February 20, 2015

Dear readers:

I am grateful for the opportunity to present at the 20th Century Politics and Society Workshop. Thanks so much for taking the time to read the enclosed piece.

This chapter is titled *Equal by What Measure? Title VII, Labor Feminism, and the Forgotten Struggle for Universal Protective Laws*. It is chapter one of a larger book project tentatively titled *Contested Labor: Social Reproduction, Work, and Law in the Neoliberal Age, 1964-2010*. This book traces how the American public’s conception of sex equality narrowed amid deepening market conservatism, the rise of the New Right, and the shift from an industrial to a service economy.

*Contested Labor* makes three major arguments. First, the book demonstrates that activism in pursuit of distributive justice formed a critical strain of feminist legal advocacy throughout the late twentieth century. *Contested Labor* excavates the legal consciousness and advocacy of rank-and-file workers, union leaders, and local feminist activists. This perspective reveals that feminists fought for much more than the elimination of gender stereotypes from the law. Grassroots activists sought enhanced labor regulation as well as equal employment opportunity, welfare entitlements as well as antidiscrimination law, class as well as gender justice.

Second, *Contested Labor* focuses on market rather than social conservatism as a primary source of opposition to feminism claims. The book traces historical shifts in the interaction between feminists and business groups’ legal strategies. From the late civil rights era to the 1970s, market conservatives began to reject gender ideologies rooted in family-wage and separate sphere ideologies and to embrace a formal conception of sex equality. During this period, too, some social conservatives advocated public supports for mothers. Conservatives divided, in other words. Reagan era politics, however, fused market with social conservatism by coupling free-market economic policies with anti-abortion policies. In the process, old adversaries reconciled their differences, with devastating effects for feminists.

Third, *Contested Labor* explains how and why the United States, virtually alone among industrialized nations, regulates the intersection of work and family via primarily antidiscrimination law. The growth in women’s labor-market participation, increase in rates of divorce and single motherhood, and reinvigoration of a mass feminist movement both fueled and followed from a backlash against the New Deal regulatory state. As a result, feminist arguments for equality of opportunity succeeded in legislatures and courts, but social-welfare entitlements with more redistributive heft lost support.

I welcome all your comments and critiques on the chapter’s substance, style, and organization. I am looking forward to the discussion!

Sincerely,

Deborah Dinner
Chapter One

Equal by What Measure? Title VII, Labor Feminism, and the Forgotten Struggle for Universal Protective Laws

Deborah Dinner

The applause grew so deafening Caroline Davis had to halt her speech. Davis, the head of the Women’s Department of the United Auto Workers (UAW), was addressing 200 women union members at a 1966 conference. The words that caused such a tremendous outburst of support were simple: “We are against the Michigan hours law,” Davis said. She was referring to a 1909 state law that restricted women’s work to ten hours per day and fifty-four hours per week. Women workers wanted to access the overtime work widely available within the auto industry and the high wages that came with it. Limits on women’s hours of work made them less able to pay for “doctor bills, children in college, and all the other [financial] demands” they faced.¹

The UAW’s fight to repeal the hours law produced a “tug of war” between Davis and Myra Wolfgang, a local leader in the Hotel and Restaurant Employees and Bartenders International Union.² Detroit’s “two top women in labor union circles” debated whether the law deprived working women of economic opportunity or offered them vital social protection.³ Wolfgang argued that working-class women needed protection from twelve-hour days on the job.⁴ Women who could not afford to hire substitutes for their unpaid domestic labor returned from the workplace to what contemporary sociologist Arlie Hoschild calls a “second shift” in the

² The Hotel and Restaurant Employees Union, the Amalgamated Clothing Workers of America, the Communication Workers of America, and the Women’s Division of the Packinghouse Workers joined Myra Wolfgang’s fight against repeal in Michigan. Helen Fogel, “Judge Tells Women to Prove that Overtime is Harmful,” Jan. 31, 1969, folder 16, box 11, UAW Women’s Department Papers.
³ Ibid.
The hours law, Wolfgang believed, took account of the sociological “difference” between men and women’s roles within the family.

Analyzing the conflict between Davis and Wolfgang tells us much about the shifting gender identities of working-class women in this period. Myra Wolfgang and the women on whose behalf she advocated defined their gender identities primarily in light of their caregiving roles as daughters, wives, and mothers within predominantly heterosexual families. They worked in sectors of the labor market culturally coded as feminine. They performed paid work that involved cleaning, cooking, and serving—tasks largely performed by women since industrialization—and labored in sectors dominated by female employees. By contrast, Caroline Davis and the women who supported her position on Michigan’s sex-based protective laws embraced emergent identities as breadwinners. This new identity remained centered upon women’s family relationships, but it placed wage-earning in the market as well as caregiving within the home at the crux of women’s familial roles. The UAW women worked in sectors of the labor market culturally coded as masculine. They produced automobiles and airplanes; their work was pivotal to the military effort in World War II; they benefitted from membership in one of the countries’ most powerful unions.

It is tempting to portray Davis as the embodiment of the new and Wolfgang as that of the old but to do so would be woefully inaccurate. Indeed, the industrial economy upon which the UAW premised its legal advocacy strategy was waning. The service sector in which the Hotel and Restaurant Employees toiled was rapidly becoming the model for a new economy dominated by contingent employment relationships and a precarious workforce. The dominant narrative in the literature tends to portray Wolfgang and her supporters as retrograde in their embrace of traditional gender roles and maternalist legal ideals. In fact, these women were harbingers of the dilemmas all low-income workers would face in a changed economy.

In the late 1960s, the precise contours of that economy and the legal regime that would govern it had not yet taken form. Alternatives to either sex-based labor protections or to a

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6 Carlton, “Women’s Work -- How Many Hours?”
workplace unfettered by labor regulation still appeared to lie within these union women’s grasp. Within a year of their bitter contest, Davis and Wolfgang had joined forces—to the surprise of almost all observers. The two former opponents now campaigned together for legislation that would limit the work hours of men as well as women.

Since the early twentieth century, the labor movement and progressive allies had embraced an ideal of universal labor standards. The constitutional jurisprudence of the *Lochner* era, however, had yielded a divided regulatory regime. Male and female workers who worked in industries engaged in interstate commerce received protections under the Fair Labor Standards Act (FLSA). This federal employment law excluded large proportions of the low-income, unorganized workforce, almost entirely comprised of women and racial minorities. Some of these employees benefitted from state protective labor laws that regulated the wages, hours, and conditions of women’s work. These laws, however, had two limitations. They did not reach the most exploited sectors of the workforce, largely engaged in service rather than industrial occupations. At the same time, for women workers who occupied less precarious positions in the labor market, sex-based labor laws functioned as a barrier to equal employment opportunity.

In the wake of Title VII, the advent of sex equality as a foundational legal principle offered a new mechanism to achieve universal protective labor standards. Sex equality mandates, some argued, required not the invalidation of sex-based protective laws but rather the extension of these laws from women to men. Just as maternalism had acted as a wedge to crack *Lochnerism*, now sex equality might serve as a lever to expand protections for labor.

Universal, sex-neutral protective labor laws held out the hope of fusing a New Deal era commitment to labor protection with a newer, civil rights era commitment to antidiscrimination. They posed an alternative to equal employment opportunity at the cost of protection for the most vulnerable, or protection at the cost of sex segregation in the workplace and unequal pay. Universal hours’ laws would extend protection to low-skilled and unorganized male and female workers, who did not have the benefit of protection from union contracts or federal or state labor law. Unlike sex-based hours’ laws, however, employers could not use sex-neutral hours’ laws as a justification to exclude women from job opportunities. The fight for the expansion of
protective labor legislation—not the fight to strike down sex-based protective laws, as the common wisdom dictates—obviated the choice between protection and opportunity.7

The struggle for universal hours’ laws catalyzed a contest over the legacy of the New Deal and the meaning of liberalism. Caroline Davis argued that sex-based protective laws represented illiberal state intervention in the market that reinforced gender stereotypes and economic inequalities between men and women. But she joined Myra Wolfgang in defining liberalism to also implicate a tradition of state regulation in the labor market to redress power imbalances between workers and businesses. In Michigan, the Big Three auto companies conceded feminists’ demands that they stop complying with sex-based protective laws. But these companies warned that universal protection would come at the cost of business growth; major manufacturing interests across the country echoed this claim. The argument held sway over many politicians as the nation transitioned from a period of affluence to one of greater scarcity. For these employers and politicians, liberalism meant business independence from regulation, individual contractual freedom, and a pluralist ideal of negotiation between labor and industry autonomous of the state.

This chapter offers a close reading of the heated debates that took us from paternalist protective laws to a legal regime that both stripped employment law of explicit sex bias and also lowered labor standards. Tracing this twisted path highlights the importance of forum and timing to legal change. Legislatures and administrative agencies gave advocates of universal protective standards the best hope of achieving their aims. Yet court-based advocacy challenging sex-based protective laws under Title VII proved considerably more successful. Across the country, litigation swept away state labor protections before advocates could use protective laws for women as a foothold from which to build campaigns for universal labor standards.

I. The Contest Between Protection and Opportunity

The Long Constitutional and Statutory Context

7 MacLean, *Freedom Is Not Enough*, 118, presents the most powerful argument that “Title VII cut the Gordian knot” which had divided the women’s rights movement between advocates of the ERA and of protective laws. MacLean argues that “[b]y promising substantive fairness” women no longer had to choose between security and equal employment opportunity.”
The contest between protection and opportunity in the mid-1960s had a long history, which began with the constitutional and political constraints on labor and welfare legislation in the early twentieth century. During the Progressive Era, some feminist reformers deployed gender ideologies to campaign for state laws regulating women’s labor and defend their constitutionality. Courts in this period deployed substantive due process and freedom of contract doctrines, recognized in the famous *Lochner* decision of 1905, to strike down protective laws including maximum-hours, minimum-wage, and other statutes regulating work conditions. At the time, women’s rights and labor reformers and other progressives managed to circumvent *Lochner* by stressing the unique importance of state protection for mothers. Their first triumph came in the 1908 case of *Muller v. Oregon* which upheld a maximum hours law for women on the basis of the state’s interest in protecting mothers’ health and welfare.\(^8\)

*Muller* catalyzed the proliferation of state laws regulating the conditions of women’s work. Within five years, twelve states passed laws limiting women’s work hours. By 1924, forty-three states enacted maternalist labor legislation. These laws regulated female workers’ maximum hours and the amount of weight they could lift; prohibited women from entering specific occupations; and regulated their work conditions by providing for rest periods, meal periods, toilet facilities, night-shift transportation, and similar benefits.\(^9\) Progressives hoped that protective laws for women would function as a wedge that would ultimately yield universal labor protections, but in the 1920s that aspiration remained a distant one.

The constitutional and political constraints that limited the landscape of feminist legal advocacy divided the movement. After the passage of the Nineteenth Amendment, feminists who had earlier united to campaign for suffrage divided. Those who prioritized the achievement of equal treatment for women under law organized within the National Woman’s Party to advocate the Equal Rights Amendment (ERA). Initially, these feminist believed that they could pursue sex-based protective legislation in conjunction with equal treatment under law. Over time,

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\(^8\) 208 U.S. 412, 421 (1908) (reasoning that because “healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest). 

however, opponents of such sex-based protective laws convinced ERA activists that these laws would undermine women’s access to workplace opportunities.\(^{10}\) Meanwhile, other feminist activists, who prioritized the protection of working-class women from exploitation, continued to press for expansive labor regulations. Both groups saw themselves as the legatees of nineteenth century feminists and advocates for economic justice for women. Advocates for protective legislation understood women’s roles as mothers as inherent and devised pragmatic solutions to working mothers’ exploitation in the labor market. ERA proponents were more aspirational; they saw women’s reproduction roles as sociohistorical constructions and labor market structures as similarly subject to change.\(^{11}\)

In 1941, a U.S. Supreme Court decision upholding the constitutionality of the 1937 Fair Labor Standards Act (FLSA) brought many feminist activists closer to their goal of universal labor protection. The FLSA enshrined the forty-hour standard work week, a demand for which labor had fought since the industrial revolution. The maternalist strategy had been successful. It built the constitutional architecture of the New Deal.\(^{12}\)

Yet the FLSA did not bring to fruition the aspiration toward universal labor protections, and by the late sixties its limitations were painfully visible. Many of the least organized and most exploited workers were exempt from coverage under the FLSA. In 1937, Congress had excluded agricultural and domestic workers, disproportionately people of color, from coverage as a concession to Southern Democrats.\(^{13}\) Even after extensions of coverage in 1966, 430,000 women employed in hotels, motels, and restaurants remained exempt from overtime pay provisions.


Another three million women were completely exempt from FLSA coverage because their employers engaged in intrastate, rather than interstate, commerce.\textsuperscript{14}

Even for covered workers, the FLSA no longer effectuated the protections it had once promised. Congress had designed the statute to reduce work weeks and promote full employment, by mandating time-and-a-half overtime pay. By the late 1960s, however, the FLSA no longer effectively deterred employers from requiring overtime work. During World War II and in the postwar period, employers dramatically expanded fringe benefits. The proportion of employees’ salaries attributable to such benefits increased accordingly. As a result, the overtime pay requirement represented only a 20% increase, rather than a 50% increase, in employment costs. Mandatory overtime posed a cheaper alternative to hiring additional workers. The Big Three auto companies in Michigan, for example kept up a competitive pace with each other by requiring overtime hours.\textsuperscript{15} Compulsory overtime also contributed to unemployment rates especially among women, youth, older workers and racial minorities.\textsuperscript{16} The FLSA thus no longer fulfilled the labor movement’s original aspirations: it neither deterred long hours nor advanced the goal of full employment.\textsuperscript{17}

The shortcomings of federal labor law made state labor legislation critical. In the late 1960s, labor and feminist advocates did not possess sufficient political power at the national level to campaign for the amendment of FLSA. They had a fighting chance, however, of preserving and even augmenting labor standards in states where unions enjoyed significant amounts of political power. Furthermore, Congress only had the constitutional power to regulate industries engaged in interstate commerce. The breadth of the states’ police powers enabled state labor legislation to reach more workers.

