intent, labored under the

effort to temper the bare language of a statute with common sense and a sympathetic understanding of the position and needs of women workers. Nevertheless, where the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker. . . . The Commission cannot assume that Congress intended to strike down such legislation. Yet our study demonstrates that some of this legislation is irrelevant to present day needs of women, and, much of this legislation is capable . . . of denying effective equality of opportunity to women.³⁴

The EEOC's view that the "competing value judgments" that underlay Title VII's suspicion of "any sex distinction in employment" and the special treatment of women enshrined in state protective laws could "not easily be harmonized" disabled the agency from adopting a principled regulatory stance. Instead, it felt compelled to inject compromise into what it after all had deemed to be clear congressional intent. To this end, the EEOC distinguished between state protective laws that (1) "require that certain benefits be provided for female employees such as minimum wages, premium pay for overtime, rest periods, or physical facilities"; and (2) "prohibit the employment of women in certain hazardous occupations, in jobs requiring the lifting of heavy weights, during certain hours of the night, or for more than a specified number of hours per day or per week." The commission did not initially build on this distinction between beneficial and prohibitory regulations, which may have been less categorical than it believed:

The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. . . .

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.³⁶

At the outset, however, the EEOC took only the most hesitant and timid steps toward deregulation. The agency could not even bring itself to invalidate the most commonly denounced of women's labor regulations, weight-lifting restrictions. The commission would deem such a regulation in conflict with Title VII only "where the limit is set at an unreasonably low level which could not endanger women." ³⁷

In the meantime, Pauli Murray and Mary Eastwood, two Washington insiders within the proliferating Status of Women groups, propelled the discussion with their influential 1965 law review article, "Jane Crow and the Law." They argued that at least some state protective legislation, including minimum wage and rest-period laws, could be harmonized with Title VII: "Such a law merely prescribes a standard for women; the lack of a legal standard for men does not affirmatively permit discrimination against men. . . . To comply with Title VII, the employer could provide for male employees what the state law requires him to provide for female employees." Nevertheless, while acknowledging that "the effect of state protective laws for women in elevating labor standards for all workers should not be underrated," Murray and Eastwood suggested that "the 'classification by sex' doctrine [that] was useful in sustaining the validity of progressive labor legislation . . . perhaps . . . should now be shelved alongside the 'separate but equal' doctrine." ³⁸

The next year, the new director of the Women's Bureau, Mary Keyserling, a longtime advocate of women's protective legislation, also struck a reconciliatory note at the Third National Conference of Commissions on the Status of Women, which occasioned the formation of the National Organization for Women (NOW)—in large part as a protest against the EEOC's failure to take sex discrimination seriously.³⁹ Without offering a resolution of the issue, she succinctly outlined "the conflicting interests," reconciliation of which she deemed "imperative," by focusing on the highest-profile issue, state hours laws:

Some women want to take advantage of overtime work opportunities at premium pay rates, and feel that the ability to work longer hours may, in some instances, be a steppingstone to employment advance. They believe that inflexible State hours laws interfere with equality of work opportunity; and a number have filed complaints with the Equal Employment Opportunity Commission. . . .



On the other hand, many wage-earning women—especially those with family responsibilities—do not want overtime work, regardless of premium pay. They regard existing hours laws as highly beneficial, want them strictly enforced, and vigorously oppose any move to eliminate them until such time as effective substitute deterrents to excessive hours of work are legislated.⁴⁰

In 1968 the Citizen's Advisory Council on the Status of Women, created five years earlier as a successor to the President's Commission on the Status of Women to propose action to accelerate progress, straightforwardly recommended that "the States convert existing provisions for lunch periods, rest periods, and physical facilities for women into modernized regulations under comprehensive safety and health programs applicable to men and women alike." *1

The EEOC amended its guidelines in 1969, determining that the entire category of prohibitory statutes and regulations failed to "take into account the capacities, preferences, and abilities of individual females and tend[ed] to discriminate rather than protect." Because such laws per se conflicted with Title VII, they would "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." In 1972 the EEOC finally came to terms with single-sex rest-period and mealperiod laws. It ruled that, as would also thenceforward be the case with minimum wage and premium overtime laws, "provision of these benefits to one sex only will be a violation of Title VII." The EEOC thus expressly advised employers that they could avoid being caught in the conflict between state and federal law by extending breaks to men. Even if "the business community's fears were assuaged" by the initial guidelines of 1965, the EEOC's new turn was potentially much more troublesome, especially since the agency offered firms only one improbable avenue of escape from that conflict: "If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex." In the event, both the courts and the state legislatures rescued employers from the prospect of the EEOC-mandated extension of statutory breaks to men by effecting their repeal.42

