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I. INTRODUCTION

> It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[1]

Although the "general constitution of things" has changed since the Supreme Court denied Myra Bradwell admission to the bar, the above rationale concerning married women is regularly used, if not articulated, in denying women equal credit opportunity. In the face of hard evidence to the contrary, many creditors assume that virtually all women will marry, have children, leave the work force, and therefore fail to meet their financial obligations.

When women marry they become economic nonentities in the eyes of the credit establishment; when they are subsequently divorced or widowed they emerge as unknowns in an increasingly credit oriented society. This pattern occurs whether or not a wife works outside the home or is, in fact, the principal wage earner in her family. The current campaign for equal credit opportunity acknowledges that the wife who does not work outside her home is nevertheless an equal partner in the economic unit of her marriage, but it recognizes that unless she has property or income of her own

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1. Bradewell v. The State, 83 U.S. (15 Wall.) 130, 141-42 (1872).

she will not be considered creditworthy.[2] It focuses primarily on the working wife because a woman who works for wages, often in addition to caring for a home and children, should have the same opportunity to obtain credit or a loan as does a man.

This article deals both with the laws that cause credit discrimination against women and with those that have been and could be formulated to solve the problem. It first explains the nature and importance of the problem, then discusses the apparent legal and economic bases of the discrimination, and finally explores the adequacy of existing and proposed remedies.

II. THE PROBLEM

The availability of credit to women is vital to the upgrading of their economic status because it determines their access to education,[3] homeownership, entrepreneurship, and investment, as well as their ability to provide for the more immediate needs of their families.

It is the married, or formerly married, woman who appears to be the prime victim of sex discrimination in credit. As a result, the female-headed household and the family with a working wife are most affected; and disproportionately so affected are black and other minority families.[4]

Based on testimony which it heard in May 1972 the National Commission on Consumer Finance (NCCF) found that women have more difficulty than men in obtaining credit and identified these five problem areas:[5]

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2. Those community property states (Arizona, New Mexico, Washington) that have recently amended their laws so as to provide husband and wife with equal management and control rights over the community have made it possible, for the first time, for a nonworking wife to be considered creditworthy. Although her contribution to the community is services and not income, she has power to obligate the community without her husband's consent. See Appendix A.

3. In addition to other credit problems discussed in this article, women obtain fewer loans for educational purposes. In 53 out of the 54 jurisdictions participating in the federal Guaranteed Student Loan Program, women have received fewer loans than men. For example, in Alabama male-female distribution is 63.8-35.6; in Arizona 79.2-20.6; in California 70.4-29.4; in Illinois 77.9-21.8; in New York 63.2-36.7; in Utah 79.1-20.8. HEW, REPORT OF THE GUARANTEED STUDENT LOAN PROGRAM, DISTRIBUTION OF CUMULATIVE LOANS AS OF JUNE 30, 1972 (May 14, 1973).

4. "The problems faced by the woman who heads a household are particularly acute if the woman is black, and 27 percent of women heading households are black." ECONOMIC REPORT OF THE PRESIDENT 108 (1973).

5. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 152-53 (1972), *reprinted in* CCH INSTALLMENT CREDIT GUIDE No. 215 (1973).

1. Single women have more trouble obtaining credit than single men. (This appeared to be more characteristic of mortgage credit than of consumer credit.)
2. Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name. Similar reapplication is not asked of men when they marry.
3. Creditors are often unwilling to extend credit to a married woman in her own name.
4. Creditors are often unwilling to count the wife's income when a married couple applies for credit.
5. Women who are divorced or widowed have trouble re-establishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in the husband's name.

The report of the Senate Committee on Banking, Housing and Urban Affairs that accompanies the Equal Credit Opportunity Act listed thirteen specific practices that discriminate on the basis of sex and/or marital status, the first five of which parallel those documented by the Commission.[6] Five of the remaining offensive practices result from the unwillingness of creditors to acknowledge the creditworthiness of a working wife and include: refusing to issue her an account for which she would be eligible were she not married; requesting information concerning her husband's creditworthiness before doing so; considering her a "dependent" of her husband when calculating his eligibility for credit; applying stricter standards when the wife rather than the husband is the primary wage-earner; and altering her credit rating on the basis of her husband's credit performance. Additionally, the committee cited three other policies that it considered objectionable: the arbitrary refusal to consider alimony and child support as income for credit purposes when the reliability of the source is subject to verification; requesting information concerning birth control practices when evaluating a credit application; and finally, the use of credit scoring systems that apply different numerical values depending on the sex or marital status of the applicant. Statements before the NCCF and other governmental bodies[7] that document these problems have been largely anecdotal. The cumulative force, however, when added to hundreds of unsolicited compliants to women's groups[8] and the results of sev-

6. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, TRUTH IN LENDING ACT AMENDMENTS, S. REP. No. 278, 93d Cong., 1st Sess. 16-17 (1973).