\textsuperscript{14} “Statement of Andrew J. Biemiller, Director, Department of Legislation, American Federation of Labor and Congress of Industrial Organizations, Before the Equal Employment Opportunity Commission on Guidelines on Discrimination Because of Sex.,” June 2, 1967, p.4, UAW Women’s Department.

\textsuperscript{15} Letter from Stella Deakins to Willard Wirtz.

\textsuperscript{16} Letter from Caroline Davis, Director, UAW Women’s Department to Ken Morris, Director, UAW Region 1B (same to Marcellius Ivory, Bard Young, E.S. Patterson, Ken Robinson), Feb. 26, 1969, folder 17, box 11, UAW Women’s Department Papers.

\textsuperscript{17} Statement Presented to Labor committee of the Michigan House of Representatives by Douglas A. Fraser, UAW Executive Board Member-at-Large, Apr. 21, 1969, p.2, folder 18, box 11, UAW Women’s Department Papers; Statement of Andrew J. Biemiller, p.5.
Egalitarian Feminism and Maternalism in the Civil Rights Era

In the mid-1960s, the Women’s Bureau coalition made both gender- and class-based arguments in favor of maternalist protections. First, they premised the importance of protective laws on the gendered division of labor within the family. The Young Women’s Christian Association and the National Council of Jewish Women, for example, argued that “emancipation, while it has released [women] for work, has not released them from home and family responsibilities.” Ruth Miller, the West Coast Education Director for the Amalgamated Clothing Workers, observed that “woman’s role and responsibilities in our culture are not the same as those of the male . . . She may be gainfully employed but at the same time be a wife, mother, homemaker, nurse or any combination of these at different stages of her life.”

Second, the Women’s Bureau coalition argued that working-class women occupied a position of peculiar vulnerability within the labor market. This argument represented the longstanding position of the labor movement and constituted the major rationale for the movement’s opposition to the ERA. A 1962 resolution by the AFL-CIO stated that “patterns of employment, rather than sex differences per se, make for the greater needs by women” for maximum hours and minimum wage laws. Disproportionately employed in non-unionized workplaces, the majority of working-class women lacked the protection of collective bargaining agreements. The AFL-CIO feared that the ERA would produce “an equality without ‘rights.’”

The Women’s Bureau coalition further argued that sex-based protective laws did not in fact force a tradeoff between protection and opportunity for the most vulnerable workers. Women who labored in the lowest-paid occupations did so within highly feminized sectors of the labor market. Within these occupational sectors, few or no ‘male’ jobs existed that women might

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19 Bernstein, “Debate Grows over Job Discrimination Due to Sex.”
20 AFL-CIO convention on minimum wage and maximum hour legislation for women, Nov. 27, 1962, p.2-4, folder 28, box 8, East Papers.
access in the absence of protective laws. Legal restrictions on the conditions of women’s labor, therefore, did not limit the job opportunities of the lowest-income women workers.  

While the Women’s Bureau coalition held steadfast to maternalist ideals, institutional developments at the federal level began to slowly shift the longstanding ideological balance within the women’s movement. In 1961, President Kennedy realized a major goal of postwar feminist advocacy—the creation of a government entity committed to advancing women’s rights—when he established the President’s Commission on the Status of Women (PCSW). The PCSW’s influential 1962 report, American Women, advocated the preservation of protective laws for women. But it also embraced commitments to sex equality, serving as a strong voice for the equal pay legislation that Congress would pass a year later and advocating the extension of state minimum wage laws to male workers. The PCSW report hovered between a New Deal era tradition of protection and newer commitments to equal employment opportunity for women.

That same year, activist Pauli Murray authored an influential memorandum to the PCSW that transformed its stance on the ERA. Murray’s personal journey traversed the Jim Crow South, the Harlem Renaissance, and Howard Law School at the heyday of its involvement in civil rights litigation. Along the way, she challenged race and sex discrimination in education and played leading roles in the Socialist Workers Defense League organizing on behalf of African-American sharecroppers and A. Phillip Randolph’s March on Washington Movement. In her activism, Murray linked struggles for sex equality with those for racial justice and against class oppression.

23 Dorothy Sue Cobble stresses the origins of the PCSW in the postwar movement by women union activists to gain not only the right to paid employment but also social rights. Cobble, The Other Women’s Movement, 4. Cynthia Harrison highlights the PCSW’s role in legitimating the principle of women’s rights, solidifying a national network of female reformers, and negotiating compromise positions between adherents to the opposing philosophies of the Women’s Bureau and the National Woman’s Party. Harrison, On Account of Sex, 306.
24 Harrison, On Account of Sex, 152-54.
Murray argued that feminist advocates should pursue a dual strategy. They should work for the passage of the ERA at the same time as they pursued litigation under the Fourteenth Amendment. The latter promised the flexibility to redress specific ills, while preserving the possibility of differential legal regulation of men and women. Historian Serena Mayeri shows that Murray’s memo had three important consequences. It established litigation as a model to achieve sex equality under the Fourteenth Amendment; brokered a peace within the PCSW between opponents and supporters of the ERA; and linked the women’s movement to the civil rights movement.26

The passage of Title VII pushed the successor to the PCSW, the Citizens’ Advisory Council on the Status of Women, toward a greater embrace of women’s employment opportunity over their protection. The Advisory Council held its first meeting just two days after the House of Representatives voted to pass the Civil Rights Act of 1964. At first, the Council’s members opposed the inclusion of the word “sex” as one of the bases for employment discrimination prohibited by Title VII because of the threat it would pose to sex-based protective laws. Nonetheless, the Council withheld comment at the request of Burke Marshall, the head of the Civil Rights Division of the Department of Justice, whose interest lay in getting the bill passed with or without the addition of a sex provision.27 After the passage of Title VII, however, Murray and other members of the CACSW argued for enforcement of the new rule on employment discrimination on the basis of sex.

In an article provocatively titled Jane Crow and the Law, Murray analogized sex-based oppression to racial oppression.28 Jane Crow challenged the idea that motherhood justified differential legal regulation of men and women. The article drew upon an analytic distinction between biological sex and the cultural biases constituting gender, which originated in the social

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27 Harrison, On Account of Sex, 178-180.

28 She published the piece in December 1965 with co-author Mary Eastwood, an adviser to the Office of Legal Counsel at the Department of Justice and secretary to the PCSW Civil and Political Rights Committee.
sciences and subsequently infused feminist thought. Jane Crow argued for an interpretation of equal protection under the Fourteenth Amendment as well as Title VII’s sex equality mandate that required state actors to treat women, like men, on the basis of individual ability rather than group characteristics. This jurisprudence would liberate women “to develop their maternal and familial functions primarily, or to develop different capacities at different stages of life, or to pursue some combination of these choices.” Jane Crow laid the foundation for feminist advocacy for a sex/gender distinction under law, premised on liberal ideals of individual self-determination and equal treatment.

“Widows, Divorcees and Single Women”: Working-Class Women Reconsider Maternalism

In the early 1960s, working-class women also began to reconsider whether sex-based labor regulations truly offered protection. More than an ideological commitment to individual self-determination, economic concerns motivated their growing skepticism about such regulations. Although we commonly understand the postwar period as a time of unparalleled affluence in American history—a period when employers paid male heads of household a family wage—that narrative belies another story. In this period, women’s wage-earning became increasingly essential to families’ ability to maintain their living standards. Rising divorce rates along with delayed marriage also transformed working-class women into household heads. They were, in their own words, “widows, divorcees and single women” who needed “extra hours to support their mother and father or children.” Blue- and pink-collar women did not necessarily enjoy long hours on the job, but they needed the money that came with overtime work.

Protective laws designed for an industrial economy were increasingly at odds with the emerging service economy. Women disproportionately occupied service jobs and faced customer demands for odd and variable hours. For example, a cosmetologist in Green Bay, Wisconsin

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29 In the 1930s, the anthropologist Margaret Mead distinguished between sex and sex roles. In the mid-1950s, social scientists started to use the word “gender” to describe the composite psychological, social, and cultural factors that differentiated women’s experience from that of men. By the late 1960s and ‘70s, feminist thinkers were beginning to argue that socio-historical forces rather than biology determined gender and to question the normativity of gender roles. Joanne Meyerowitz, “A History of ‘Gender’,” American Historical Review 113, no. 5 (2008): 1353-55.
wanted the liberty to work longer hours in periods of high demand and shorter hours on other
days. Protective laws, however, placed her at a competitive disadvantage. Men in her salon
worked ten hours on high-demand days, whereas state law limited her to nine. Women
workers, furthermore, pointed to hypocrisy in the restrictions on women’s work hours. The laws
prohibited any single employer from hiring a woman to work hours above the statutory limit.
This did not necessarily limit the hours that woman actually worked in the week. Women who
needed the money simply obtained additional part-time or even full-time jobs.

The passage of Title VII cast protective laws in a new light as an obstacle to job
opportunities. Evidence suggests that some employers might have been willing to comply with
Title VII’s prohibition on sex discrimination but for these laws. For example, management at
General Motors’ Saginaw Malleable Iron plant suggested in 1965 it would be willing to hire
women, though it had not done so since 1953. But the laws governing weight-lifting and work
hours posed the “biggest drawback against women.” Some employers, then, welcomed equal
treatment for women so long as women’s participation in the labor market did not bring
heightened labor regulations.

In other cases, employers and state labor agencies used protective laws precisely to avoid
federal antidiscrimination mandates. In Michigan, the Department of Labor ruled in 1965 that
employers had to remove women from jobs as “polishers” or “grinders.” A state law had long
prohibited women from these positions, but women had occupied them since World War II.
Indeed, sex integration had improved work conditions for men as well as women in these jobs;
employers’ compliance with sex-based protective laws had produced safety upgrades across the
board. After Title VII passed, however, political pressure increased to shield male workers
from female labor market competitors. The Michigan Department of Labor consequently stepped

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32 Letter from Richard A. Graham Commissioner, EEOC to Mary Dublin Keyserling, Director, Women’s Bureau,
33 Letter from Martha Bradley to Willard Wirtz, Oct. 27, 1967, folder 15, box 11, UAW Women’s Department
Papers.
34 “Letter from Barbara Decaire to Caroline Davis,” September 29, 1965, UAW Women’s Department
Papers.
35 “Statement Prepared for and Excerpts Given at the White House Conference on Equal Employment Opportunity,
Washington, D.C., August 19,20, 1965, By Caroline Davis, Director of the UAW Women’s Department, Who
Served as a Panelist in the Workshop on ‘Discrimination Becuase of Sex’,” Aug., 19-20 1965. p.3, folder 15, box 5,
UAW Women’s Department Papers.
up enforcement of the law as a means to preserve higher-paid, more desirable jobs for male workers.

Employers could use work schedules and job requirements in combination with protective laws to discriminate against women. For example, after the UAW won $150,000 in an equal-pay claim against agricultural and construction equipment manufacturer Allis-Chalmers, the company threatened to retaliate by implementing a swing shift that would eliminate women from job eligibility. A strike threat by the “militant” local put an end to that threat. Less aggressive locals, however, did not have the power to stop other companies from using similar strategies.36 The passage of Title VII thus shifted the costs and benefits of sex-based protective laws for women workers.

The law also enhanced many women workers’ feminist consciousness. They argued that because they shouldered the same economic burdens as men, both as consumers and producers, they should enjoy equal economic opportunity. One woman argued that because she had to pay the same price as men for commodities, she did not want any “protections” that resulted in less income.37 Another argued that because women’s work product was the same as men they “should be allowed the same privileges as the men.”38

Women industrial workers did not believe in the inherent justice of overtime work and continued to subscribe to the labor movement’s goals of full employment and shorter work weeks.39 But they felt that if overtime existed, it should be available on an equal basis for women and men. A Milwaukee woman who operated a sixty-ton crane in a factory lost $1,500 a year in wages because she could not access overtime work. “We have equal pay for equal work,” she wrote, “now I want equal rights. . . . I believe in forty hour weeks but . . . the men get all the overtime. This is a matter of principle.”40 Stella Deakins, an active member of UAW Local 205,

36 Caroline Davis, “Untitled,” circa no date 1965, UAW Women’s Department Papers.
37 Letter from Regions 1-1A-!B-1E, UAW Women’s Committee, Stella Deakins, Recording Secretary, Oct. 30, 1967, folder 15, box 11, UAW Women’s Department Papers.
38 Letter from Sophie Iwardowski to Willard Wirtz, Oct. 27, 1967, folder 15, box 11, UAW Women’s Department Papers.
40 Letter from Graham to Keyserling, p.4.
advised that sound management principles counseled against “abus[ing ] the health and body of a woman or man” by “demanding excessive and unreasonable hours of work.” Given the fact that management scheduled overtime hours, however, women workers “welcomed” the extra $200 or more that such hours promised.  

While some unions supported rank-and-file members’ growing opposition to protective laws, other unions continued to defend the importance of these laws to their members. A comparison between the UAW and the Hotel and Restaurant Employees Union offers insight into how the institutional structure of unions, their position within the labor market, and their demographic composition affected their differing stances. First, the UAW had a unique history of women’s rights activism within the union. As historian Nancy Gabin has shown, the UAW opposed protective legislation almost two decades before other unions. During World War II, women auto workers pressed their issues onto the union agenda. The creation of a UAW Women’s Bureau in 1946 led to the codification of antidiscrimination principles within the union, the institutionalization of initiatives for women’s equality, and the formation of a network of women’s advocates.

Among them was Caroline Davis, whose stemwinder speech opened this chapter. She was thirty years old in 1941, when she helped organize her factory and won election to her local’s first negotiating committee. As UAW Women’s Bureau Director, Davis led a campaign to hold onto women’s wartime gains. She advocated sex-neutral wage, job, and seniority rules and opposed employers’ use of protective laws to justify replacing female with male workers during reconversion. In the early 1960s, Caroline Davis acted as a conduit between women’s rights reformers and the labor movement. According to “feminist godmother” Catherine East, Davis “was not only the smartest and prettiest and probably the youngest member” of the PCSW but also “the most courageous participant.” Despite the “great[] pressures against dissent,” Davis in 1963 had filed a lone minority opinion in support of the ERA.  