In the last *Handbook on Women Workers* published (in 1962) before Title VII, the Women's Bureau reported that over half the states (as well as the District of Columbia and Puerto Rico) mandated meal periods (lasting from twenty to sixty minutes) for women in some or all industries: Arkansas, California, Colorado, Delaware, Indiana, Kansas, Kentucky, Louisi-



ana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wisconsin. Of these, only Indiana, Nebraska, New Jersey, and New York conferred the right to eat at work on men. Twelve states, an increase of four over the previous decade, also provided for rest periods—generally ten minutes within each half-day of work—for women in some or all industries: Alaska, Arizona, California, Colorado, Kentucky, Nevada, New York, Oregon, Pennsylvania, Utah, Washington, and Wyoming. To be sure, the recent New York and Pennsylvania provisions were curiosities, applying only to elevator operators (including men in New York) who were not furnished seats; and the Alaska General Safety Code prohibited requiring women to stand for more than two hours without a ten-minute rest period. But Kentucky's 1958 enactment mandating two ten-minute rest periods every four hours for all women (in addition to lunch) was the first by any state outside of the Far West.43

The bureau's first post-Title VII Handbook could report that in 1965 twenty-five states still mandated meal periods and twelve states rest periods. Nevertheless, the EEOC, if only subtly, conceded that the demise of state protective legislation was underway: whereas its 1965 Guidelines stated that "most States" had enacted women's labor laws, four years later they spoke merely of "many States." 44 In the wake of Title VII, the constitutionality of gender-biased rest-period statutes under the equal protection clause of the Fourteenth Amendment and Muller v. Oregon became irrelevant because such classifications were, in the words of a federal court, "no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act." By the late 1960s and early 1970s the conflict between state protective statutes that capped hours for women or excluded them from strenuous or hazardous employment and federal antisex-discrimination law, was, the Women's Bureau recorded, "essentially resolved . . . by repeals and amendments of State laws, State and Federal administrative rulings, or court decisions." 45

The debate over whether those laws should be repealed or extended gained renewed vigor at the outset of the 1970s as yet another congressional discussion of the ERA prompted predictions of the amendment's impact on women's protective legislation. In his colloquy with Senator Sam Ervin, Paul Freund of the Harvard Law School, one of the most prominent constitutional law scholars in the United States and an opponent of the ERA, explained the structure of the reasoning that would undergird any judicial decisions concerning the validity of sex-biased statutes. In di-



vining what state legislatures' intent would have been decades earlier had they been able to foresee that these statutes would one day be held invalid and had they considered whether under those circumstances the benefits should be extended to men or abolished altogether,

the Court tries to determine what the legislature would have intended if they had addressed themselves to the problem of partial invalidity. Would they have wanted the whole thing to fall or would they have wanted part of it to be saved? And one has to fathom what they would have wanted.

Now in the case of minimum wage legislation for women, or seating laws for women, or maximum hours laws for women, I don't know frankly what a legislature would have wanted if that special treatment has to fall. Would the legislature prefer a no-seating law or a no-maximum-hour law, or would they prefer to extend alike to men and women?

I think the legislatures like to take a hand in this and decide for itself [sic]. 46

Pressed by Senator Ervin to predict that courts would strike the laws down because they failed to refer to men at all, Freund went even further by introducing Ervin to the economics of judicial realpolitik:

Mr. Freund. I think that a court would be likely to do that because that would seem less of a ... legislative act than to extend the law where it had never been extended before and where the cost and the effect on the industry might be great. The court might well feel it was the responsibility of the legislature to extend the law if it wanted, but not the business of the court to do so.

Senator ERVIN. In other words, no matter how desirable a court might feel it would be for the court to do so, it would be powerless to, in effect, write into law words that are not there?

Mr. Freund. Well, if not powerless, reluctant.