7. *See Testimony before the Federal Deposit Insurance Corporation* (Dec. 19-20, 1972); CREDIT REPORT OF THE PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN (Oct. 31, 1973); *Hearings on Discrimination in Finance Before the Governor's Commission on Women's Programs of Idaho* (May 12, 1972); *Testimony of Sharyn Campbell for the Commission on the Status of Women Before the Economic Development, Manpower and Labor Committee of the District of Columbia City Council* (June 7, 1973).

8. *See Statement of the National Organization for Women (NOW), Oversight Hearings*

eral informal surveys,[9] shows that women do have cause to complain.[10]

III. THE CAUSES

There is no direct evidence that women are poorer credit risks than men. On the contrary, two studies show that women are more likely than men to pay their debts.[11] Bankers who have reviewed their own past accounts for the purpose of developing numerical credit scoring systems have found that sex is not relevant to risk determination.[12] Women as a class are economically disadvantaged

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on 15 U.S.C. §§ 1601-81(t) (1970) *Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency,* 93d Cong., 1st Sess. (Nov. 13, 1973) [hereinafter cited as *Oversight Hearings*].

9. *See* Report based on a joint survey of the Women's Legal Defense Fund, Inc. & the Government of the District of Columbia Commission on the Status of Women, Residential Mortgage Lending Practices of Commercial Banks, Savings and Loan Associations and Mortgage Bankers (Aug. 1972); Report based on a joint survey of the Women's Legal Defense Fund, Inc. & the Government of the District of Columbia Commission on the Status of Women, Credit Policies of Bankers (Aug. 1972); Report based on a joint survey of the Women's Legal Defense Fund, Inc. & the Government of the District of Columbia Commission on the Status of Women, Credit Policies of Department Stores in the Metropolitan Washington Area (Aug. 1973); St. Paul Department of Human Rights, Installment Loan Survey of St. Paul Banks (1972); North Carolina Public Interest Research Group, Short-Changed—Sex Discrimination in Consumer Credit (Oct. 1973); Oregon Student Public Interest Research Group, No Credit for Women (Feb. 1973).

10. Eugene Adams, then President of the American Banking Association, in a speech reprinted in The Am. Banker, June 25, 1973, at 22, col. 3 said "I think we have to acknowledge that banks, along with the rest of the credit industry, do in fact discriminate against women when it comes to granting credit. The question then becomes, is that discrimination justified?"

11. A study in the mid-1960's, which measured risk on installment credit, found that for both married and single women the bad account probability was substantially lower than for men with the same marital status. Smith, *Measuring Risk on Installment Credit,* 2 MANAGEMENT SCIENCE 327-40 (1964). The author of an earlier study concluded: "The classification of borrowers by sex and marital status indicates that women are better credit risks than men; and the superiority appears to be statistically significant." D. DURAND, *Risk Element in Consumer Installment Financing,* NATIONAL BUREAU OF ECONOMIC RESEARCH, TECHNICAL EDITION 74 (1941). Similar results were reported by the director of an organization providing home improvement loans to elderly and low income families. Many of the loans have gone to women who are heads of households. They as well as the other program beneficiaries were considered high risks and were therefore unable to get conventional financing. The program has a delinquency rate of only 4%; there have been no foreclosures. Most significantly, of the families headed by women, the delinquency rate is estimated as 2%. The program's director believes that female-headed families "demonstrate better fiscal responsibility than other households." Letter from Thomas A. Jones, Executive Director, Neighborhood Housing Services, Inc., to Jane Chapman, Co-Director, Center for Women Policy Studies, April 18, 1973.

12. Interviews with James L. Smith, Senior Vice President, Security Pacific National Bank, in Washington, D.C., June 21, 1973, and Charles F. Hayward, Vice President, First National City Bank, in New York, N.Y., December 7, 1973.

in that they have more difficulty finding work,[13] are paid less for what they do,[14] and are generally relegated to jobs with little opportunity for advancement.[15] This unfortunate fact explains why fewer women than men obtain loans and credit, but it does not justify the denial of credit to a woman who, by all objective criteria, is as qualified as a man who obtains credit.[16]

The credit industry has suggested that state laws prevent it from dealing with women on the same basis as men.[17] Most of the laws that have been identified as having this effect, however, do not apply to women in general, but only to married women. Furthermore, the industry's belief persists in spite of the fact that every state has a law, usually entitled a Married Women's Property Act, that was enacted to nullify the common-law disabilities of married women.[18] Typically, these statutes provide that wives may contract, buy and sell property, and conduct business as though they were not married. Standing alone, these acts would establish the intent of the legislatures that married women be considered legally capable of entering into any financial agreement.[19] Nevertheless, other laws are cited as obstacles to that end. Domestic relations laws requiring husbands to support their wives, community property laws, and multiple agreements laws are most often mentioned as adversely affecting the creditworthiness of married women.

A. Support Laws. In every state husbands are required by law

13. Tables of the national employment rates for workers 20 years and over show that in 1972 5.4% of the women were unemployed as compared to 4.0% of the men. In 1971 the ratio was 5.7% to 4.4%, in 1970 4.8% to 3.5%, and in 1969 3.7% to 2.1%. MANPOWER REPORT OF THE PRESIDENT 17 (1973).

14. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (1973).

15. "Women are more apt than men to be white-collar workers, but the jobs they hold are usually less skilled and pay less than those of men. Women professional workers are most likely to be teachers, nurses and other health workers, while men are most frequently employed in professions other than teaching and health. Women are less likely than men to be managers and officials, and are far more likely to be clerical workers." *Id.* at 5.

16. *See Statement of Jane R. Chapman, Co-Director, Center for Women Policy Studies, Hearings on Economic Problems of Women Before the Joint Economic Comm.*, 93d Cong., 1st Sess. (July 12, 1973).

17. *E.g., Testimony of Matthew Hale, Counsel for the American Bankers Association, Hearings on the Availability of Credit to Women Before the National Commission on Consumer Finance* 3 (May 23, 1972).

18. L. KANOWITZ, WOMEN AND THE LAW, THE UNFINISHED REVOLUTION 40 (1969).

19. Maryland, in addition to enacting laws prohibiting discrimination in credit, amended its Married Woman's Property Act to remove confusion in its interpretation by adding the following sentence: "The provisions of this section apply to all contractual relations entered into by married or unmarried women, including retail installment sales or retail credit accounts as defined in Article 83 of this Code." MD. ANN. CODE art. 45, § 5 (Supp. 1973).

to support their wives.[20] These laws were enacted at a time when married women did not ordinarily work outside the home and served the purpose of preventing women from becoming wards of the state. They affect credit practices by permitting a merchant to sell goods to a married woman and then look to her husband for payment.[21]

The presumption that the husband is obligated to pay for his wife's "necessaries" need not stand in the way of her establishing credit in her own name. A wife can bind herself alone simply by making it clear in her agreement with the seller that she is undertaking to pay the debt from her separate property. A court is not apt to disturb such a contract by permitting the creditor to recover against the husband. For example, in *Almon v. R. H. Macy & Co.*[22] the court held:

> In the absence of the husband's signature we think that the legal consequence of the document signed only by the wife is to bind the wife separately and to extend credit solely to her and excludes as a basis of recovery the theory of agency of the wife to purchase necessaries. This agreement does not purport to be a contract by the plaintiff to give credit to the husband for the purchase of necessaries by the wife. The only legal conclusion is that credit was extended solely to the wife in which case the husband is not liable even for the purchase of necessaries.[23]

In twenty-two states creditors have obtained the enactment of Family Expense Acts. Generally, they make it possible for the creditor to seek payment from either husband or wife for "family expenses" regardless of which spouse made the purchase.[24] In these states, at least, it is clear that the law does not prevent a creditor from collecting from a married woman those debts she has undertaken, as well as family expenses that her husband has charged.

Quite likely, the reason creditors are reluctant to extend credit to a married woman is not that they believe it to be inconsistent with the law or that they fear collection problems. It is more apt to be that it is expensive for them to open two accounts per family and,

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20. These principles of support are largely judge-made, although some states have codified the common law duty of the husband to support his wife. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 182 (1968).

21. When this doctrine arose, married women were under the common-law disability of being unable to contract, and it was necessary for the protection of creditors that the law find a way to establish that a wife's purchases would result in a binding contract for payments between the husband and the creditor.

22. 106 Ga. App. 123, 126 S.E.2d 641 (1962).

23. *Id.* at 125, 126 S.E.2d at 643. *See also* Swanson v. Hutzler Bros. Co., 135 A.2d 151 (D.C. 1957); Waxelbaum v. Citizens & Southern Nat'l Bank, 120 Ga. App. 312, 170 S.E.2d 333 (1969); Saks & Co. v. Nager, 74 Misc. 2d 855, 345 N.Y.S.2d 883 (1973).

24. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 186-87 (1968).

as between the husband and the wife, they prefer to deal with the man.[25]

B. Community Property laws. Eight states chose property systems from the civil codes of continental Europe rather than from the common law.[26] The civil law made the husband the manager of all property acquired by him or his wife during their marriage,[27] but most community property states have modified their laws to allow married women to control at least their own earnings.[28] These changes have been recent and are in some cases the result of the passage of state equal rights amendments.[29] Only in Louisiana is a woman still not permitted to obligate her own income.[30] In California, however, a woman may lose control of her earnings if she commingles them with community property managed exclusively by the husband.[31] These laws are, of course, taken into consideration when evaluating the creditworthiness of a married woman.[32]

C. Multiple Agreement Laws. The Report of the National Commission on Consumer Finance points out that "most state statutes fixing a graduated rate ceiling on consumer credit transactions usually prohibit the maintenance by creditors of separate accounts for husband and wife [in order to] minimize the aggregate finance charge."[33] Examples of these statutes are the Uniform Consumer Credit Code and the Uniform Small Loan Law. Under the UCCC, with respect to consumer loans whose finance charge exceeds eighteen percent, "no lender may permit any person, or husband and wife, to become obligated in any way under more than one loan

25. A spokesman for Sears, Roebuck and Company says that it is very expensive for Sears to keep 2 accounts for one family and adds, "We discourage married women from opening their own accounts, but if they push us on it, we'll go along." BUSINESS WEEK, Jan. 12, 1974, at 77.