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42 Cobble, The Other Women’s Movement, 40.
leadership by women including Davis and Dorothy Haener, who had risen to from the rank-and-file to become an International Representative, fostered the UAW’s progressive stance on women’s rights. This institutional commitment, in turn, primed rank-and-file women members to oppose the maximum hours laws.

Second, industrial unions such as the UAW had the benefit of FLSA protections, whereas craft unions did not. The auto workers, along with the chemical and steelworkers, labored in industries engaged in interstate commerce and accordingly were covered by the FLSA. If UAW women faced mandatory overtime after the repeal of the hours law, then they would be compensated for this burden. By contrast, restaurant, hotel, and motel workers, even if represented by a union, lacked FLSA coverage because they worked in industries commonly understood to engage only in intrastate commerce. Accordingly, hotel and restaurant workers would face overtime without any extra financial compensation.

Third, the demographic composition of the two unions determined the extent to which repeal of sex-based protective laws would open up job opportunities to women. Wolfgang’s Hotel and Restaurant Employees Local 705 had 10,000 members of whom 85% were women. Because the hotel and restaurant industry itself was feminized, protective laws did not prevent many women from competing for ‘male’ jobs. By contrast, less than half the UAW membership was female. A far greater proportion of jobs within the auto industry were higher-income positions that employers restricted to men as a result of protective laws for women. Sex-based protective laws blocked women autoworkers who sought access to ‘male’ jobs.

In 1965, Davis reported to the UAW that sex-based protective laws discriminated against women workers. Maximum hours laws barred women from promotions to departments that required overtime, allowing men with less seniority to take the jobs. In addition, twelve states’ restrictions on the weight that female employees could lift—between fifteen and thirty pounds—underestimated women’s strength. Dorothy Haener used women’s performance of domestic

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44 Letter from Myra K. Wolfgang, Jan. 28, 1969, folder 18, box 11, UAW Women’s Department Papers.
46 “Statement Prepared for and Excerpts Given at the White House Conference on Equal Employment Opportunity, Washington, D.C., August 19,20, 1965, By Caroline Davis, Director of the UAW Women’s Department, Who
work to argue that they could perform all kinds of industrial work, as well: “to say that women can’t lift over 15 pounds . . . would rule out most of us gals carrying a well-stocked purse. Women in their homes . . . carry babies, laundry, a vacuum sweeper, bags of groceries, etc., regularly weighing 35 pounds.”

Technological advances, moreover, had rendered brute strength less important in industrial workplaces. According to Davis, the only sex-based protective laws that did not discriminate were those that provided benefits such as seating on factory floors, meal periods, minimum wages, and maternity leave prior to and following childbirth. Davis’ report proved influential with the union leadership.

At its twentieth convention in 1966, UAW leaders called on locals to campaign for reform of “out-dated and unrealistic labor laws.” Laws which “restrict[ed] the earnings and job opportunities for . . . women members” violated both UAW contracts and Title VII. This situation meant that the union was saddled with resource-intensive processing of grievances, arbitration claims, and litigation. In sum, workers’ attitudes toward protective laws depended on their family structures and economic resources, the tradition of feminist activism within their unions, whether they were covered under federal labor law, and the degree of sex segregation within their labor sectors.

Working for the repeal of sex-based laws, however, was only half the equation. At the 1966 convention, the UAW also pledged to “lend its efforts to achieving necessary amendments to state labor laws to provide equal treatment for men.” Men, for example, would also benefit from laws protecting them from lifting weight beyond their individual capacities. Davis explained, “We don’t want to see men develop hernias or other illnesses because of excessive weights.” By the mid-1960s, the calculus had changed for the UAW. Whereas the Women’s


Bureau coalition believed it essential to keep sex-based protective laws, even if they could not be extended to men, the UAW prioritized fighting sex-discriminatory laws, even as they began to campaign for their extension to men.

The UAW was not alone in suggesting that extension might pose a solution to the discrimination wrought by sex-based protective laws. *Jane Crow* had likewise argued that employers could harmonize state law with Title VII by extending “beneficial” protective laws—such as those providing for minimum wages or rest periods—to men.\(^{51}\) Yet Murray had taken a more tentative position than the UAW. *Jane Crow* had determined that Title VII did not require the extension of “restrictive” regulations, such as those limiting the maximum weight that women could lift or hours they could work. Extending these restrictions to men would require an employer to restructure “the manner of operating his business.” Mandating that an employer eliminate night work, reduce the weight of equipment or products, or restructure work shifts “would be unrealistic and far removed from the purpose of the Civil Rights Act. . . .”\(^{52}\)

*Jane Crow*’s analysis reveals how an antidiscrimination paradigm, focused on the federal courts, limited the political imagination of feminist attorneys. Title VII left intact the fundamental terms of workplace organization, requiring neither employers nor courts to alter them. But legislatures and administrative agencies could respond to the advent of sex equality as a legal principle by acting independently of Title VII’s mandate to expand protective regulations. The UAW’s tradition of legislative and administrative activism led it to focus on this potential.

**II. The Triumph of the Antidiscrimination Paradigm**

*What is “Discrimination Because of Sex?” The EEOC, Sex-Based Protective Laws, and the Split in the Women’s Movement, 1965-1966*

In August 1965, the White House Conference on Equal Employment Opportunity brought the dueling camps within the labor and women’s rights movements to Washington. A panel titled “Discrimination Because of Sex” addressed vexing questions: Did sex-based protective laws violate Title VII? The Women’s Bureau coalition urged the EEOC to interpret


\(^{52}\) Ibid., 250.
Title VII as leaving in place sex-specific state protective laws. By contrast, Caroline Davis and the UAW urged the EEOC to conduct an empirical study of which sex-based protective laws were “outmoded” and which were “still needed.”\(^{53}\) The dominant narrative depicts the EEOC as dragging its heels in the enforcement of the sex provision of Title VII. Yet if we take seriously the arguments of labor and women’s rights reformers against the repeal of sex-based protective laws, the early policy of the EEOC looks different.

The EEOC Commissioners grappled with exceedingly difficult questions of interpretation. The statute provided that sex, as well as religion and national origin, might constitute “a bona fide occupational qualification” (BFOQ) exempting a defendant from liability. Could a state labor law serve as a BFOQ? The federal statute provided little guidance. It stated only that employers had continued responsibilities under state law, so long as that law did not require the employer to commit an unlawful employment practice. This amounted to a tautology unless one had an external measure by which to evaluate whether complying with a sex-based protective labor law violated Title VII. The absence of formal legislative history on the statute’s sex provision, however, made such a measure elusive.\(^{54}\)

The EEOC’s inaugural commissioners held disparate views. Franklin D. Roosevelt, Jr., the first Chair of the EEOC, was committed to enforcing the sex provision yet uncertain of its scope. Other commissioners included Luther Holcomb, who was resistant to the sex discrimination mandate, and Samuel C. Jackson who took a tentative stance. Richard Graham, who would help found the National Organization of Women (NOW) in 1966, and Aileen Hernandez, who became President of NOW in 1970, were the most dedicated to the cause of equal employment opportunity for women.

Hernandez’s experiences as an African-American woman enhanced her skepticism of protective laws. Hernandez was a former organizer with International Ladies Garment Workers


Union and Deputy Chief of the California Division of Fair Employment Practices from 1962 to 1965. The only woman among the five original EEOC commissioners, Hernandez was born to Jamaican-American parents in Brooklyn in 1923 and was a graduate of Howard University. She was sensitive to the fact that the exclusion of domestic and agricultural workers from coverage under both FLSA and state protective labor laws disproportionately affected African American women. As Pauli Murray explained: “Negro women enjoy neither the advantages of the idealizations of ‘womanhood’ and ‘motherhood’ which are part of American mythology, nor the ‘protections’ extended to women which opponents of the Equal Rights Amendment are so zealous to preserve.”

Hernandez and Graham led the EEOC effort to reconcile Title VII and state labor legislation. Yet even they did not take an extreme stance that Title VII by its own force invalidated all sex-specific protective laws. Graham hoped the EEOC would formulate a policy that state protective laws could never justify discrimination. He did not claim that Title VII invalidated all sex-based protective laws; but he was becoming increasingly suspicious that employers used the laws as subterfuge for discrimination.

In walking a tightrope between Title VII and state labor laws, the EEOC’s December 1965 guidelines similarly endeavored to distinguish sex from gender. The guidelines stated that the BFOQ exception “should be interpreted narrowly,” so as to prevent it from swallowing Title VII’s sex discrimination mandate. The EEOC gave three negative examples of a BFOQ first outlined in a memorandum by Margaret Hickey, Chair of the Citizens Advisory Council on the Status of Women, and shortly thereafter in Murray’s Jane Crow. Prejudices or biases in the minds of customers, clients, or fellow employees could not serve as a BFOQ. Neither could assumptions about women’s life patterns, such as their propensity to leave the workforce. Nor could stereotypes about women’s life patterns, such as their propensity to leave the workforce.

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men.\textsuperscript{60} Sex might serve as a BFOQ only when necessitated by “authenticity or genuineness,” as in case of an actor or actress.\textsuperscript{61}

The EEOC’s 1965 guidelines stated that Title VII did not eradicate state laws that had the purpose and effect of “protecting women against exploitation and hazards.”\textsuperscript{62} But the EEOC provided little guidance about how to answer the looming, difficult question: which laws were genuinely protective and which discriminatory? Some so-called ‘protective’ laws clearly worked to discriminate against women. The EEOC gave the example of laws limiting the weight women workers could lift, “set at an unreasonably low level.” Employers violated Title VII when they used such laws to veil acts of gender discrimination. Employers also violated Title VII when they refused to hire women to avoid complying with a valid protective law, such as a state minimum wage rule, that required them to extend a benefit to female employees. But employers could lawfully refuse to hire or promote women when the jobs at issue were in conflict with state laws restricting women’s work hours and conditions.\textsuperscript{63} The guidelines raised more questions than they answered. They left workers, unions, employers, and state labor departments to draw the line between valid regulations that reflected genuine protective intent and invalid regulations rooted in gender stereotypes.

In their ambivalence, the EEOC guidelines encouraged both opponents and defenders of sex-based protective laws. At the third annual conference of state commissions on the status of women, in June 1966, a number of feminist reformers expressed anger at the perceived failure of the EEOC to enforce Title VII’s sex provision. They held a famous midnight meeting in the hotel room of Betty Friedan, author of the 1963 bestseller \textit{The Feminine Mystique}, to devise a plan to jumpstart the recalcitrant EEOC and cautious state commissions. The next morning the dissenters proposed a strongly-worded resolution denouncing the agency and demanding that the EEOC treat sex discrimination as a serious issue. Defenders of the state protective laws, however, thwarted debate on that resolution and another in support of the ERA. The incensed

\textsuperscript{60} Ibid., 243-46; Memorandum from Margaret Hickey, Chairman, to members of the Citizens’ Advisory Council on the Status of Women, September 11, 1965, p.8-9, folder 8, box 4, East Papers.
\textsuperscript{63} Ibid.
agitators devised a plan over lunch; they decided to form a new organization modeled on the NAACP that would advocate for women’s equality. Dorothy Haener and Caroline Davis of the UAW broke with labor movement stalwarts to participate in the founding of the National Organization for Women.\textsuperscript{64}

The Women’s Bureau coalition organized a counter-campaign; Margaret Healey, Dorothy Height, and Olya Margolin, at the respective helms of the National Councils of Catholic, Negro, and Jewish Women, took the lead. The American Civil Liberties Union and several more conservative labor unions also joined the maternalist coalition.\textsuperscript{65} In the summer of 1966, these maternalists wrote to EEOC Chairman Franklin Roosevelt, Jr. and Acting Chairman Luther Holcomb.\textsuperscript{66} “There is some misunderstanding,” they wrote, of “the importance of maintaining present State labor standards for women until such time as the laws are reexamined and improved to provide good labor standards for all workers.”\textsuperscript{67} One supporter argued that the laws’ eradication would benefit “highly skilled, or favorable situated women” while harming “those with the least skill and bargaining power.”\textsuperscript{68}

Facing pressure from both camps, the EEOC turned the fate of the protective laws over to the courts and legislatures. August 1966 guidelines stated that in cases involving a conflict between Title VII and state protective laws, the EEOC “would decline to make a determination of reasonable cause.” Instead, the agency “would leave the charging party to judicial remedies.”\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{64} Cobble, \textit{The Other Women’s Movement}, 184-85; Flora Davis, \textit{The World Split Open: How the Modern Women’s Movement Changed America} (New York: Viking, 2000), 74-75.
\item \textsuperscript{65} These unions included the Including the International Union of Electrical, Radio, and Machine Workers and the Amalgamated Clothing Workers of America. “Letter from Dorothy I. Height National President, National Council of NEgro Women, Inc., to Luther Holcomb, Acting Chairman EEOC” July 7, 1966, p.1, UAW Women’s Department Papers.
\item \textsuperscript{66} Letter from Dorothy Height to Franklin Roosevelt, July 28, 1966; Letter from Mary Dublin Keyserling to Catherine Conroy, July 20, 1966; Letter from Olya Margolin to Franklin Roosevelt, Jr. July 30, 1965. All documents located in folder 10, box 16, Catherine East Papers, Schlesinger Library, Radcliffe Institute, Harvard University [hereafter East Papers].
\item \textsuperscript{67} “Letter from Dorothy I. Height National President, National Council of Negro Women, Inc., to Luther Holcomb, Acting Chairman EEOC” July 7, 1966, p.2, UAW Women’s Department Papers.
\item \textsuperscript{68} National Consumers League Statement on State Protective Labor Legislation, January 1967, p.1-2, folder 18, box 16, East Papers.
\item \textsuperscript{69} 32 Fed. Reg. 5999 (Apr. 14, 1967).
\end{itemize}
“Channels of Communication”: Women Workers Turn to the Federal Courts, 1966-1968