Senator ERVIN. Be reluctant to do so. In other words, that would essentially be a legislative, rather than a judicial function; would it not?

Mr. Freund. I think most courts would tend to feel that way.⁴⁷

A future chief justice of the U.S. Supreme Court, William Rehnquist, at the time an assistant attorney general in the Nixon administration, agreed that "the likely effect of the amendment would be to subject women to the labor rules currently applicable to men." Leo Kanowitz, the most persistent professorial exponent of preserving and extending the benefits of



women's labor laws, noted that what these legal analysts overlooked was "that the decision to take the benefit away from the class the legislature intended to benefit—when that benefit can be preserved by extending it to the group the legislature had originally excluded—is analytically no more nor less a judicial usurpation of the legislative function than the extension itself." Neglected too was the fact that judicial repeal "would create a windfall for employers who, until the law's invalidation for underinclusiveness, at least had been required" to provide women with paid rest breaks.⁴⁸

Not all experts testifying before Congress indulged in the same legal speculations as Freund, Ervin, and Rehnquist. A number of leading constitutional law professors from elite law schools predicted that the courts could and would decide to extend the benefits of women-only laws to men. Senator Cook, for example, expressed frustration at hearing his colleagues pose leading questions calculated to elicit a prediction that the ERA would lead to the elimination of thousands of laws designed to prevent suffering by women, and asked his own leading question as to whether the Supreme Court did not historically more often extend benefits rather than strike down discriminatory laws. His interlocutor, Professor Thomas Emerson of the Yale Law School, was quick to furnish the expected prediction: "Yes. Yes; I agree with that analysis. As to rights of that character, I think it is quite clear that the courts will interpret the legislation to remain, eliminate the discrimination and thereby extend the benefits of the statute to those who have previously been discriminated against." Professor Norman Dorsen of the New York University School of Law testified with respect to state labor laws that there was "abundant evidence that if the amendment is ratified it would result in the general extension of certain benefits to men." The Citizens' Advisory Council on the Status of Women asserted dogmatically that "rest period and lunch period laws will be [judicially] extended to men." The same certainty marked street-level canvassing for the ERA as proponents sought to assure women workers concerned about losing their extra breaks that such benefits would instead be extended to men. 49

Representative Griffiths's views on the fate of labor-protective laws deserve special attention: not only did she play a leadership role in incorporating the ban on sex discrimination in the Civil Rights Act and in the drive for congressional passage of the ERA, but as a pro-labor liberal she was by no means an enemy of government intervention in the labor market. In 1967 she elaborated her perspective at an EEOC hearing on proposals to amend the agency's regulations on sex discrimination. While expressing support for gender-neutral protective laws that "balance the odds between



employers and the workers, particularly the unorganized workers," Griffiths argued that "the drive for these state protective laws was distorted . . . into laws applying solely to women." Yet the form of these labor standards had resulted from judicial denial to the states of the power to regulate men's hours, which then prompted advocates to urge enactment of statutes for women in the hope of extending their benefits to men as well as to enact as standards the hours that well-organized trades had secured through collective bargaining. Even if Griffiths's account were accurate, it is unclear why this putative strategy should be viewed as having created legal distortions since in the United States men had, as in Britain, at most "fought from behind the women's petticoats" to gain the same norms, not to protect their "rights in better paying jobs" that women might otherwise have occupied. 50

As an additional basis for rejecting women's legislation as obsolete, Griffiths asserted that "None of the state laws restricting a woman's hours of work are directed at the woman, merely the employer. Thus, a woman can and does work two or even three poorly paid jobs, and no one protects her from this. Therefore, it can legitimately be asked—Does the protection protect? Of course, it doesn't." Griffiths's absolutely formulated claim was incorrect. Several states did prohibit the employment of women by more than one employer for hours in excess of those permitted to a single employer. But even had Griffiths been aware of the Delaware and New Hampshire statutes, for example, which were on the books from 1913 and 1917 until they were repealed in 1965 and 1989 respectively, she would presumably have denounced them as impermissible interferences with women's freedom to determine for themselves whether they wished to dedicate forty or eighty hours per week to wage labor.⁵¹