26. ARIZ. REV. STAT. ANN. § 25-211 *et seq.* (Supp. 1973); CAL. CIV. CODE § 5124 *et seq.* (West 1970); IDAHO CODE ANN. § 32-912 *et seq.* (1963); LA. CIV. CODE art. 2402 *et seq.* (West 1971); NEV. REV. STAT. ANN. §§ 123.190, 123.230 (1973); N.M. STAT. ANN. § 57-4A-2 *et seq.* (1973); TEX. FAMILY CODE § 5.22 (1972); WASH. REV. CODE § 26.16.030 (Supp. 1972). See Appendix A.

27. W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 322 (1943).

28. See Appendix A.

29. N.M. CONST. art. 11, § 18 (1973); TEX. CONST. art. 1, § 3a (1972); WASH. CONST. art. xxxl, § 1 (1972).

30. LA. CIV. CODE art. 2404 (West 1971).

31. CAL. CIV. CODE § 5124 (West 1970).

32. In a community property state a woman may maintain control of her earnings and property that she buys after marriage by making an ante nuptial agreement concerning her property rights. *See e.g.*, LA. CIV. CODE art. 2325 & art. 2392 (1971).

33. REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 153 (1972), *reprinted in* CCH INSTALLMENT CREDIT GUIDE No. 215 (Jan. 15, 1973).

agreement . . . with intent to obtain a higher rate of loan finance charge than would otherwise be permitted . . . ."[34] The Uniform Small Loan Law, which establishes for small loans maximum rates of charges in excess of those permitted under usury laws, contains the following two sections:

> Section 13(a). Every licensee hereunder may contract for and receive, on any loan of money not exceeding $300 in amount, charges at a rate not exceeding 3 percent a month on that part of the unpaid principal balance of any loan not in excess of $100, and 2 percent a month on any remainder of such unpaid principal balance. No licensee shall induce or permit any person, nor any husband or wife, jointly or severally, to become obligated, directly or contingently or both, under more than one contract of loan at the same time, for the purpose of obtaining a higher rate of charge than would otherwise be permitted by this section.
>
> Section 15. No licensee shall directly or indirectly charge, contract for, or receive a greater rate of interest than upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of $300. The foregoing prohibition shall also apply to any licensee who permits any husband and wife, jointly or severally, to owe directly or contingently or both to the licensee at any time a sum of more than $300 for principal.[35]

The purpose of these laws is to prevent creditors, when graduated rate ceilings are applicable, from exacting more interest from a couple by having two high interest accounts rather than one at a lower rate. For example, under section 13(a), if a husband borrows 150 dollars, he will pay a rate of three percent a month on one hundred dollars and two percent a month on fifty dollars. If his wife were to borrow 150 dollars, she would, without this statute, also pay three percent on the first one hundred dollars and two percent on the remaining fifty dollars. If, however, the two loans were treated as one, as they would have to be under this statute, they would pay three percent on one hundred dollars and two percent on the remaining 200 dollars. Without such a statute, therefore, creditors could require separate accounts for husband and wife and thereby frustrate the rate ceilings imposed by law. While these laws serve the public interest by protecting consumers from unscrupulous credit practices, they may have the additional unfortunate effect of preventing a spouse from having a separate account or loan where

34. UNIFORM CONSUMER CREDIT CODE § 3.509. The UCCC has been enacted in Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah, and Wyoming. The multiple agreement provisions governing credit sales (§ 2.402) and other loans (§ 3.409) do not treat husband and wife as one person. One commentator believes these omissions to be oversights rather than intentional. W. WILLIER & F. HART, CONSUMER CREDIT HANDBOOK 58 (1969).

35. UNIFORM SMALL LOAN LAW (7th Draft June 1, 1942). Some states enacted § 15 of the sixth draft, which does not include the provision on husband and wife. See B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 21 (1966).

the other spouse has already established credit. This circumstance falls most heavily on women because it is likely to be the husbands who have the established credit. The National Commission on Consumer Finance suggests that it is reasonable to permit husband and wife to have separate accounts if they so wish as long as full disclosure of possible additional costs is provided to them.[36]

D. Divorce and Separation. Another form of discrimination believed to result from the legal structure is the plight of the divorced woman. In fact, however, this problem arises not from the law but from a series of sociological factors. Typically, the divorced woman has relied upon her husband's credit during her marriage; when she applies for her own charge accounts or a loan she is, as they say in the credit business, a "new face." If she is not fully employed and relies in part upon alimony or child support to meet the creditor's income requirements, she will probably be refused. Such payments by husbands are considered unreliable[37] even though in an individual case they may have been made regularly over a long period of time.

Many creditors deny accounts to divorced people because they believe that they are generally unstable and less reliable than married or never-married persons.[38] This belief is probably based on

36. REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 153 (1972), *reprinted in* CCH INSTALLMENT CREDIT GUIDE No. 215 (Jan. 15, 1973).