As working-class women’s opposition to protective laws grew, they turned to the federal courts for remedies. These lawsuits accentuated the injurious consequences of the protective laws while minimizing the laws’ benefits. Anne Draper, an AFL-CIO economist and ardent supporter of protective labor standards, worried that the litigation caused reformers “to lose perspective” on the protective laws’ importance. She explained the dynamic: “The complaint machinery under Title VII provides a built-in channel of communication and ready documentation . . . for highlighting particular situations in which the operation of a law works to the disadvantage of certain individuals.” No similar “channel of communication” existed for those harmed by the removal of protective laws.70

In April 1966, Velma Mengelkoch announced that she planned to bring a case challenging the California Labor Code’s protective laws “all the way to the Supreme Court.”71 Mengelkoch was a UAW spokeswoman at North American Aviation, Inc.’s Autonetics plant in Anaheim, California. Speaking at hearings sponsored by the California Commission on the Status of Women, she described herself—a widow supporting three children—and many of her female coworkers as “heads of households.” They needed opportunity more than protection: “nobody allows us to pay less rent, or get meat cheaper or pay any less income tax.” Mengelkoch wanted “the right to accept or reject” jobs that would require overtime work or heavy lifting, but which paid higher wages.72

Mengelkoch used the courts as a venue to publicize women’s campaign for equal citizenship.73 Her October 1966 complaint in federal district court, seeking to enjoin California’s enforcement of laws limiting women’s work hours, alleged that these laws violated both Title VII and the Equal Protection Clause of the Fourteenth Amendment.74 Mengelkoch described her

70 Letter from Anne Draper, Economist, AFL-CIO, to ACLU Equality committee Chairman, Marvin Karpatkin, Mar. 13, 1968, quoted in Memorandum from Alan Reitman and Susan Goldstein to the Board regarding Sex Discrimination, p.5.
71 “Autonetics Women Land ‘Equality’ Blow.”
72 “Autonetics Women Land ‘Equality’ Blow” Santa Ana California Evening Register, April 2, 1966, folder 9, box 10, East Papers.
73 Robert Self recognizes that Mengelkoch exemplified women workers’ use of Title VII to reconfigure the workplace, but misses the case’s significance to the Fourteenth Amendment. Self, All in the Family, 116-17.
lawsuit as a claim for recognition that women “are ‘persons’ as stated in the fourteenth amendment.” She was conscious of her role as the first woman in the nation to challenge sex-based protective laws in court and a symbol of “great courage” in the fight for sex equality. Mengelkoch spent much of her own money on her case: “Shoes had to be worn longer than their life expectancy and clothing mended many times in place of purchasing a new supply.” But, she said, “Should the case be a successful one you will never hear of my complaining.” Instead, the suffering only deepened her resolve.

In contrast to Mengelkoch, Lorena Weeks did not set out to advance a feminist cause; she merely wanted a better job. Weeks was “no bra burner” but rather “a mid-Eastern Georgia, church-going wife and mother, a nose-to-the-grindstone sort of woman who doesn’t belong to any women’s group.” Weeks worked for Southern Bell as a telephone operator in Atlanta. When her mother died, Weeks transferred to the Bell exchange in her hometown of Wadley to help support her brothers and sisters. When the Wadley exchange switched from manual to dial service, Weeks took a job as an Outside Plant Clerk in Swainsboro in 1965. She worked alone in the plant as a night operator from eleven at night until seven in the morning, and she drove forty miles round-trip each day from her home in Wadley. In March 1966, Weeks applied for the position of switchman. The job was closer to home, had daytime hours, and would pay $51.50 per week more than she was earning. Southern Bell rejected her bid for the position of switchman because she was a woman. Weeks filed a complaint with the EEOC and, subsequently, a suit in federal district court.

At times, the lack of union support for resolving sex discrimination grievances led working-class women to the courts. Leah Rosenfeld had worked for the Southern Pacific as an agent-telegrapher. The railroad company rejected her bid for a higher-paying freight agent job.

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76 Ibid.
78 Fact Sheet on Lorena Weeks & Weeks v. Southern Bell, folder 34, box 10, East Papers; see also Original brief on behalf of Lorena Weeks in the Southern District of Georgia, folder 35, box 10, East Papers.
80 “Fact Sheet on Lorena Weeks & Weeks v. Southern Bell,”
citing California law restricting hours that women could work as well as the maximum weight they could lift on the job.\textsuperscript{81} Rosenfeld delayed too long in filing a grievance with the Transportation-Communication Employees Union. She likely believed the union would not support her claim because it had demonstrated a commitment to preserving better jobs for male workers.\textsuperscript{82} Lacking another option to obtain redress, Rosenfeld filed a lawsuit in the same district as had Mengelkoch—the central district of California.

Rosenfeld, a fifty-eight year old mother of twelve, used women’s labor in the domestic sphere to challenge the gender stereotypes that underpinned some protective laws.\textsuperscript{83} At trial, Rosenfeld’s attorney highlighted the fact that she worked long hours—“in excess of eighty hours a week”—as a landowner who combined ranch work with her day job. Rosenfeld had also demonstrated that she could lift heavy weights. Rosenfeld drove a tractor and regularly carried feed sacks weighing up to one-hundred pounds.\textsuperscript{84} As a freight agent, Rosenfeld would work ten to twelve-hour days during harvest seasons and load and unload freight weighing up to eighty pounds.\textsuperscript{85} She was up to the job.

The federal district courts diverged in their rulings on the legality of sex-based protective laws. The Southern District of Georgia ruled against Lorena Weeks, holding that a state protective law rendered sex a BFOQ for the job of switchman and, consequently, exempted Southern Bell from liability under Title VII.\textsuperscript{86} The courts likewise tested Mengelkoch’s resolve. In May 1968, a three-judge district court (customary in this period when a lawsuit filed in federal district court raised a constitutional issue) dismissed the case on the ground that it posed no substantial constitutional question.\textsuperscript{87} After the dissolution of the three-judge court, the case reverted back to a single-judge federal district court, which dismissed the case on the ground that

\textsuperscript{83} “State Law on Women’s Working Hours Voided,”\textit{Los Angeles Times}, Part II, Sept. 11, 1968, folder 23, box 1, East Papers.
\textsuperscript{84} Handwritten excerpt from page 25 of the transcript of proceedings, In the United States District Court for the Central District of California, Rosenfeld v. Southern Pacific Co., No. 67-1377-F, attached to Note from Catherine East to Bessie, July 31, 1969, folder 23, box 10, East Papers.
\textsuperscript{87} Mengelkoch, 284 F. Supp. at 953-55.
it raised issues of state law and thus belonged in the state courts.\textsuperscript{88} Leah Rosenfeld was more fortunate; her case was assigned to a considerably more sympathetic district court judge than Mengelkoch’s. Judge Warren J. Ferguson struck down California’s protective laws for women with little explanation.\textsuperscript{89}

\textit{“A Jane Crow Law”: Middle-Class Feminist Legal Advocacy and the Shift within the EEOC, 1968-1969}

Feminist attorneys, middle-class women’s groups, and government reformers viewed working-class women’s lawsuits as an opportunity to advance their goals, too. Mengelkoch’s case, in particular, attracted considerable support from feminist attorneys. Pauli Murray believed that the case would demonstrate the power of the feminist movement to aid working-class women. Catherine East hoped that the case might heal the divide within the women’s movement on the question of protective laws. Citizens’ Advisory Council member Marguerite Rawalt assumed responsibility for the case in 1967, funded in part by the NOW Legal Committee.\textsuperscript{90} The Federation of Business and Professional Women’s Clubs, NOW, and the UAW—departing ways with the AFL-CIO—filed supportive amici curiae briefs.\textsuperscript{91} NOW’s brief called the California statute a “Jane Crow law,” analogizing “special treatment for women” to the “separate but equal” doctrine struck down in \textit{Brown v. Board of Education}.\textsuperscript{92} The same group of feminist reformers, consisting of Rawalt, East, New Orleans lawyer Sylvia Roberts, and Pauli Murray’s co-author Mary Eastwood assisted Lorena Weeks in her appeal to the Fifth Circuit.\textsuperscript{93}

Feminist advocates pursued administrative reforms in addition to supporting litigation efforts. For example, feminists critiqued a June 1967 ruling of the U.S. District Court for the

\begin{thebibliography}{99}
\bibitem{Mengelkoch} \textcite{Mergelkoch v. Indust Welf. Comm., 284 F. Supp. 956 (C.D. Cal. May 1, 1968)}.
\bibitem{Rosenfeld} \textcite{Rosenfeld, 293 F. Supp. at 1224}.
\bibitem{Mayeri} \textcite{Mayeri, \textit{Reasoning From Race}, 31}.
\bibitem{Rawalt} Marguerite Rawalt and Evelyn E. Whitlow, Brief of the National Organization for Women as Amicus Curiae, In the United States District Court for the Central District of California, Mengelkoch v. Industrial Welfare Commission et al., No. 66-16-18-S, folder 15, box 118, NOW Records. \textsuperscript{\textlt{Cite other briefs}}\textsuperscript{\textgreater}
\bibitem{Mayeri} \textcite{Mayeri, \textit{Reasoning From Race}, 32}.
\end{thebibliography}
Southern District of Indiana, which held that Colgate Palmolive Co. did not violate Title VII when it restricted Thelma Bowe and other women workers to lower-paid “finishing labor jobs” within a plant because of their alleged inability to perform the heavier work required in higher-paid “general labor jobs.” The decision had relied in part on Bulletin 110 of the U.S. Department of Labor, which supported a report by the International Labour Organization (ILO) recommending weight limits for women workers. The ILO report stated that heavy lifting endangered women’s reproductive capacity, particularly during pregnancy. Rawalt wrote a letter to Secretary of Labor Willard Wirtz asking how he, as a former member of the PCSW, could have supported the ILO recommendation. Catherine East called the U.S. government position “very embarrassing.” In the spring of 1968, the Department of Labor took a stand against the ILO convention. Litigation by working-class women had led middle-class feminist to advocate government reforms that took U.S. policy further away from maternalist protections toward greater economic opportunity within a less-regulated labor market.

Meanwhile, the National Organization for women exerted sustained pressure on the EEOC. NOW members testified at EEOC hearings, wrote letters, spoke to the media, and held public rallies calling for equal treatment of women workers. NOW also had a direct influence on the EEOC via Sonia Pressman, an attorney adviser at the agency. Historian Nancy MacLean describes Pressman as a “double agent.” During the day, Pressman worked within the EEOC for greater enforcement of Title VII’s sex-equality mandate. At night, she attended NOW meetings, learning about the concerns of the broader women’s movement and forging strategies for greater

94 Ibid., 347, 354-57.
98 Memorandum from Catherine East to Esther Peterson, November 3, 1967.
employment opportunities for women. Because of its influence, the stance taken by NOW came to stand in for the range of women’s rights activism concerning protective laws. Increasingly, sex equality came to mean the erosion of sex-based protective laws rather than their extension.

By the late 1960s, the EEOC gradually embraced NOW’s position that sex-based protective laws violated Title VII. In three decisions, the EEOC held that employers must hire on the basis of individual ability and that state laws limiting the weight women could lift did not constitute a BFOQ. Although these decisions were nonbinding, they nonetheless influenced the outcome in some federal court cases. In August 1969, the EEOC issued revised guidelines, stating that protective laws could no longer counter a charge of sex discrimination under Title VII. The laws, the EEOC reasoned, had “ceased to be relevant to our technology or to the expanding role of the female worker in our economy.” NOW members were ecstatic, claiming that their efforts had changed the law.

At the decade’s turn, landmark decisions in the U.S. Courts of Appeal dealt sex-based protective laws a final blow. In March 1969, the Fifth Circuit Court of Appeals reversed the trial court in Lorena Weeks’ case, holding that Georgia’s weight-lifting law could not serve as a defense to sex discrimination under Title VII. Then, in January 1971, the Ninth Circuit reversed the three-judge district court in Velma Mengelkoch’s case, holding that state enforcement of protective laws raised a substantial constitutional question under the Fourteenth Amendment. The court reasoned that the paternalist constitutional regime represented by Muller v. Oregon no longer controlled the case. In addition, the court of appeals held that the district

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100 MacLean, Freedom is Not Enough, 127.
101 In February 1968, the EEOC broke its silence on the contentious issue of protective laws for women, only to go back to the same position first articulated in its December 1965 guidelines. 33 Fed. Reg. 3344 (Feb. 24, 1968).
103 See, for example, Colgate Palmolive v. Bowe 416 F.2d 711, 717 (7th Cir. 1969).
106 408 F.2d at 236.
107 First, the factors that Supreme Court considered in Muller—women’s maternal function, their dependence on men, their lack of disposition to assert their rights in workplace—either no longer existed or had diminished
court erred in abstaining on the Title VII claim. Six months later, in June 1971, the Ninth Circuit upheld the district court in *Rosenfeld* invalidating California protective laws for female workers as a violation of Title VII. Citing the EEOC’s 1969 guidelines, the Ninth Circuit in *Rosenfeld* held that employers’ assumptions about women’s physical capacities could never justify making sex a BFOQ. The decision in *Rosenfeld* rendered the controversy in *Mengelkoch* moot. A claim under Title VII and not the Equal Protection Clause invalidated California’s laws regulating the hours of working women.

EEOC guidelines and federal court decisions did not alone catalyze enforcement of Title VII. More than two years after the Fifth Circuit ruled that the district court must afford Lorena Weeks “appropriate relief,” Southern Bell had still not awarded Weeks the switchman position. Weeks’ plight became a cause célèbre. On behalf of the National Board of NOW and leveraging her position as a former EEOC Commissioner of the EEOC, Aileen Hernandez wrote to the president of Southern Bell: “Not only has [Weeks] been denied that position, the ‘great’ Southern Bell system has elected to pit its might against Ms. Weeks -- a working woman whose alleged frailty triggered the initial complaint.” A NOW circular put it this way (in all caps): “SHE BELIEVES THAT HAD SHE GOTTEN THE JOB IN 1966, SHE WOULD NOT HAVE HAD TO BORROW MONEY FOR HER CHILDREN’S EDUCATION (AT 12%) OR SELL HER HOUSE. HELP LORENA WEEKS. HER LONELY, COURAGEOUS STRUGGLE . . . WILL HELP THOUSANDS OF US.” Weeks, herself, told a newspaper that she had been “‘thrilled to death,’” when the Fifth Circuit handed down its decision. But “‘I thought it would soon be over . . . . My patience is sorta worn.’”