More importantly, however, Griffiths's point was overbroad because it also applies to gender-neutral federal overtime regulation, which mandates premium pay not for all employees working more than a total of forty hours weekly, but only for those working such hours for a single employer. Nor was Griffiths merely making an academic point: she was using the argument to chide the EEOC for upholding the validity of state hours laws for women in part on the grounds "that women who have children cannot afford overtime work and therefore must be 'protected' . . . even at the expense of the women who seek to assert their employment rights under Title VII." But she asserted that on the contrary, the EEOC's "files are filled with instances of women who believe they cannot afford not to work overtime." ⁵² Because so many women were paid wages below the poverty limit, Griffiths's assertion may have been accurate; but her under-



lying policy principle failed to identify an alternative to cycles of overwork and poverty. Indeed, Title VII's unshackling of the forces of labor-market competition led to a predicament ironically echoing that of male workers in mid-Victorian England, who, though not covered by ten-hours laws, preferred to work the same hours as protected women; some, however, "had no choice" but to work twelve hours because "so many were out of employment . . . that if they refused to work the longer time, others would immediately get their places, so that it was a question . . . of agreeing to work the long time, or of being thrown out of employment altogether." ⁵³ The acceptance of laissez-faire by some ERA advocates persuaded observers that supporters might "unwittingly . . . destroy the foundations of protective legislation"—and perhaps only the "tight labor markets" of the latter 1960s prevented that suspicion from maturing into a more successful countercampaign. ⁵⁴

This tacit policy preference for laissez-faire also underlay an influential early court decision holding a state hours law for women invalid. It found that the state statute "require[d]" employers "to assign to male employees daily overtime work . . . and jobs normally requiring such overtime work, thereby imposing primarily upon male employees the burdens of such work." Yet nothing in the statute required Caterpillar or any other employer to compel its employees to work overtime; it was the firm's decision to structure its jobs so that they would "normally requir[e] such overtime." The firm could just as well have hired additional workers and spread the work among them. The court, however, like most other adjudicators and Griffiths, implicitly ratified employers' requirements of profitability in deciding to incorporate women into, rather than to extricate men from, the mandatory overtime regime. 55

Griffiths's perspective on the realities of employment relations emerged more clearly from her statement at the Senate Judiciary Committee's hearings on the ERA in 1970. She conceded that the ERA would invalidate the forty-hour week for women to the extent that courts had not already done so under Title VII; but she chided a female unionist who had testified that her union had negotiated a forty-hour week for men and women for having "ignored the fact that this same route is open to all other unions. Hours are negotiable. Ask GM this morning if they believe [UAW president] Leonard Woodcock could enforce a forty-hour workweek for his members, and . . . you might find that they would be delighted if that were all he was asking." In light of the automobile companies' pattern of imposing mandatory overtime, which even the UAW, arguably the strongest union in the United States, has been powerless to prevent, Griffiths's



recommendation that state legislatures instead enact mere overtime (instead of maximum hours) laws for some workers, leaving "all others to their own judgment," revealed her underestimation of the labor market's coercive power. The suggestion that the ungendered overtime provision of the Fair Labor Standards Act (FLSA) rendered "obsolete" the maximum hours provisions of the very state protective statutes that "enemies of labor legislation powered by a combination of middle-class feminists and employers" were seeking to "wipe out" neglected the actual content of the FLSA: as the AFL-CIO noted in 1967, it offered (and continues to offer) no "protection against involuntary overtime." The consequence is that once the state maximum hours laws were repealed or held invalid, a woman "does not get on the payroll to refuse overtime." ⁵⁷

Perhaps some feminists did not fully understand the realities of working-class women's lives, as demonstrated by their continued adherence to the market-knows-best principles that freedom to work overtime should be the norm and that workers opposed to involuntary overtime should have the burden of seeking exemptions through statutes or collective bargaining. Nevertheless, their insight into the gendered workplace hierarchy was powerful. This two-edged anticollectivist, competitiveindividualist methodology, so reminiscent of the NWP's emphasis on vindicating women's individual liberty, underlay Gloria Steinem's critique of union women's defense of protective laws as "giving up a long-term gain for a short-term holding action." The perceived need to undertake the gargantuan task of changing, from the outside, the male-oriented structure of the U.S. labor force and employment relations informed Steinem's 1970 congressional testimony that such legislation "gives poor women jobs but serves to keep them poor. Restrictions on working hours . . . may keep women in the assembly line from becoming foremen." 58

Like some politicians, some organizations of affluent women also misrepresented working women's needs. The president of the National Federation of Business and Professional Women's Clubs, for example, matronizingly explained that working women no longer needed lunch- and rest-period legislation, because in the intervening years

States and the Federal Government have passed comprehensive laws protecting workers.