37. The Citizens' Advisory Council on the Status of Women, in its January 1972 memorandum, The Equal Rights Amendment and Alimony and Child Support Laws, cited one study which showed that within one year after the divorce decree, 38% of the husbands were in full compliance with the support order. The figure dropped to 28% for the second year, 26% for the third, 22% for the fourth, 19% for the fifth, and 17% for years 6 through 9. Such figures would indicate that those husbands who continued support payments for 6 years after the court order would continue steadily for the next few years.

38. For example, a report, Credit Study by the Missouri Commission on the Status of Women, done in 1973 states:

> With respect to men obligated to pay their ex-wives court ordered support, alimony was considered a debt which reduced their income for credit purposes. This rationale did not follow through, however, with respect to the women who receive such support from their ex-husbands. For credit purposes from a woman's point of view, not only is alimony not considered "income," but it is also deducted as a liability, since, according to one bank officer, it is uncertain to continue. The result of this policy is discriminatory against both divorced women and men. For example, if a divorced man earns $10,000 per year and pays support of $2,000 per year, his income, assuming he has no other fixed debts, would be $8,000. On the other hand, a divorced woman who works and receives a salary of $8,000 per year and alimony of $2,000 per year, would have an income of only $6,000 for purposes of credit, whereas under the Missouri and federal tax laws, she would be treated as having an income of $10,000 per year. The incredible explanation for this computation was that a woman would become accustomed to living on her salary plus the alimony and would have to make up those expenses from her regular salary when the alimony ceased.

experience with divorced men, since so few previously married women have credit. At least one bank has learned from studying its own experience that divorced women are good risks but a divorced man is twice as likely to default than a married man.[39] Nevertheless, the burden of this policy falls most heavily on women. A man need not notify his creditors of his change in marital status, but a woman, opening her own accounts for the first time will be required to state that she is newly divorced.

Divorced and separated women suffer the results of having been actually or ostensibly financially dependent on their husbands. If they have never supported themselves and are unable to do so, they may be justifiably denied credit. If, however, they have worked and contributed to the family income but failed to establish themselves as an independent economic entity in the credit market, they are likely to be treated unfairly when they try to develop a credit record as a divorced person.[40] It is for this reason that married women are now insisting on having accounts in their own names and credit bureau records separate from their husbands'.[41]

IV. SOLUTIONS

The above summary of the causes of credit discrimination against women is incomplete and oversimplified, but it is sufficient to indicate that there is no easy solution to the problem. Sex discrimination, like racial discrimination, is deeply rooted and persists in the face of strong governmental policy and implementing legislation to the contrary.[42] Still, an attempt must be made to change all the conditions that contribute to the disadvantaged economic status of women. There are two major avenues of reform through law. State laws that give rise to the problem can be amended, and nondiscriminatory treatment can be mandated at the state and/or federal level.

A. Amendment of State Laws. It is unlikely that significant reform will be effected through the amendment of state laws. Not

39. Interview with Charles Hayward, Vice President, First National City Bank, in New York, N.Y. December 7, 1973.

40. *See* Campbell, *Women and Credit,* in MANUAL OF THE NATIONAL ORGANIZATION FOR WOMEN 1 (1973).

41. In 1973 The Baltimore Women's Law Center, in cooperation with the Baltimore City Women's Political Caucus, succeeded in negotiating a policy change on the part of the Credit Bureau of Baltimore which will now, upon request, maintain a separate file for each spouse.

42. This fact is evidenced by the experience of the Equal Employment Opportunity Commission in enforcing Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race or sex.

only do many of the laws commonly believed to inhibit the extension of credit not in fact do so, but also, such statutes are confined to a few states. Moreover, since such statutes frequently serve some other public interest, they are not likely to be repealed.

Laws that require a husband to support his wife should not prevent a creditor from extending credit to a married woman in her own name. Nevertheless, because some state courts might interpret them to be an obstacle, it is helpful to know that the equal rights amendment[43] (ERA) to the Constitution, if ratified, will require that support laws be rewritten so that they do not discriminate on the basis of sex.[44]

Community property laws will also be affected by the ERA[45] and have already undergone change in states that have enacted equal rights amendments to their own constitutions.[46] Arizona has completely revised its community property laws to give women equal management powers even though it has not enacted an equal rights amendment.[47]

State property laws that favor one spouse over the other are subject to challenge in federal courts. In *Reed v. Reed*,[48] the Supreme Court struck down an Idaho statute[49] that provided for a mandatory preference of men over women when persons of equal relation to an intestate decedent apply for appointment as administrator of the estate. The Court posed the issue, whether a rational basis exists between the difference in the sex of competing applicants for letters of administration and the state objective of reduc-

43. The operative language reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. RES. 208, 92d Cong., 1st Sess. (1971); S.J. RES. 8, 92d Cong., 1st Sess. (1971).

44. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 944-46 (1971). The following states, however, have Equal Rights provisions in their own Constitutions, and there is no indication that these provisions have altered domestic relations law: ALASKA CONST. art. 1, § 3; COLO. CONST. art. 2, § 29; HAWAII CONST. art. 1, § 4; ILL. CONST. art. 1, § 18; MD. CONST. DECLARATION OF RIGHTS, art. 46; N.M. CONST. art. 2, § 18 (Supp. 1973); PA. CONST. art. 1, § 27 (Supp. 1973); TEX. CONST. art. 1, § 3a (Supp. 1974); UTAH CONST. art. 4, § 1; VA. CONST. art. 1, § 11; WASH. CONST. amend. 61; WYO. CONST. art. 1, §§ 2, 3, art. 6, § 1.

45. Brown, Emerson, Falk & Freedman, *supra* note 44, at 946-49.

46. In Washington and in New Mexico, with the exception in the latter state of commercial community personal property, the wife shares with the husband equal management, control and disposition rights over community property. N.M. STAT. ANN. § 57-4A-7.1 to -8 (Supp. 1973); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1972).

47. ARIZ. REV. STAT ANN. § 25-214 (Supp. 1973).

48. 404 U.S. 71 (1971).

49. IDAHO CODE § 15-314 (1948) provided: "Preferences.—Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

ing the workload of its probate courts by eliminating a hearing. The Court held that:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.[50]

Laws conclusively vesting the management of community property in the husband rather than the wife seem to be similar violations of the equal protection clause.[51]

Multiple agreement laws, which prevent women from opening accounts or obtaining loans from creditors with whom their husbands have already established credit, are not being revised. Because these laws do operate in the public interest, attempts to repeal them would likely meet opposition. Moreover, it should not be expected that any or all of these changes would substantially correct the difficulties women face in obtaining credit. For example, in the past two years Washington has not only revised its community property law and enacted a state equal rights amendment, but has, in addition, passed a comprehensive credit law.[52]

B. State Laws Prohibiting Discrimination in Credit Practices. Twenty-two states and the District of Columbia now have laws prohibiting sex discrimination in the extension of credit; most of these states also prohibit marital status discrimination.[53] Because the majority of these laws were enacted less than a year ago, it is difficult to evaluate their effectiveness at this time, but a few observations can be made.

Many of these state laws do not prohibit all the types of discrimination identified in Part II. For example, the statutes of six states apply only to sex discrimination and therefore might not be interpreted to include some of the offensive practices that affect married women.[54] The West Virginia law applies only to public ac-

50. 404 U.S. at 76-77.

51. Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime,* 19 LOYOLA L. REV. 373 (1972-73).

52. WASH. REV. CODE ANN. § 26.16.030 (Supp. 1972) (property); WASH. REV. CODE ANN. ch. 141, § 5 (Supp. 1973), *amending* WASH. REV. CODE ANN. § 49.60 (1962) (credit); WASH. CONST. art. XXXI, § 1 (equal rights amendment).

53. See Appendix B.

54. Alaska, Kansas, South Dakota, Texas, Utah and West Virginia. Both Colorado and Minnesota have separate statutes for consumer credit and home financing. Marital status is covered only under the home financing statutes. See Appendix B.

commodations,[55] and the Illinois law covers only retail credit or credit cards.[56] Nine state nondiscrimination statutes apply to public accommodations and expressly or implicitly cover only some credit establishments.[57]

The enforcement provisions of these laws fall into two basic categories: those that extend a private right of action for damages;[58] and those that provide for an administrative remedy.[59] The Oregon, Washington, Massachusetts, and District of Columbia laws include both provisions and permit the complainant to choose which to pursue. Three states explicitly provide for injunctive relief in addition to one of the above remedies,[60] and Wisconsin has a criminal sanction of a 1,000-dollar fine instead of the right to a civil action. The Illinois law was enacted without any enforcement provisions. Six states provide for attorneys' fees and/or court costs[61] and punitive damages may be awarded in Oregon and Florida.

C. Existing Federal Remedies. Unlike the reform of property laws, legal prohibitions against discriminatory credit practices do not have to be left to the states. The federal government has legislative authority under the commerce clause to control credit practices.[62] Prior to a discussion of proposed federal legislation, it is useful to explore existing federal remedies in order to assess their adequacy and the consequent need for legislation.

1. *Constitutional Litigation.* At least one suit, *Hoberman v. Manufacturers' Hanover Trust Co.*,[63] has been filed[64] in a federal court challenging the discriminatory credit practice of discounting a married woman's income for the purpose of computing family income for a home mortgage. The cause of action in *Hoberman* arose in New York where at that time the Executive Law forbade sex, but not marital-status, discrimination by banks in mortgage lending

55. Althougb discrimination in the granting of mortgage credit by banks can usually be covered under a public accommodations statute, language in the West Virginia law suggests that discrimination on the basis of sex in home financing is not prohibited. W. VA. CODE § 5-11-2 (1971).