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relevance more than a half-century later. Second, *Muller* did not serve as a true precedent. An employer had filed the suit in *Muller* challenging the state police power under the Due Process Clause, while *Rosenfeld* and *Mengelkoch* involved actions by an employee brought under the Equal Protection Clause. Third, the Court decided *Muller* in light of the infamous *Lochner* case, which could only be circumnavigated by differentiating between male and female workers. That doctrinal bind no longer existed. *Mengelkoch* v. Ind. Welfare Commission, 442 F. 2d 1119, 1122-24 (9th Cir. 1971).

108 Ibid., 1125-27.
110 Letter from Aileen C. Hernandez to Frank M. Malone, President, Southern Bell, Atlanta, Feb. 18, 1971, folder 34, box 10, East Papers.
111 Fact Sheet on Lorena Weeks & Weeks v. Southern Bell.
112 “Still not a switchman, Lorena Keeps on Hoping.”
Weeks’s perseverance finally paid off when in August of 1971 Southern Bell made her a “switchman--woman, that is--at last.”\textsuperscript{113} The concession came amid increasing pressure from the EEOC. The Bell System was the nation’s largest employer of women. Its discriminatory practices—AT&T alone accounted for seven percent of EEOC complaints in 1970—helped convince the EEOC to turn from individual complaints to systemic assaults on discrimination, in the form of a report in 1971 that documented extensive sex and race discrimination. The report concluded that “The Bell monolith is, without doubt, the largest oppressor of women workers in the United States.” This public lashing helped produce compliance with the Fifth Circuit order in \textit{Weeks}, and ultimately led to a consent decree against AT&T that represented the EEOC’s largest backpay settlement to date.\textsuperscript{114} Only one year after the 1973 consent decree, the number of women in skilled jobs had increased seventy-eight percent.\textsuperscript{115}

\textbf{III. A Lost Alternative: The Pursuit of Universal Protective Legislation in Michigan}

After the enactment of Title VII, several states eliminated protective limits on women’s work hours under both the federal law and its state analogues. The Communication Workers of America supported a worker’s petition to the Arizona Civil Rights Commission, which resulted in the invalidation of the state’s sex-based protective law.\textsuperscript{116} The following spring, the UAW catalyzed a legislative campaign in Maryland that led to the repeal of an hours law for women,\textsuperscript{117} and the union was instrumental in a similarly successful campaign in Delaware.\textsuperscript{118}

Other states found repeal too drastic. Instead, they amended hours’ laws to make them more flexible. Pennsylvania, for example, permitted employers to petition a state agency to allow women workers voluntarily to work in excess of the statutory limitations. The problem with this solution, as Cecelia Carrigan of the UAW Women’s Department noted, was that such a

\textsuperscript{113} Judy Flander, “Switchman--woman, that is--at last,” \textit{D.C. Daily News}, August 4, 1971, folder 34. box 10, East Papers.
\textsuperscript{114} Maclean, \textit{Opening of the American Workplace}, 131-33.
\textsuperscript{115} Stansell, \textit{Feminist Promise}, 298.
\textsuperscript{116} “Memorandum from Dorothy Haener to Caroline Davis,” April 8, 1967, UAW Women’s Department Papers.
\textsuperscript{117} Ibid., 2.
\textsuperscript{118} Ibid., 8.
“ponderous procedure” would discourage employers from pursuing it. Women’s opportunities for overtime work, she predicted, would not improve.\textsuperscript{119}

Several states, including Virginia, Wyoming, and Idaho, turned to premium pay as an alternative to repeal of hours laws.\textsuperscript{120} Premium pay represented a market-based solution to protecting women workers; theoretically, the additional compensation would deter employers from imposing long hours, while the possibility of such hours would both broaden women’s employment opportunities and foster “a positive business climate.” Proponents argued that overtime pay would balance workers’ interest in humane hours and management’s interest in flexibility necessary “to meet production requirements.” When a Wisconsin Industrial Commission endorsed the premium pay solution, however, five of twelve members dissented. Communication Workers of America activist Catherine Conroy and feminist reformer Kathryn Clarenbach argued that premium pay could not “protect the worker from excessive overtime demands of employers” because the added wages fell far short of the cost of hiring additional workers. These dissenters argued that the law should impose premium pay for up to fifty-four work hours per week. Beyond that, an employee should be able to refuse work without suffering job sanctions. Only in Michigan did unions’ political power give labor feminists the chance to pursue this ideal: a legislative right to refuse overtime work without retaliation by an employer.

\textit{“A Hell of a Storm”: The Repeal of the Maximum Hours Law for Women}

The question of whether Michigan should end its restrictions on women’s hours of work sparked a jurisdictional contest that traversed all branches of the state government. In the fall of 1967, both houses of the Michigan legislature unanimously repealed the hours’ law for women.\textsuperscript{121} At the time, forty-three of fifty states had a maximum-hours law for women, and

\textsuperscript{119} “Letter from Cecelia Carrigan, International Representative Women’s Department to Henry Lacayo, President, Local 887, UAW,” February 27, 1967, UAW Women’s Department Papers.

\textsuperscript{120} Ibid.,1-2 (Discussing Virginia law exempting from the state hours’ laws those female employees covered by FLSA and Wyoming and Idaho laws allowing women to work overtime when they were paid time-and-a-half). Testimony from UAW activist Lillian Hatcher helped move a similar bill in Illinois to the floor of the state house of representatives, but the bill was defeated in the senate. “Memorandum to Hon. Joseph C. Fagan, Chairman; Hon Gene A. Rowland, Commissioner; Hon. Edward E. Estowski, Commissioner, Industrial Commission of Wisconsin,” 8-9 1967, UAW Women’s Department Papers.

\textsuperscript{121} Morgan O’Leary, “Women’s Wrath Shakes Lansing as Males Quail,” \textit{The Detroit News}, October 21, 1967, folder 16, box 18, UAW Women’s Department Papers.
Michigan was a frontrunner in the trend toward the repeal. Soon thereafter, however, the legislature created a state Occupational Safety Standards Commission, stipulating that protective laws would remain in effect until the Commission had promulgated new labor standards. The tension between the two mandates produced “rampant” confusion within unions and on factory floors.

The legislature’s waffling pushed the debate to the executive branch. In March 1968, the Michigan Attorney General issued an opinion that the statute creating the Occupational Commission superseded the statute repealing the maximum hours law. The Attorney General’s opinion passed the buck to the newly created Occupational Commission. In public hearings that summer, the UAW argued that the Commission should make all overtime work by male as well as female workers strictly voluntary. In issuing regulations, the Commission embraced the UAW’s commitment to equal employment opportunity but not its commitment to universal hours laws. Regulations scheduled to go into effect in early 1969 repealed the restrictions on women’s hours. But the Commission did not promulgate sex-neutral regulations on workers’ hours.

The Big Three auto companies supported the repeal of women’s work hours in Michigan, and employers across the country took the same position on their states’ laws.

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122 Fogel, “Judge Tells Women to Prove that Overtime is Harmful,” Jan. 31, 1969, folder 16, box 11, UAW Women’s Department Papers.
124 Transmittal Slip from Olga Madar to Caroline Davis, November 1967, folder 15, box 11, UAW Women’s Department Papers.
125 Letter from Bernard F. Ashe, Assistant General Counsel, regarding the Attorney General Opinion 4617 to be sent to employers where the UAW has contracts covering female employees, folder 16, box 11, UAW Women’s Department Papers.
126 Memorandum from Leonard Woodcock, Aug. 8, 1968, folder 16, box 11, UAW Women’s Department Papers.
128 The repeal did not affect domestic and agricultural workers, who were not subject to the Commission’s jurisdiction. Act 285 of 1909, however, did not impose limits on these workers’ hours. Helen Fogel, “Work Hours Ceiling Raised for Women,” Detroit Free Press, Nov. 26, 1968, folder 17, box 11, UAW Women’s Department Papers.
129 Memorandum from Stephen I. Scholssberg and Bernard F. Ashe to Leonard Woodcock and Ernie Moran, May 23, 1968, folder 18, box 11, UAW Women’s Department Papers. See also, “Letter from Duane D. Daggett, Manager, Labor Relations Department, Illinois State Chamber of Commerce to Lillian Hatcher”; “Letter from Duane D. Daggett, Manager, Labor Relations Department, Illinois State Chamber of Commerce to Stephen Schlossberg, General Counsel, United Auto Workers,” June 14, 1967, UAW Women’s Department Papers.
Indeed, repeal served business interests by enhancing employers’ control over workers. Limits on women’s work hours put a spoke in the wheel of production. By freeing women from maternalist protection, the repeal also represented an opportunity for management to speed up production. Now management could deny women meal breaks and force them to work longer hours. There thus existed ideological overlap between UAW opposition to sex-based protective laws and business advocacy for a workplace unfettered by labor regulation.

Employers also welcomed the campaign for the repeal because it promised a way out of the legal uncertainty they faced. Bound by both state protective laws and Title VII, employers found themselves, in the words of one lawyer, “caught between the devil and the deep blue sea.” After the Attorney General’s opinion that the protective laws remained in effect, General Motors management that despite its support for repeal it nevertheless was bound to follow earlier limits on women’s work hours. When the dust finally settled, a decisive mandate in favor of repeal would promise legal clarity, facilitate market transactions, and lower companies’ legal costs.

The uncomfortable alliance between gender and market liberalism did not escape workers. After the Occupational Commission repealed the limit on women’s work hours, Elizabeth Kollar expressed her suspicion “I would like to know how much [the Attorney General] is getting for making the decision, by the big 3 auto makers.” Kollar understood that formal equality was intertwined with corporate profit.

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132 Recognizing that GM found itself caught between union allegations that sex-differentiated hours of work violated Title VII, and the threat of prosecution pursuant to state labor law, Schlossberg recommended that the UAW refrain from filing grievances against GM related to this issue, until the legal conundrum had resolved. Memorandum from Stephen I. Schlossberg and Bernard F. Ashe to Leonard Woodcock and Ernie Moran, May 23, 1968, folder 18, box 11, UAW Women’s Department Papers. Within a few months, however, the UAW decided to process grievances against plants that limited women’s work hours, lest not doing so made the UAW itself vulnerable to unfair labor practice charges. Memorandum from Dorothy Haener to Caroline Davis, Oct. 15, 1968, folder 18, box 11.
133 Letter from Elizabeth L. Kollar to Walter Reuther, January 1, 1970 folder 18, box 11.
The repeal catalyzed a resurgence of maternalist activism. Myra Wolfgang accused the UAW Women’s Department of forging an unholy alliance with the Chamber of Commerce and the General Federation of Business and Professional Women. In contrast to UAW women who could rely on strong bargaining agreements to protect them from involuntary overtime, seventy percent of Michigan’s workers were not unionized. Many of these workers labored in the low-income clerical, retail, and service sectors. Wolfgang argued that the repeal would leave 200,000 women vulnerable to profit-hungry employers. Mary Dublin Keyserling, the Director of the Women’s Bureau of the Department of Labor, travelled to Michigan at the invitation of the Hotel and Restaurant Employees Union, the National Councils of Catholic and Jewish Women, and the Governor’s Commission on the Status of Women. Keyserling expressed sympathy especially for women with “family responsibilities.”

The UAW defended repeal by pointing to the hypocrisy of maternalist legislation and arguing, instead, for universal protective laws and stronger unions. The Executive Secretary for the Citizens’ Advisory Council on the Status of Women, Catherine East, noted that protective laws had never applied “to domestic workers or agricultural workers nor to some other groups at the bottom of the economic ladder—the great unorganized groups that Mrs. Keyserling’s heart is now bleeding for.” Haener and Davis argued that Keyserling would better serve these workers now by campaigning for targeted hours and minimum wages laws for agricultural and domestic workers. They also suggested she use her national prominence to help other unions secure

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137 UAW women members, however, were incensed that Keyserling did not contact the UAW to ask for its position before getting involved. They wanted Secretary of Labor Willard Wirtz to acknowledge that many rank-and-file women in the UAW viewed protective laws as discriminatory and applauded their repeal. Letter from Charleen Knight to Willard Wirtz, Nov. 7, 1967, folder 15, box 11.
139 Ibid.
contract provisions like those the UAW had won: time and a half on Saturdays, double pay on Sundays, and triple wages for holiday work.\textsuperscript{140}

Several locals dissented, however, from the UAW’s official position. Sometimes locals voted unanimously for resolutions favoring protective legislation. Other times, disagreement on the issue divided a local.\textsuperscript{141} For example, the repeal “whipped up” UAW Local 818 at the Soss Manufacturing Company into “a hell of a storm.” Some employees voluntarily came to work at 11pm on a Saturday night, working sixteen hours in a twenty-four period. Others did not want to work beyond their regular shifts.\textsuperscript{142} Leaders within Local 818 pleaded for guidance from the UAW legal department.\textsuperscript{143}

In light of these divides, Dorothy Haener worried that UAW had not effectively communicated that it was fighting simultaneously for repeal of sex-based hours’ laws and for “voluntary overtime for both men and women.”\textsuperscript{144} Dissent stemmed from more than a breakdown in communication, however. Women workers who bore the burden of long hours of labor, at work and at home, did not want to pin their hopes on legislation that might not pass. They did not oppose equal employment opportunity per se. But they opposed a liberalized workplace that would shift power over the pace and timing of production from workers to management.