Today the sweatshop conditions, the dawn to dusk hours, the subsistence level pay are to a large degree sins of the past. Judicious legislation and courageous labor organization have helped to amend that situation. Thus, women do not need protection against oppressive conditions which have ceased to



exist. They need the same things men workers need: broad coverage by Federal wage and hour legislation; adequate guarantees against occupational hazards, et cetera.

Consequently, today State labor laws for women only impose additional considerations for the employer who hires women; they give him an adequate reason for paying women less for the same work, or refusing to hire a woman who must have a 30 minute lunch hour, must have special seating arrangements.⁵⁹

Apart from ignoring the EEOC ruling, five years earlier, that any employer refusing to employ a woman "in order to avoid providing a benefit for her required by law" was violating Title VII, some professional women willing to sacrifice working-class women's welfare on the altar of deregulation overlooked the simple step of equalizing conditions by universalizing rest periods. (Antifeminists such as Phyllis Schlafly were content to retain sex-discriminatory statutes as "part of [a woman's] right to be treated like a woman.") A notable exception was the anthropologist Margaret Mead, who had expressed skepticism of the underlying assumption that "all roles and statuses should be equalized toward those of the American, white, Protestant, well-educated adult male." At a labor union conference on women in 1971 she opposed the ERA because it would have endangered the entire body of labor standards: "It is going to be used extensively to pull the chairs out from under the women on the assembly line." Instead, she recommended that such protective standards be extended to men. 61

Despite her acceptance of the traditional sexual division of labor and women's double workday, Mary Keyserling, the former director of the Women's Bureau during the Johnson administration, demonstrated more realism than did free-market feminists about working women's lives. After noting that "a number of laws which provided rest and lunch periods for women, benefits equally needed by men, have recently been nullified rather than extended," Keyserling agreed in 1970 that women should have the same right to work overtime as men; but she wondered whether the ERA was the only way of securing that right, since it would "deny a great majority of women the benefit they have worked hard to obtain—the right to go home after a reasonable workday to cook and clean and do the wash and get the children off the street. . . . Were existing hours laws nullified in the name of so-called equality, many of these women would find that overtime would be required as a condition of employment." Keyserling's approach confirmed that the disagreement between the Women's Bureau



and old-line ERA supporters at bottom reflected the maldistribution of power and burdens between men and women.⁶²

Other female trade unionists, representing low-paid women "not burdened with the necessity of holding philosophical discussions on whether women should or should not be in the work force," emphasized that precisely such workers "who are in the greatest need of the protection of maximum hour legislation are in no position to fight for themselves." This concern applied with greatest urgency to women who, being employed in firms too small to be covered by FLSA or Title VII, could rely on no mandatory norms except the state women's laws that were in the process of being repealed or struck down.⁶³

The struggle over the fate of women's protective laws was complicated by the fact that the labor movement itself hardly presented a monolithic position. In 1963 the AFL-CIO had opposed the ERA on the ground that the resulting elimination of protective legislation would bring about a situation in which "there might be 'equality,' but it would be an equality without 'rights.'" The skepticism that women in the labor movement expressed about the interference by the women's movement with labor legislation that vitally affected its factory-worker members but not others symbolized for one feminist "the class antagonisms that haunt the New Feminism as a political movement and women as a group." The AFL-CIO, too, saw the controversy over the invalidation of protective statutes in part as an interclass struggle: "What the dispute . . . comes down to is that the women in lower-paying and marginal jobs and those with heavy responsibilities want the protective laws continued, whereas women in higher paying blue-collar and professional jobs — most of whom are exempt from these laws anyway—consider them restrictive." Although the AFL-CIO's contention that "the argument that it is easier to extend or amend existing laws . . . than to repeal them and create all-inclusive new ones carries little weight with the women's movement" may have been politically astute, by 1973 it was constrained to endorse the ERA when judicial decisions had made it clear that protective laws for women could not withstand Title VII scrutiny and that the courts were unwilling to extend benefits to men: "labor's historic support of protective laws had been rendered moot."64