56. ILL. PUB. ACT 78-839, § 1a, *amending* ILL. STAT. ANN. ch. 121 ½, § 385.

57. Alaska, District of Columbia, Kansas, New Jersey, New York, Oregon, South Dakota, Utah, West Virginia. See Appendix B.

58. California, Colorado, Florida, Texas, Utah. See Appendix B.

59. Alaska, Connecticut, Kansas, Maryland, Minnesota, New Jersey, New York, Rhode Island, South Dakota, West Virginia. See Appendix B.

60. California, Utah, Washington. See Appendix B.

61. Colorado, Florida, Massachusetts, Oregon, Texas, Washington. See Appendix B.

62. Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.* (1970).

63. Civil No. 73-3279 (S.D.N.Y., filed July 26, 1973).

64. The case had not reached trial at the time of this writing.

and provided an administrative remedy.[65] Plaintiff's attorneys, however, preferred the forum of a federal district court to the cumbersome state administrative process.[66] Plaintiffs allege discrimination on the basis of sex in violation of the fourteenth and fifth amendments, and an important threshhold issue is whether sufficient state and federal involvement to raise claims under these amendments exists.[67] Plaintiffs are expected to argue that because the defendant bank's activities are regulated by both state and federal agencies, the requisite "state action" is present.[68] Assuming that state action will be found, the *Hoberman* decision will turn on whether defendant's justifications for discounting the income of a married woman can withstand the degree of scrutiny tha the court chooses to apply to a classification according to sex.[69]

2. *Regulation by Federal Agencies.* The issue being litigated in *Hoberman* is subject to regulation by several federal agencies. On December 17, 1973, the Federal Home Loan Bank Board published a policy statement concerning nondiscrimination by its member organizations.[70] The guidelines required that "[e]ach loan applicant's credit worthiness . . . be evaluated on an individual basis without reference to presumed characteristics of a group,"[71] and they specifically discourage the discounting of a working wife's income.[72] The Board found that "such discrimination is contrary to

65. New York Executive Law § 296(5) (e) (McKinney 1972), *repealed by* Act of Feb. 6, 1974, Bill No. A-9359, that specifically prohibits arbitrary discounting of a married woman's income.

66. Spokeswoman for the feminist law firm of Bellamy, Blank, Goodman, Kelly, Ross and Stanley, which represents plaintiffs and has received a foundation grant to litigate in the area of sex discrimination in credit.

67. Plaintiffs claim jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343. They have pleaded violations of 42 U.S.C. §§ 1981, 1982, 1983. The court is asked to find state action for the purposes of § 1983 in the regulation of the bank by the New York State Banking Department and the Board of Governors of the Federal Reserve System.

68. While the requisite state action might be found in the case of a bank or savings and loan association, it is doubtful that other types of creditors could be reached on constitutional grounds. *But see, The Discredited American Woman: Sex Discrimination in Consumer Credit,* 6 CALIF. DAVIS L. REV. 61, 78-79 (1973).

69. The Supreme Court in its most recent application of the Equal Protection Clause to a sex discrimination case was divided as to whether the "rational basis" test or the "suspect classification" test should be employed. The majority found that even under the most lenient test the Air Force regulation denying to dependents of servicewomen benefits granted to dependents of servicemen was unconstitutional. Four Justices, however, did adopt the "suspect classification" test saying that sex discrimination, like racial discrimination, must be subjected to strict judicial scrutiny. Frontiero v. Richardson, 411 U.S. 677 (1973).

70. 38 Fed. Reg. 34653 (1973). The FHLBB regulates all federally chartered savings and loan associations as well as many other institutions. 12 U.S.C. §§ 1437-42 (1970).

71. 38 Fed. Reg. 34653 (1973).

72. *Id.*

the principle of, and may in fact violate, constitutional provisions which guarantee equal protection of the law for all persons."[73] Although it has no legislative mandate to deal specifically with sex discrimination, the Board said that it had issued the guidelines on discounting married women's income under its authority to enforce provisions of the Civil Rights Act of 1968,[74] which prohibits discrimination in housing against minority groups, because "a larger proportion of minority group families rely on the wife's income to afford housing and other necessities."[75]

Other financial regulatory agencies—the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System and the Comptroller of the Currency—have been asked to issue rules prohibiting sex discrimination in lending policies.[76] The FDIC held hearings in December 1972 to consider the need for and its authority to issue such regulations. Although more than a year has elapsed, the FDIC has not yet announced its decision as to either issue.

The Federal Housing Administration (FHA)[77] and the Veterans Administration (VA)[78] provide mortgage insurance or guarantees for housing-related loans with low down payments. In 1965 the FHA revised its underwriting manual to include the following liberalized policy with respect to a wife's income:

> The principal element of mortgage risk in allowing the income of working wives as effective income is the possibility of its interruption by maternity leave. Most employers recognize this possibility and provide for maternity leave, with job retention, as an inducement of employment. With strong motives for returning to work any failure to do so after maternity leave would probably be due to causes which would be unpredictable and would represent such a very small percentage of volume that it could be accepted as a calculated risk.[79]

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73. *Id.*

74. 42 U.S.C. §§ 3601-31 (1970).