Workers’ opposition culminated in a litigation challenge, backed by Myra Wolfgang’s Ad Hoc Committee against Repeal, to the new Occupational Safety Standards Commission.\textsuperscript{145} In December 1968, power machine operator Stephanie Prociuk, who had been employed for more than thirty years at the Chrysler’s “Dodge Main” plant in Hamtramck, Michigan, filed a class-action lawsuit on behalf of 200,000 women workers. The lawsuit, which observers

\textsuperscript{140} Letter from REgions 1-1A-1B-1E, UAW women's COmmittee, STella Deakins, REcording Secretary. Oct. 30, 1967, folder 15, box 11.
\textsuperscript{141} Letter from Elaine Munoz, Recording Secretary, Local 898 to Caroline Davis, Aug. 17, 1968, folder 17, box 11, UAW Women’s Department Records; Memorandum from Dorothy Haener to Caroline Davis, Sept. 4, 1968, folder 17, box 11; Letter from Dorothy Haener, International Representative UAW Women's Department to Margaret Thompson, Labor Chairman, WILPF, folder 17, box 11.
\textsuperscript{142} Letter from Ken Morris to Steve Schlossberg, Nov. 21, 1968, folder 17, box 11.
\textsuperscript{143} Letter from Ken Morris to Steve Schlossberg, Nov. 21, 1968, folder 17, box 11.
\textsuperscript{144} Memorandum from Dorothy Haener to Caroline Davis, Sept. 4, 1968, folder 17, box 11.
predicted would have national importance, claimed that the Occupational Safety Commission lacked the authority to repeal the hours law.146

The trial in Prociuk v. Occupational Safety Standards Commission portrayed women as either caregivers or breadwinners, but never both at once. Prociuk’s complaint argued that long hours of work for women deprived children of “maternal guidance.”147 Workers from UAW locals and the Communication Workers of America testified about “poor marriages, sick husbands, sick parents.”148

Witnesses testified to excessive hours in the wake of repeal. Chrysler had made female and male employees alike work as many as sixty-nine hours per week. Members of the Amalgated Meat Cutters Union testified that their employers ordered them to work twelve hour days, seven days per week.149 Similarly, the Hostess Cake Division of the Continental Baking Co. went from three shifts of eight hours to two twelve-hour shifts, and the women employed there consequently worked an average of sixty-seven hours per week.150 Some class members were hopeful that labor ultimately would win overtime legislation for all workers. Until that time, however, they urged the court to “shield[] at least women against such shocking work practices.”151

Conversely, the defense stressed women’s role as breadwinners. Witnesses for the Commission spoke about the wages women lost as a result of “protection.” For example, Helen Gorrecht, a line worker at Grey Iron Chevrolet Foundry, claimed that she lost the chance to earn

148 Helen Fogel, “Overtime Hearing Begins; ‘Harm to Families' Claimed” Detroit free Press, Jan. 22, 1969, folder 16, box 11, UAW Women’s Department Papers
149 Letter from Emily Rosdolsky to Walter Reuther, Mar. 3, 1969, folder 17, box 11.
151 Letter from Emily Rosdolsky to Walter Reuther, Mar. 3, 1969, folder 17, box 11.
$3,380 in overtime pay.\textsuperscript{152} A member of Detroit’s Mayoral administration testified that protective laws raised unemployment among otherwise qualified women.\textsuperscript{153}

Prociuk posed the question how the law should respond to the gendered division of labor within the family. Caroline Davis challenged men to assume greater caregiving responsibility so that women could work longer hours in the market. “Women are supposed to have it all,” she explained, “The home, the family, the responsibility is all theirs. What about the role of the father in the home?” Prociuk’s attorney, Mrijana Relich, found Davis’ position unrealistic and called for legal recognition of differentiated gender roles. “Sure I’m for having things equal between men and women,” Relich conceded. But she was representing women who did not “get help with the housework and baby care from their husbands.” Relich concluded: “Until equality is something more than theory, women need protection.”\textsuperscript{154}

Initially, the judge sided with the plaintiffs and temporarily enjoined the Occupational Commission from repealing the laws limiting women’s work hours.\textsuperscript{155} In March 1969, following trial, however, the court upheld the authority of the Occupational Safety Commission to repeal protective laws.\textsuperscript{156} The decision in Prociuk once again stoked fears that sex equality law would support “reforms” that would only increase women’s burdens.

\textbf{A “United Front”: The Coalition for a Voluntary Overtime Law}

The campaign for sex-neutral overtime laws in Michigan challenged the dichotomy between protection and opportunity. As the Socialist Workers’ Party explained, both sex-based protective laws and their repeal played into the hands of the ruling class . . . .” Sex-based protective laws presumed that women deserved special treatment “not because they are superexploited but because they are inferior.” Repeal would mean “a step backward” because it gave up the “decades-old struggle of the working class for a shorter work week at higher pay for all workers.” The Socialist Workers’ Party believed that “to carry out the full struggle,” it was
necessary to campaign both for women’s equal rights in the workplace and for protective legislation. Although the Party may have toiled at the margins of Michigan’s political landscape, the unions at its center shared the same aspiration for universal protective laws.

UAW lawyers drafted a statute in November 1967 that would make overtime work voluntary for employees, preventing employers from retaliating against workers who refused to work beyond the standard workday and workweek. The promise of the proposed bill led Esther Peterson, Assistant Secretary of Labor and Director of the U.S. Women’s Bureau under President Kennedy, to predict that the two sides of the protective laws debate might “reconcile differences” without too much difficulty. She was too optimistic. Admittedly, both sides maintained ideological commitments to extending protective laws to all workers. But politics pitted maternalist against egalitarian feminism in ways that initially foreclosed collaboration.

The two camps joined forces only when faced with the chance to fuse commitments to opportunity and to protection. In the fall of 1968, the Michigan State AFL-CIO and UAW began to discuss a collaborative effort to achieve overtime legislation. This dialogue forged a bridge between advocates of protection and of opportunity. By 1970, the UAW and the Hotel and Restaurant Employees Union forged what the press labelled a “united front.” Now, Myra Wolfgang and Caroline Davis were on the same side. These two unions also helped build a coalition with feminist organizations including Business and Professional Women and NOW.

A broad coalition, however, did not reflect an equivalence of interests. The phrase “long hours of work” held different meanings for unionized industrial workers and for professional women. To UAW workers, the question of overtime hours was an issue of fairness—an opportunity for women, like men, to access the same much-needed extra income. But the UAW

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158 Letter from Caroline Davis to Steve Schlossberg, Nov. 9, 1967, folder 15, box 11, UAW Women’s Department Papers; Memorandum from Steven Schlossberg to Caroline Davis, Nov. 10, 1967, folder 15, box 11, UAW Women’s Department Papers.
159 Letter from Esther Peterson to Lois M. Lane (Nov 1967).
160 Memorandum from Dorothy Haener to Caroline Davis, Nov. 18, 1968, folder 16, box 11.
did not view overtime as an unqualified good and sought, instead, to limit work hours and maintain high wages.  

By contrast, professional women viewed occasional long hours as critical to productivity as well as to their identities. Margaret Borbach, President of the Detroit Business Woman’s Club, explained that women had the same “responsibility” to work long hours as did men. The Business and Professional Women’s Club and the Association of American University Women had supported repeal of all overtime laws for management, supervisors, and professionals. Their position reflected a shift in frame within the women’s movement, from protection to equality. In 1970, NOW founder Betty Friedan declared that protective laws for women “only protect women out of a good opportunity . . . . The name of the game is equality, not protection.” Friedan, however, elided the fact that class position could determine whether repeal of protective legislation promised opportunity, injury, or some combination of both.

In Michigan, middle-class feminists saw overtime laws as a necessary compromise. Bonnie Calvin, NOW Vice President for political action, said of the proposed overtime law: “We could live with this one . . . because it would give women freedom of choice.” Calvin’s statement implied that NOW leadership might have preferred no regulations of work hours. She explained that NOW joined the campaign for overtime laws primarily for strategic purposes: “[the law] would satisfy Myra Wolfgang so maybe we could work with her instead of against her from now on.”

The “Spiritual Needs of Man,” “Production Schedules,” and the Defeat of Voluntary Overtime Schedules

The proposal for voluntary overtime proved Michigan’s “most controversial piece of labor legislation” during the late 1960s. The proposal generated controversy for two reasons. First, the vision for universal overtime limits posed a threat to powerful business interests

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163 Letter from Charleen Knight to Willard Wirtz, Nov. 7, 1967; Carlton, “Women’s Work—How many Hours?”
164 Carlton, “women’s Work---How Many Hours?”
165 Helen Fogel, “Judge Tells Women to Prove that Overitme is Harmful,” Jan. 31, 1969, folder 16, box 11, UAW Women’s Department Papers.
167 <cite newspaper magazine title> (Dec. 10, 1970), folder 17, box 11, UAW Women’s Department Papers.
168 Memorandum from Russ Leach to Caroline Davis, Jan. 20, 1969, folder 16, box 11.
committed to free-market principles. Second, the gendering of “protection” frustrated labor feminists’ effort to universalize protective labor laws.

The Big Three may have supported the repeal of sex-based protective laws, but they did not unequivocally embrace equal treatment. They vociferously opposed the extension of protective laws and, specifically, hours’ and weight limits to men. The Big Three argued publicly that overtime laws would have “dire consequences on production schedules.”

Business opposition forced unions to compromise on key dimensions of the overtime legislation. The unions wanted to cap the time that nonprofessional employees could work at forty hours. Between 1969 and late 1970, however, the limit on mandatory hours’ within proposed legislation crept steadily higher: from a maximum of forty, to forty-eight, to fifty-four hours per week. The bills considered by the Michigan legislature also provided a mechanism for employers to require mandatory overtime work, in times of high demand for production or low manpower. These exemption periods also crept upward, from thirty days to sixty days.

Labor feminists fought a steep uphill battle when they tried to transform a maternalist discourse of protection into a sex-equalitarian one. The half century since the Progressive Era had hardened the gendered gloss with which advocates had strategically painted labor protections. Legal and political discourse understood protection as a feminine ideal. Labor regulation reflected this gendering: “Protective” laws covered women; labor “standards” applied to men.

The UAW faced the challenge of substituting sex-neutral rationales for labor protections in place of maternalist rationales. Dorothy Haener implored the Occupational Safety Standards Commission: “it is . . . welfare, in the broadest sense for all workers, which we ask you to

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172 Employers could not demand excess overtime for more than thirty days in a twelve-month period; even then, employees would be able to reject such demands in cases of “unnecessary hardship.” An Act to Regulate the hours of Work for Public and Private Employees in the State of Michigan, Feb. 22, 1968, folder 27, box 10, UAW Women’s Department Papers; An ACT to amend the Labor Law in relation to hours of work for women over the age of twenty-one years, Feb. 27, 1968, folder 16, box 11, UAW Women’s Department Papers; Memorandum from Russ Leach to Caroline Davis, Jan. 20, 1969, folder 16, box 11.
Overtime laws, she argued, served moral and economic purposes. They equalized bargaining power “between employers and workers, particularly unorganized workers.”175 They also helped to reduce unemployment and once formed part of President Roosevelt’s plan to achieve full employment.176 “It is immoral to permit employers to require presently employed workers to work excessive overtime while others . . . are denied the opportunity to work at all.”177 Overtime in lieu of hiring additional workers, moreover, entrenched white, male dominance in industry and contributed to high unemployment rates among “blacks, women, youths, and older workers.”178

Haener also stressed men as well as women’s needs for a familial and civic life outside of the workplace. Instead of emphasizing women’s domestic responsibilities, she stressed workers’ need for “leisure time to be with their families, for living and relaxing.”179 Rather than protecting mothers’ role in the home, universal overtime laws would foster workers’ capacity “to perform their duties as citizens.”180

UAW Board Member Douglas Fraser argued that overtime laws would advance workers’ self-ownership. This ideal had roots in the free-labor ideology of the Republican Party, the Thirteenth Amendment, Marxist conceptions of alienation, and even Cold War ideology. In the antebellum period, free-labor Republicans juxtaposed contractual labor with slavery.181 In the age of emancipation, arguments about “wage slavery” reflected social anxieties about the blurry lines between free and coerced labor.182 Fraser updated these arguments in light of twentieth-century evils. The standard forty-hour work week did not only preserve workers’ leisure time, it also preserved their right to self-ownership: “Corporations have to get away from the antiquated and inhuman concept that when a worker punches his time clock in the morning he becomes an

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174 Ibid., 1.
175 Ibid., 1, 3, 7.
176 Ibid., 8
177 Ibid., 7
178 Ibid.
179 Ibid., 7.
180 Ibid.
extension of the production process, and that since the company owns the production process, the worker belongs to the company.”  

In Fraser’s view, a man’s capacity for self-determination—to decide, himself, the ends to which he wanted to devote his time—constituted the mark of a free society compared to a totalitarian one. He concluded, “an honest day’s labor . . . cannot in itself be all-fulfilling to the total physical and spiritual needs of man.”

Whereas Haener and Fraser understood worker self-ownership as the hallmark of freedom, the Big Three understood freedom was a factory unfettered by labor regulation. In 1971, the fight for overtime laws in Michigan finally succumbed to opposition from the auto lobby. This defeat marked the demise of the aspiration for state legislation that protected workers’ from mandatory overtime.

IV. Seeking Protection in the Administrative State: Labor Feminism in Reagan’s California

As the hope of voluntary overtime laws waned in Michigan, the ideal of universal protective labor standards gathered momentum in California. Labor feminists viewed these laws as critical to both female and male workers. Women workers needed the laws because they disproportionately lacked the protection of union contracts—80% of women workers in the state were unorganized—and because their families depended on their incomes. Much was at stake. California had the most comprehensive protective labor regime in the country: 2.5 million women and minors benefits from laws that specified a $1.65 minimum wage, time-and-a-half pay for overtime work beyond eight hours, two daily ten-minute rest periods, and more than fifty additional labor standards. Union activists fought to preserve regulations that in the aggregate made long, hard workdays more tolerable and low wages less meager: “meal periods,

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183 Ibid.
184 Statement Presented to Labor committee of the Michigan House of Representaties by Douglas A. Fraser, UAW Executive Board Member-at-Large, Apr. 21, 1969, folder 18, box 11, UAW Women’s Department Papers, at 2.
185 Ibid.
186 “Protective Laws . . . We Fought to Get ‘Em, We’ll Fight to Keep ‘Em!,” n.d., box 16, folder 8, Union WAGE.
187 “Letter from Anne Lipow, President and Luella Hanberry, Vice President, Union WAGE to Equal Employment Opportunity Commission,” July 19, 1972, box 16, folder 5, Union WAGE.
prohibitions against deducting tips, premium rates for split shifts, . . . washing facilities, rest rooms, . . . seats and weight[].”