The Amalgamated Clothing Workers (ACW) staunchly supported the retention of women's laws and the extension of their benefits. Its recognition that they benefited so many low-paid and unorganized women—millions of whom were also excluded from the FLSA—contributed a more nuanced understanding to the debate. In addition to expressing a will-



ingness to abandon weight-lifting restrictions in favor of gender-neutral individualized standards, the ACW speculated that it was "doubtful that serious objection would be raised if state provisions were confined to . . . seating, rest periods, days of rest, and meal periods." Although the union may have been right to stress that from the point of view of employers and employees, "the heart of the matter is really hours limitations," it was misleading to suggest that making mandatory breaks universal would not have incited sharp opposition by employers.⁶⁵

Similarly misguided was the prediction by Thomas Emerson and his colleagues that "the courts are . . . likely to presume that the legislatures would prefer to have these laws remain in effect, on an equalized basis, rather than be completely invalidated," because extension to men would impose "little extra burden on the employer." After all, if, as some employers assume, paid rest periods represent wages paid for doing nothing, requiring employers to forgo output for 83.3 hours annually (= 2×10 minutes \times 250 days) doubtless impressed many business-minded judges as a considerable imposition. Shortly after Title VII went into effect, for example, an Ohio supermarket chain complained that rest periods cost it almost a million dollars annually. This material consideration gives substance to Deborah Rhode's argument that ERA proponents' support for extension of benefits to men "often ignored the political obstacles to obtaining adequate gender-neutral statutes." 66

Indeed, ever since World War II, U.S. firms and their publicists had been complaining about "the staggering cost of giveaway time," which for two ten-minute daily breaks amounted, as one article title announced, to the "Equivalent of 'Two Weeks with Pay.'" They blamed the federal government for the proliferation of the "coffee hour," which had been encouraged "as a morale builder" for wartime armaments workers. In fact, however, pro-business labor relations experts contended that such "giveaway time ha[d] done more to destroy morale among male workers in industrial plants" because it was "responsible for the vast increase in gambling in manufacturing plants and . . . bootlegging." Magazines such as Time, Business Week, and Reader's Digest in the 1950s and 1960s reinforced the view that bosses had become powerless to put an end to what "the drum-tight labor market of World War II" had taught (especially but not exclusively) office workers to regard as "an inalienable right" to the morning coffee break. Only after having focused on the alleged breakdown of discipline did the popular press mention as an afterthought that "workers are more alert and make fewer mistakes" after pauses. 67 Nevertheless, these claims should be put in perspective: although the U.S. surgeon general in 1942



did urge two rest periods of five to fifteen minutes one-quarter and three-quarters of the way through the workday, decades earlier even a business professor had characterized such short breaks as "hardly . . . anything more than recesses," which merely "eliminate[d] the mid-morning practice of eating in the shops, followed by workers who have left home before the family was up to get breakfast." ⁶⁸

More realism came from another ACW representative testifying before Congress, who observed that proposals to extend the two daily ten-minute rest periods to men elicited from employers the response:

"Do you know what that would cost?" . . . That is the real reason why leaders for the equal rights amendment don't seek better standards for men as a first step. It is also the kernel of why employers continuously support removal of existing protections.

They have no intention of . . . giving women equality of opportunity in the work force. They seek to save the money now expended when women have such luxuries as two 10-minute rest periods per day.⁶⁹

Some individual unions, however, took a different position. The UAW's considerable bargaining strength, which enabled it to negotiate superior conditions for its members, made it sensitive to the EEOC's initial failure to challenge women's laws and relatively indifferent to the possibility of gender neutrality leading to the repeal of women's laws. The UAW took its hard line because employers since the end of World War II had been invoking state protective laws—especially those limiting women's daily hours—to "circumvent" the equal pay, job opportunity, training, and seniority provisions in collective bargaining contracts and thus to discriminate against female union members. Because the UAW's efforts to use the grievance and arbitration procedures to enforce contracts were being "stymied" by employers' reliance on the statutes to which arbitrators had given deference as bona fide occupational qualifications, the union came to view laws "based on stereotypes as to sex rather than true biological factors [as] undesirable relics of the past." Advocates of the retention of women's laws such as Katherine Ellickson of the National Consumers League emphasized that the UAW as "a strong union [with] relatively high wages" was "not representative of the millions of nonunion, low-income wage workers" because it was "in a special position." 70