In addition, forty percent of male workers in the state who did not enjoy coverage under FLSA would benefit from sex-neutral state labor standards. The erosion of sex-based protective laws, furthermore, threatened to lower standards even for those male workers not formally covered under the laws. Workplace “custom” often resulted in the extension of regulations on women’s condition of work to male employees in the same workplaces. Likewise, federal and state equal pay laws resulted in the extension of the state minimum wage for women to men. As courts struck down sex-based protective laws, their extension to men represented the only hope for protecting the most vulnerable sectors of both the female and male labor forces.

In the spring of 1971, a new activist organization formed called Union Women’s Alliance to Gain Equality, or Union WAGE. The leaders of Union WAGE had rich experience as labor activists. Jean Maddox, for example, was the President of Office and Professional Employees Union Local 29. In 1970, she had led the famous Lucky Strike of clerical workers at food stores. That year, fifteen unions in the food industry were negotiating master contracts for all food retail stores; the male dominated unions got good contracts but the employers refused to negotiate with the single female-dominated union. After the union accused the stores of sex discrimination, the startled employers capitulated—except the Lucky Supermarket chain. Jean Maddox called on women workers to stage an all-night picket of the stores. She convinced the Teamsters not to deliver goods across the picket lines and members of local women’s liberation groups to join the lines and learn the problems facing union women. Local 29 gained the reputation of being the “labor movement conscience” in the Bay Area.

Union WAGE’s first action was a demonstration at public hearings held by the Industrial Welfare Commission, a state administrative dating to the Progressive Era which regulated minimum wage standards and work conditions for women. Union WAGE demanded the

188 “Letter from Anne Draper to David A. Roberti, Chairman, Labor Relations Committee, State Capitol,” box 16, folder 5, Union WAGE.
190 “Jean Maddox,” n.d., box 18, folder 2, Union WAGE.
extension of both minimum wage and protective labor laws to men. Union WAGE likewise argued in the national arena for an amendment to the ERA that would prevent it from being used to downgrade existing labor standards. When such an amendment did not come to fruition, Union WAGE took the position that the ERA should only be ratified in California after the state had extended protective labor laws to men. The activist group persuaded the San Francisco Board of Governors to adopt the same position.

In 1972, the state legislature passed a bill that would have given California’s Industrial Welfare Commission jurisdiction over the hours and conditions of work for men as well as women. Both labor feminists and unions viewed the bill as an essential counterweight to the erosion sex-based protective laws. In addition to court decisions striking down these laws, California had recently ratified the Equal Rights Amendment. Much to the dismay of Union WAGE, which cynically noted business groups’ support for the ERA, employers used ratification as justification to end compliance with sex-based protective laws. One company stopped giving rest periods to women workers; another lowered wages to equalize them on the basis of sex; still another eliminated taxi service previously provided to women working nights. The Teamsters, representing thousands of women workers in the food processing and other industries, viewed the bill as the sole “remedy” for the problem of protective laws’ erosion. California NOW argued that the legislation would preserve proper heating and lighting, safe floors, lunch breaks, and rest periods important to women workers.

Employers and business trade associations, however, sent Governor Reagan a “heavy volume” of mail urging him to veto the bill. These letters made two broad arguments that linked a private, unregulated market to efficient business and, at the same time, tied the concept of protection to waning gender stereotypes.
First, the business lobby argued that sex neutral protective legislation would impose new costs on business, interfere with the private employment relationship, and generate cumbersome litigation. Employers especially targeted weight restrictions. Pacific Far East Line, Inc., for example, argued that “somebody working on the piers” had to be able to lift more than twenty-five pounds. “Otherwise, the complete industrial complex of the United States would have to change its packaging sizes.” Employers of professional laborers targeted hours’ restrictions. California Broadcasters Association, for example, argued that the erratic schedules and long hours involved in television production made it impractical to conform to maximum-hour regulations. Undermining the liberty of employers and employees to engage in private negotiation over the terms of work, opponents argued, would interfere with collective bargaining procedures. Last, the California Manufacturers Association warned that protective laws would only increase the already alarming number of lawsuits filed by women workers. These arguments appealed to Reagan’s ideals of efficient business, a private market, and a minimal state. The Manufacturers Associated raised the specter that overly burdensome regulation would yield higher unemployment rates.

Second, employers and business trade associations tied free-market to sex egalitarian arguments. Pacific Telephone and Telegraph Company argued that the testimony for the ERA had undermined the legitimacy of the protective laws. Another corporation dismissed protective laws, such as the requirement that women workers have safe transportation home from

197 See, e.g., Letter from C.T. Morton, the Duncanson-Harrelson Co., to Governor Ronald Reagan, December 8, 1972, Vetoed Bill File (arguing that AB 1710 would “make it harder to do business, increase costs and raise taxes”); Letter from D.J. Haughton, Chairman of the Board, Lockheed Aircraft Corporation to Governor Ronald Reagan, December 11, 1972, p.2, Vetoed Bill File (arguing that AB 1710 would cost Lockheed Aircraft Corporation would cost the company “multimillions of dollars” by making normal business operations impossible).
199 Letter from Howard J. Smiley, President, California Broadcasters Association, to Governor Ronald Reagan, December 1, 1972, Vetoed Bill File; see also Telegram from CBS, Inc., to Governor Ronald Reagan, November 30, 1972, Vetoed Bill File.
200 It is not clear why the Association thought that lawsuits by women would increase when AB 1710 would have extended the jurisdiction of the Industrial Welfare Commission to men. Letter from A.L. Libra, General Counsel, California Manufacturers’ Association to Governor Ronald Reagan, December 6, 1962, p.2, Vetoed Bill file.
night shifts, as “archaic.” These comments rhetorically tied gender liberalism to the ideal of an unregulated free market. Other companies, however, based arguments against the bill on gender stereotypes, suggesting that it would be “ludicrous” to extend maternalist protections to men. One company argued “that since the days of Neanderthal man, the male, on the average, has grown larger and physically stronger than the female, developed patterns of work capabilities which differentiated him from the female, to the advantage of the human race.” The company concluded that a universal labor standard would defy nature. Their arguments proved persuasive to a Governor committed to small government and private commerce. Reagan vetoed the bill.

Some workers pursued a different path to universal protective labor standards. Michael Burns argued that Title VII required his employer, the Rohr Corporation, to extend the rest periods guaranteed female workers under state law to men. He turned to the courts, rather than the state legislature or administrative agencies, to extend existing labor regulations. Such faith ultimately proved overly optimistic, yet there was theoretical support existed for Burns’ action. In 1968, Leo Kanowitz, a law professor at the University of New Mexico, argued that the courts and the U.S. Supreme Court, in particular, had an obligation to extend protective labor laws to men. Kanowitz reasoned that the Supreme Court’s *Lochner*-era responsibility for the maternalist character of labor regulations dictated this remedy.

In April 1972, the EEOC issued guidelines that partially embraced Kanowitz’s view. They guidelines interpreted Title VII to require employers to extend sex-based minimum wage and premium pay laws to men; yet they stated that employers did not similarly have to extend other sex-based protective laws regulating work conditions if “business necessity” precluded them from doing so. The EEOC derived the concept of business necessity from an important

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204 Letter from Philip Steinberg, Regional Vice President, American Institute of Shipping, to Governor Ronald Reagan, November 22, 1972, Vetoed Bill File.
208 Ibid., 170-71.
Supreme Court case decided the previous year. In *Griggs v. Duke Power Co.*, the Court held that Title VII prohibited employment practices that, even in the absence of discriminatory intent on the part of employers, had the effect of disproportionately excluding racial minorities from equal employment opportunities. If plaintiffs could establish a prima facie case of disparate impact liability, then an employer would have to show that the challenged practice was related to job performance; “the touchstone [was] business necessity.” Like *Griggs*, the EEOC’s 1972 guidelines interpreted Title VII as an affirmative guarantee of equal employment opportunity rather than as merely a prohibition on employment practices based on discriminatory animus or overbroad stereotypes.

But labor feminists in California were not satisfied by the guidelines. They criticized the EEOC for opening the door for employers to evade the extension of labor standards to men. Calling the guidelines “an outrageous concession to business interests,” they insisted that the EEOC explain the breadth of the business necessity defense. EEOC Chairman William H. Brown III replied that “business necessity” was a narrow exception, which would apply only in “that very rare situation where an employer genuinely could not extend a benefit to men without shutting down the whole operation.”

The courts did not take Brown’s expansive view of employers’ mandate under Title VII. The Southern District of California similarly disappointed Burns. It rejected his claim that it should resolve the conflict between Title VII and California law by requiring Rohr to extend rest breaks to men. The court reasoned that a rest period might be characterized as restrictive, as much as beneficial, because it reduced women’s work hours by “one hundred minutes per forty-hour week.” The state law thus frustrated Title VII by making women less competitive in the labor market than men. The court concluded that it would invalidly usurp legislative power if it universalized a state protection that the legislature had intended only to apply to women. Only

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210 “Letter from Anne Lipow, President and Luella Hanberry, Vice President, Union WAGE to Equal Employment Opportunity Commission.”
211 “Letter from William H. Brown III, Chairman, to Anne Lipow and Luella Hanberry,” August 30, 1972, 1–2, box 16, folder 5, Union WAGE.
212 346 F. Supp. at 997.
213 Ibid.
one federal court reached a different conclusion. In *Hays v. Potlatch Forests, Inc.*, the Eighth Circuit required an employer to comply with both Title VII and an Arkansas state law requiring premium pay for overtime work by women, by extending the premium pay to men.\(^{214}\) the EEOC had filed an amicus brief in support of this expansive reading in *Hays* and had also filed on the appeal from *Burns*, urging the Ninth Circuit to overturn the district court ruling.\(^{215}\) The Eighth Circuit decision in *Hays* remained an outlier, however.\(^{216}\)

The pattern of federal jurisprudence on the question affected female as well as male workers. In *Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare*, an employer of domestic workers and home-health-care aides argued that the California law requiring overtime pay for female employees violated Title VII.\(^{217}\) As the district court observed, the employer’s motives were self-serving. Homemakers, Inc. employed an overwhelmingly female workforce. In all probability, Homemakers could thus comply with California law without risking liability under Title VII. Homemakers’ challenge to the overtime law could only have been to obtain judicial leave to pay its own employees less. California argued that the state law did not conflict with Title VII; Homemakers could simply pay male employees at the same overtime rate, were it to hire men. The district court, however, held that it would be an exercise of legislative power, beyond its own institutional role, to require Homemakers to extend the state overtime law to men would be an exercise of legislative power beyond the institutional role of the court.\(^{218}\) Therefore, holding that Title VII superseded the state’s premium pay law,\(^{219}\) the court allowed an employer to use a putative sex discrimination claim to erode real protections for women workers.

The decisions in *Burns v. Rohr Corp* and *Homemakers, Inc.* illustrate the differential effects of court rulings in labor law. To the extent that women could overcome sex segregation within particular industries, the invalidation of sex-based protective laws promised greater


\(^{215}\) “Letter from William H. Brown III, Chairman, to Anne Lipow and Luella Hanberry,” August 30, 1972, 1–2, box 16, folder 5, Union WAGE.

\(^{216}\) In a February 1972 decision, the EEOC found that reasonable cause existed to believe that the defendant business violated Title VII by failing to offer the benefit of a state overtime pay law to male workers. E.E.O.C. Decision No. 72-1115, Feb. 18, 1972. But EEOC decisions were not binding and had no precedential value.


\(^{218}\) Ibid., 1112-13.

\(^{219}\) Ibid., 1113.
opportunity. Women like Velma Mengelkoch, Thelma Bowe, Leah Rosenfeld, and Lorena Weeks wanted higher paying jobs. Others did not reap similar benefits. Michael Burns lost the opportunity to use state protective laws for women to gain improved work conditions for low-income men. In addition, the persistence of highly sex-segregated occupations—industries in which low-wage female workers comprised nearly the entire workforce—meant that for some women workers, longer hours did not mean greater opportunity. Homemakers’ domestic workers and home-health-care-aides actually saw a reduction in their overtime pay as a result of the *Homemakers* decision.

Meanwhile, Union WAGE advocated for an increase in California’s minimum wage before the Industrial Welfare Commission. In September 1973, activists picketed public hearings and argued that the minimum wage, which had remained at $1.65 per hour since 1968, should be increased to $3. Union WAGE justified its suggested increase on skyrocketing inflation. The existing wage level amounted to $66 for a forty-hour week. But in November 1970, the California Bureau of Labor Statistics had determined that the minimum budget was $71.50. Costs of living, moreover, had increased 5.6% from 1970 to 1972 and 5.9% from 1972 to 1973. Food and rent—the expenses that comprised the majority of low-income families’ budgets—had increased at an astounding rate,²²⁰ rising 22% in one estimation.²²¹ In national politics, commentators debated whether raising the minimum wage would further worsen inflation or whether escalating prices resulted from the growing demand for goods and services rather than labor costs. Popular finance journalist Sylvia Porter suggested that the relationship between inflation and the minimum wage was a moral question as well as an economic one: “How dare we ask the very lowest paid workers among us to stand in the first line of defense against an inflation fueled by the buying and borrowing of the affluent?”²²² Union WAGE activists echoed this sentiment, but the Industrial Welfare Commission did not concede to their demands. It instead increased the

²²⁰ “Press Release, Union Women’s Alliance to Gain Equality,” summer 1973, box 16, folder 8, Union WAGE.
minimum wage to $2 per hour, to be raised if the federal government set its minimum wage at a higher rate.\textsuperscript{223} Labor feminists and their allies also rededicated their efforts to vest the Industrial Welfare Commission with jurisdiction over male workers. In early 1973, Assemblyman Willie J. Brown, Jr. introduced a revised bill. This new proposal did bow to business opposition in two significant ways. First, it exempted weight lifting, so that men would not be subject to restrictions on women.\textsuperscript{224} In addition, the bill required the Industrial Welfare Commission to “interpret . . . [the bill’s] provisions in a manner which does not cause undue hardship and loss of employment opportunities in any segment of industry in California.”\textsuperscript{225} This language did not pacify opponents, however. Business trade associations mobilized once again in the spring of 1973 to oppose the legislation.\textsuperscript{226}

By the fall, however, many business interests supported the proposed bill.\textsuperscript{227} Increasing legal uncertainty played a partial role in the shift. Employers felt trapped between the conflicting state laws and Title VII and feared the costs associated with further litigation. Although the new law threatened to impose further regulation on employers, it also helped employers resolve the legal “dilemma” that they faced.\textsuperscript{228} Even more important, the Senate amended the bill in crucial ways. First, the new bill only invested the Industrial Welfare Commission with the power to extend protective regulations to men and did not require the Commission to do so. It also mandated that the Commission to hold public hearings prior to extending any existing regulation to men. Furthermore, the Commission was directed to review and update its regulations every

\textsuperscript{224} “AB 478-Brown as Amended 5-7-73; Hearing Date: 8-30-73,” circa 1973, California State Archives, Sacramento, California.
\textsuperscript{225} “Letter from Willie J. Brown, Jr. to Governor Ronald Reagan,” September 24, 1973, California State Archives, Sacramento, California.
\textsuperscript{226} “Letter from Emmonds McClung, Executive Vice Presiden, California Manufacturers Association to Governor Ronald Reagan,” March 20, 1973, California State Archives, Sacramento, California.
\textsuperscript{228} “Letter from William H. Smith, Exec VP, Federated Employers of the Bay Area to Governor Ronald Reagan,” September 19, 1973, California State Archives, Sacramento, California.
two years, a process that would include hearings. And where the jurisdiction of the Industrial Welfare Commission overlapped with that of the Industrial Safety Board, the Commission’s regulations would prevail.229

These changes included employers in the regulatory process and reduced the costs of employment regulations. In public hearings, business groups could make the case that maternalist regulations should not be extended to men. Business trade associations could deploy equal-treatment mandates to ratchet labor regulations downward rather than upward. Provisions for the primacy of the Commission over the Safety Board also held out a carrot to employers. In 1972, California had adopted an OSHA plan that imposed expensive record-keeping and reporting requirements on employers. Giving the Welfare Commission jurisdiction over some work regulations that might otherwise fall within the jurisdiction of the Safety Board reduced these burdens.

Despite a broad management consensus in favor of the bill, the media industries continued to oppose the legislation. Association of Motion Picture & Television Producers argued that its collective bargaining agreements should govern hours of work. These agreements allowed employers lawfully to offer a set wage for erratic work schedules, without having to pay overtime. According to the Association, employees and employers possessed the deepest knowledge of employment practices and were thus best positioned to negotiate hours.230 The radio industry similarly opposed the bill.231

230 “Telegram from Billy H. Hunt, Executive Vice President, Association of Motion Picture & Television Producers, Inc. to Governor Ronald Reagan,” September 24, 1973, California State Archives, Sacramento, California.
231 “Telegram from W. Russell Barry, Vice President and General Manager, Radio Station KNXT,” September 21, 1973, California State Archives, Sacramento, California; “Telegram from Peter McCoy, Vice President and General Manager, Radio Station KCBS,” September 21, 1973, California State Archives, Sacramento, California; “Telegram from George Nicholaw, Vice President and General Manager, Radio Station KNX,” September 21, 1973, California State Archives, Sacramento, California.
On the other side, labor challenged the notion of the labor market as a realm of private action. The California Labor Federation and the Teamsters, several unions representing teachers, office and professional employees, and retail workers, and a labor feminist organization called Union WAGE (Women’s Alliance to Gain Equality) all supported the legislation.

Telegrams poured into legislators from all sides.

Finally, the legislature passed the new legislation known only as AB 478, and it arrived on Governor Reagan’s desk. There, the bill was as controversial as it had been in earlier debates. The Department of Industrial Relations (DIR) argued in favor: AB 478 would “eliminate the attack in the courts on the orders of the Industrial Welfare Commission,” clarify the respective jurisdictions of the Divisions of Industrial Safety and Industrial Welfare, and the proposed public hearings would prove less expensive than then-existing Wage & Board hearings.

The Department of Finance, by contrast, recommended that Reagan veto the bill. By extending Industrial Welfare Commission regulations to men, AB 478 would eliminate the distinction between the Industrial Welfare and Labor Law Enforcement Divisions within the DIR. But it contained no mechanism to consolidate the two divisions. And because the courts were already striking down sex-based protective labor standards, the legislation would aggrandize a state administrative agency to no purpose. This reasoning, of course, elided the

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difference between achieving same treatment of male and female workers via legislation that might raise labor standards for men versus judicial doctrine that lowered them for women. Reagan signed the legislation nonetheless based on business support and its modest cost.

The legislation that vested the Industrial Welfare Commission with universal jurisdiction also enabled business to capture the Commission. Governor Reagan appointed new commissioners in 1974; three of the five represented the industries that employed the largest number of female workers: agriculture, restaurants, and electronics manufacturing. The Commission legalized the actions that employers took after California ratified the ERA, slashing protective laws for women and thereby lowering standards for unorganized male workers. Most significantly, the Commission increased the standard work day from eight to ten hours, affecting the overtime pay for five million workers in the state. The orders exempted another seven million workers not covered by FLSA, mostly in the retail industries, from coverage. In addition, new orders eliminated the requirements that employers provide two ten-minute rest periods and pay for protective clothing in hazardous jobs. The extension of FLSA to agricultural and domestic workers the same year mitigated some of the political pressures on the Commission to expand state labor standards. Their evisceration, nonetheless, devastated Union WAGE leaders.

The evisceration of state labor standards galvanized the formation of the Committee for Better Working Conditions spearheaded by Union WAGE, the Asian Community Center, and the Revolutionary Union. Activists protested at public hearings, wearing shrouds and carrying placards and banners that read: “10 hour day- no way” and “Women need protective laws, men do too.” In addition to campaigning for new regulations, labor activists brought two lawsuits

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235 The fourth commissioner was the wife food chain owner and the fifth a teamster union official. “IWC? What’s That?,” n.d., box 16, folder 7, Union WAGE.
236 “ERA: Equal Rights or Equal Oppression?”
237 “Fact Sheets on Action to Save Premium Overtime Pay for All Women and Men Workers,” March 5, 1975, 3, box 16, folder 7, Union WAGE; Mel Ziegler, “No Overtime Pay for 10-Hour Day,” circa 1974, box 16, folder 7, Union WAGE.
238 Elaine Reed, “IWC Hears Women’s Protest,” Oakland Tribune, April 25, 1974, 25, box 16, folder 7, Union WAGE.
challenging the authority of the Industrial Welfare Commission to revoke the protective laws.\textsuperscript{239} In February 1975, the court ruled in favor of Jack Henning, the executive secretary-treasurer of the California Federation of Labor, holding that the Commission did not have the authority to set wage rates statewide but rather had to create a wage board for each industry. The Committee for Better Working Conditions celebrated cautiously, as the Commission remained stacked in favor of management.\textsuperscript{240}

Labor feminists also renewed a legislative campaign to complement their litigation and administrative advocacy. The California Commission on the Status of Women collaborated with Assembly Majority Leader Howard Berman (D-Sherman Oaks) and Senate Caucus Chairman David Roberti (D-Los Angeles) to introduce legislation that would reinstate key protective laws and make them applicable to male as well as female workers. Key bills provided overtime pay beyond an eight-hour day and forty-hour week, rest and meal periods, prohibitions on employers’ practice of deducting portions of workers’ tips from their pay, and a guarantee that the state minimum wage would not fall below the federal one. In addition, a proposed bill would reorganize the Industrial Welfare Commission, increasing the number of members from five to seven and mandating that appointments involve equal representation of labor and management and reflect the sexual and racial diversity of the workforce.\textsuperscript{241} Proponents of the bills, however, did not succeed in pushing them through the legislature. Governor Jerry Brown, who assumed office in 1975, was more socially liberal than Reagan but still a fiscal conservative; the state’s political environment had shifted definitively.

Advocates’ legislative disappointments kicked the issue of protective laws back to the Industrial Welfare Commission. In 1976, Union WAGE continued to pursue three objectives in public hearings: a $4 minimum wage; overtime pay beyond the eight-hour day, and health and

\textsuperscript{239} The California Federation of Labor filed one suit, and three women workers in Sacramento filed another.
\textsuperscript{240} “Notes on History of Protective Legislation from Union WAGE Workshop;” Fact Sheets on Action to Save Premium Overtime Pay for All Women and Men Workers,” 3–4; Maupin, “Equal Rights for Whom?”
safety protections. Yet these feminist activists felt that they did not receive the full support of the labor movement. Union WAGE leaders lamented unions’ declining political power and failure to see the issue of protective laws as critical to male as well as female, organized as well as unorganized workers. The unions did not send sufficient numbers of spokespeople to Commission hearings and thus hampered labor feminists’ ability to exert influence on the administrative process.

Throughout the late 1970s, the pendulum of political influence in California’s administrative agencies swung back and forth between labor and business. In 1981, Union WAGE boasted that a decade of struggle had resulted in the extension of protective labor legislation to all workers. By the late 1970s, Union WAGE had gained significant influence within the Industrial Welfare Commission despite the relative political weakness of the labor movement. But activists also reflected on the limits of the state’s regulatory scheme. No law existed limiting the hours in a workday; some Californians continued to feel the burden of overtime while others the sting of unemployment. Now, however, Union WAGE fought to keep the issue of labor standards within the administrative forum. Activists viewed the legislature as hostile to protective standards, especially overtime laws.

Since Caroline Davis addressed women UAW members in Michigan, political resistance had deepened to protective laws that shifted some of the costs of social reproduction from individual workers to the state. Labor feminists observed an irony: while men’s declining wages had prompted women to enter the workforce, the state now used the fact of two wage-earner families as an “excuse” to keep the minimum wage low. Union WAGE director Joyce Maupin

243 “Meeting 2/9/75 on Industrial Welfare Commission.”
244 Jan Arnold, “IWC Hearings,” no date circa 1976, box 17, folder 2, Union WAGE.
245 See, for example, “Letter from Geraldine Daesch to the Union WAGE Executive Board,” March 21, 1979, box 17, folder 3, Union WAGE (discussing a plan to revive the three-pronged litigation, legislative, and administrative strategies pursued in 1976).
246 “Alert! Employers Attack California’s Overtime Laws,” circa 1981, box 17, folder 4, Union WAGE.
247 “Letter from Joyce Maupin to Jan Arnold and Geraldine Daesch,” July 30, 1979, box 17, folder 3, Union WAGE.
urged the Industrial Welfare Commission to set up wage boards that could once again make the state a national leader in labor standards. “We don’t want California to become a ‘cheap labor’ state, she admonished” Maupin queried: “Why shouldn’t the big employers in banking and insurance pay enough so that a woman can be self-supporting and not need welfare?”

Maupin’s statement at once called for state regulation of the employment relation and reinforced the stigma associated with public assistance. The idea that women, and neither the state nor men, had a responsibility for privatizing their own dependence thus provided a justification for a higher minimum wage. A political consensus had calcified around private responsibility for social reproduction.

Similarly, even as women’s gender roles change, they remained in important ways constant. In the mid-1960s, the Women’s Bureau coalition had used maternalist arguments to defend sex-based protective labor laws. Over time, advocates had somewhat awkwardly adapted these arguments to craft sex-neutral defenses for limits on work hours. These rationales, however, remained tied to the notion of familial caregiving. By 1981, activists argued that overtime work was a “source of friction within families” and was particularly important within “single-parent” and “two-worker families” that needed to make “accommodations . . . for childcare and for the fulfillment of other family responsibilities.” Though advocates framed these arguments in gender neutral terms, they remained implicitly and sometimes explicitly tied to the idea that the problem with long work hours was the conflict women experienced between mothering and remunerated labor.

Gone from the analysis were the arguments Douglas Fraser had made in favor of workers’ self-ownership, which included but did not rest upon caregiving labor within the home. Moreover, by the early 1980s, limits on overtime work no longer represented a policy within the landscape of political possibility. Labor feminists now argued for

250 “Petition to Industrial Welfare Commission of the State of California,” March 23, 1981, 2, box 17, folder 4, Union WAGE.
251 “Letter from Joyce Maupin, President Union WAGE to Commissioners of the Industrial Welfare Commission,” June 19, 1981, box 17, folder 4, Union WAGE.
a much narrower claim—forty-eight hour notice to employees when they would be required to work overtime so that they could individually manage familial arrangements.

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The labor feminist fight to expand protective laws in the wake of Title VII’s passage has been largely forgotten within historical memory. The dominant narrative depicts feminist efforts to use Title VII to invalidate sex-based protective laws, and their consequent erosion, as the dawn of a new era of sex equality. Others interpret the decline of protective laws for women more ruefully, as part of the waning of an earlier strand of women’s rights activism. Lost in both accounts is the fight to use sex equality as a means to augment state labor legislation.

The decade that followed the forgotten campaign for universal protective laws witnessed the “opening of the American workplace”—to use historian Nancy MacLean’s provocative phrase. The nation transitioned from status-based gender hierarchies under law toward individualism and sex as well as race neutrality under law. Workers’ efforts to enforce Title VII forced open white, male strongholds in the labor market to women and minorities. The workplace opened in a second sense, however, as political opposition rolled back New Deal and Great Society labor regulations. The negotiations between management and workers were opened in new and often unbalanced ways, favoring the power of employers over workers. Liberalism came to mean, for some, freedom from discrimination and, for others, freedom from state regulation.