Significantly, however, not even the UAW spoke with one voice on the issue of protective legislation. Union members who sought to equalize women's access to overtime hours and the increased income associated



with premium pay triggered controversy by "working at cross purposes with those in the UAW who demanded relief from mandatory overtime." Women opposed to repealing state protective laws argued that failure to retain maximum hours laws would undermine efforts to induce state legislatures to make overtime voluntary or to incorporate such provisions into collective bargaining agreements: "The implication was that by condemning women to brutal working conditions, advocates of repeal were betraying not only feminism but unionism and class solidarity as well." And in the wake of the repeal of the state laws, the UAW "made almost no progress toward the goal of voluntary overtime," proving the dissident women's analysis, as labor historian Nancy Gabin observes, "both astute and prescient. . . . Having decided that gender equality means that women should be treated like men, male UAW leaders did not consider that men could be treated like women and receive legal protection from excessive overtime." ⁷¹

An Inevitable Outcome

Here is a question the Feminists must agree on, before they go far in their campaign for industrial equality. Are they going to level up or level down? Are they going to insist that men workers be brought under the safety and health regulations that now apply only to women? Or are they going to insist that women be taken out from under those regulations?

Crystal Eastman, "What Is Real Protection?" (1927) in Crystal Eastman on Women and Revolution (1978)

The end result of this prolonged argument over labor standards was unprecedented regulatory retrogression for women—a sharp contrast with the "continuous progress not only in the number of laws regulating women's hours and working conditions, but also in the standards they prescribe[d]" from the late nineteenth century until the 1960s. By 1982 only thirteen states and Puerto Rico, half as many as shortly before the enactment of Title VII, had valid gender-neutral meal-period laws or regulations—half as many for women, for whom twenty-six states had mandated meal breaks before Title VII, but three times as many for men, who had previously been entitled to meal breaks in only four states. These states were California, Colorado, Illinois, Kentucky, Massachusetts, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, and Washington. Likewise, only six states, again half as many as two decades earlier, validly mandated rest periods. Enforcement of this new gender-neutral right to rest, moreover, proved to be very lax.⁷²



After Title VII had, all too predictably, succeeded in eliminating almost a century's worth of protective legislation—already by 1980, hours limitations laws had been either repealed or held to violate Title VII in forty-two states, whereas only eight states had amended them to cover both sexes and the campaign to extend benefits to men judicially had failed, some ERA supporters nevertheless erroneously claimed that "by the 1960s, most of the truly beneficial laws . . . had been extended to men by the legislatures." Some feminists wondered whether extension was even important and urged "social reformers to direct their energies toward truly protective legislation." A loftier form of this attitude appeared as the collective wisdom of the editors of the Harvard Law Review in 1971—the next generation of Wall Street lawyers: "Being fired for refusal to work overtime is not within the protection offered by Title VII. Such solicitude is ill placed, though, in view of Title VII's establishment of individual ability over sexgroup stereotyping. Men have gotten along well without such prohibitions against overtime." A quarter century after the demise of gender-specific protective legislation some scholars are still so riveted by the achievement of formal equality that they dogmatically (but incorrectly) assert that "while exploitation of women workers continues, concessions such as a minimum wage and overtime pay have been won for all workers."73

Thus even if it were true that "protective labor legislation had played a critical role in sustaining socially approved gender-based distinctions in the work force," the fact that the 1938 national wage and hour law made no provision for rest periods and that the majority of female (and male) workers remained uncovered by collective bargaining agreements should have constituted yet another reason for carefully considering ex ante whether a campaign for immediate formal equality was worth risking the strong possibility of leveling down. In any event, it is simplistic to conclude that "The New Deal expansion of legislative protection to all workers, together with the spread of trade unionism during the depression and the war to encompass many more women, undermined the argument for special protection for women." 74

The failure of the trade unionist and feminist movements to reinforce each other's goals at a critical juncture in the development of labor standards legislation in the late 1960s and early 1970s led to the demise of what for several decades had been widely available and enforceable statutory rest periods for women. The origins of Title VII—somewhat serendipitous, and at the very least unusual—meant that its potential consequences were not carefully thought through. In this sense, Crystal Eastman's admonition in the 1920s to feminists that they determine whether to level



up or level down before embarking on a campaign for equality did not so much go unheeded as prove incapable of application. For once the movement for gender equality had succeeded in securing wide if not universal acceptance of the view that women did not differ sufficiently from men in any relevant immutable, biological respects to warrant different workplace treatment, the judicial and administrative nullification of gendered laws under Title VII became a foregone conclusion. At that point the labor movement was confronted with an almost impossible political predicament, which it was never able to resolve successfully. Even at the UAW, which conceded that laws dealing with pregnancy and maternity leave "really are protective" because "they are not based on a stereotype but on biological facts," such an insight, which "conflicted with the view that women and men were equal as human beings, . . . had been muted in the pursuit of gender equality and the elimination of female labor laws." 75

Thus while the women's movement devoted its energies to the ERA and other issues, trade unionists who had (correctly) seen as a certainty the risk that equality would be achieved through leveling down proved incapable of mobilizing political support to invalidate their prophecy legislatively. For example, they lost forever the opportunity to combine a ban on sex discrimination with an amendment to the Fair Labor Standards Act creating gender-free national rest periods. And given the absence of prior federal rest-period legislation and hence the need to lobby fifty state legislatures to universalize the benefit, enacting such laws would have been even more difficult than the unsuccessful campaign to ratify the ERA even if the women's movement had solidly supported such a campaign. But the labor movement's failure to secure enactment of unisex rest-period laws was hardly surprising. After all, unions have always been ambivalent toward legislation which, by imposing standards for all workers, reduces the incentive to join a union that has thereby lost its privileged position to secure those benefits exclusively for its members. To be sure, the Coalition of Labor Union Women, at its founding conference in 1974, did commit itself to working for ratification of the ERA and enactment of legislation extending to men such statutory protection as rest breaks, seats, and maximum hours, but this organization of trade union women neither represented a merger with the mainstream women's liberation movement nor galvanized a successful campaign for making universal what had been gender-specific benefits.76

Although no compromise would have been possible with that wing of the middle-class feminist movement that opposed government intervention in the labor market, even feminists who would in fact have welcomed



the universalizing of protective benefits were willing to accept the risk that achieving equality in the abstract, which would accelerate upward mobility for elite women, might result in a deterioration of working conditions for run-of-the-mill women workers. The enactment of Title VII's ban on sex discrimination meant the almost immediate attainment of a long-held feminist goal: women could no longer be lawfully constructed as weak and in need of special protection. NOW, for example, affirmed from the beginning its opposition "to all policies and practices . . . which, in the guise of protectiveness, not only deny opportunities but also foster in women self-denigration, dependence, and evasion of responsibility, undermine their confidence in their own abilities and foster contempt for women."77 Even if the non-working-class members of the feminist movement wished the labor movement well in its pursuit of leveling up, both sides understood that unions' failure to secure extension of benefits to men would not jeopardize women's newly obtained formal equality while it would leave trade unions weakened.

To conclude that some feminists were willing to settle for a leveling down in which women were as deprived of legal protections as men is not to assign blame for that outcome. Rather, a kind of tragic inexorability drove the political process at an unpropitious historical moment as the two movements failed "to find a 'third way' in their search for equality and protection." That under certain local political, organizational, and leadership conditions a different outcome was possible was demonstrated by the unique cooperation in California between NOW and the Union Women's Alliance to Gain Equality (Union W.A.G.E.), a left-wing women's trade union group, which led the struggle for preserving and universalizing labor standards laws. At first, the labor group lambasted NOW leaders, charging that they "boast about their 'victories' in destroying protective legislation." Although NOW supported extension of the state's protective laws to men, it had rejected Union W.A.G.E.'s proposal to campaign for the ERA and labor legislation simultaneously (or, alternatively, for a "Labor ERA"); but once California ratified the ERA in 1972, NOW did join the labor movement in testifying before the state legislature in favor of universal protection.78