75. 38 Fed. Reg. 34653 (1973).

76. In February and March 1972 the Center for National Policy Review filed comments on behalf of 30 civil rights and public interest groups with all these agencies arguing that the agencies have authority under the Constitution and the Housing Act of 1949 to promulgate regulations prohibiting sex discrimination. A petition for rulemaking was also filed before the Board of Governors of the Federal Reserve System by the Institute for Public Interest Representation of the Georgetown University Law Center, May 15, 1973.

77. 12 U.S.C. §§ 1702-06(d) (1970). The FHA, an agency of the Department of Housing and Urban Development, insures a variety of housing related loans whose loan-to-value ratios are low and are, therefore, more subject to default than those in which a large down payment has been made.

78. 38 U.S.C. §§ 201-44 (1970). The VA provides mortgage insurance on low down payment loans as well as other benefits to veterans.

79. VII FHA Underwriting Manual, Home Mortgages, § 71924.

In 1970 the FHA counted all of the wife's income in ninety-one percent of the loans actually extended for new single-family homes.[80] The percentage of applicants who were rejected as the result of discounting the wife's income is not known.

The VA, on the other hand, persisted until mid-1973 in a more restrictive policy[81] and, in addition, obtained considerable adverse publicity because in order to comply with VA guidelines lenders were demanding affidavits from wives stating that they were practicing birth control and did not intend to have children.[82] A VA circular dated July 18, 1973, urged lenders to adopt a new policy:

> In consideration of present day social and economic patterns, the Veterans Administration will hereafter recognize in full both the income and expenses of the veteran and spouse in determining ability to repay a loan obligation. VA regional offices have been instructed that there shall not be any discounting of income on account of sex or marital status in making such determination.[83]

The federal secondary mortgage markets—the Federal National Mortgage Association (FNMA)[84] and the Federal Home Loan Mortgage Corporation (FHLMC)[85]—issued nondiscriminatory underwriting guidelines for use in their conventional mortgage purchase programs in 1971. The contract of FNMA (Fannie Mae) includes a warranty that the seller of the mortgage did not discriminate against the mortgagor on the basis of race, color, creed, religion, sex, age, or national origin, but it does not include marital status.[86] The FNMA also requires that, with respect to a wife's income, "[t]he key determination to be made is whether the circumstances reasonably indicate that the income, jointly or severally, will continue in a manner sufficient to liquidate the debt under

80. The Center for National Policy Review, The Catholic University of America, School of Law, Washington, D.C., Memorandum to the VA, VA's Restrictive Credit Practices—Comparative Analysis with Policies of Other Federal Agencies (April 1973).

81. DVB Manual M-26-1, Ch. 5, § IV, ¶ 5.11c(5) stated that a wife's income could be "considered" if facts indicated that it was reasonable to conclude that her employment would continue in the "foreseeable future."

82. *E.g., Wife Says Loan Tied to No-Child Vow,* Washington Post, Feb. 24, 1973 at A-1. In an information bulletin entitled *Wives' Income* (DVB 1B 26-73-1, Feb. 2, 1973), the VA said it did not require or condone solicitation of such affidavits.

83. DVB Circular 23-73-24, July 18, 1973, announcing Change 42; DVB Manual M-26-1, Ch. 5, § IV, Credit Standards.

84. 12 U.S.C. §§ 1716-19 (1970). FNMA is a secondary mortgage market for both conventional loans, *id.* § 1717(b)(2), and loans insured by FHA and VA, *id.* § 1717(b)(1). FNMA purchases mortgages from commercial and savings banks.

85. 12 U.S.C. §§ 1451-59 (1970). FHLMC, like FNMA, buys conventional FHA and VA mortgages, *id.* § 1454, but it deals primarily with federal savings and loan associations, federal home loan banks and state chartered banks which are members of the Federal Home Loan Bank system.

86. FNMA Conventional Selling Contract Supplement, § 701(s) (Nov. 1972).

the terms of the note and mortgage."[87] The guidelines do not explain the use of "reasonably" in this sentence or give examples of circumstances that would indicate that the income is stable.

FHLMC (Freddie Mac) has issued more specific rules to the same effect:

> If there are two borrowers both of whom have full time employment, a determination should be made as to whether both will probably work for several years (normally at least 20% of the time).[88]

The guidelines permit discounting of fifty percent of one income, however, when it judged that one person is likely to stop working during the first few years of the mortgage. Significantly, temporary maternity leave is exempted from that provision.

These guidelines will not abolish the practice of discounting a wife's income unless FNMA and FHLMC check the practices of the institutions with which they deal and refuse to buy loans from those who discriminate.[89]

3. *Proposed Federal Legislation.* Because the efficacy of existing judicial remedies and regulatory prohibitions of sex discrimination in the granting of credit remains uncertain, there has been considerable activity in both houses of Congress aimed at providing a comprehensive, effective remedy. On July 23, 1973, by a 90-0 vote, the Senate unanimously passed the Equal Credit Opportunity Act[90] as an amendment to the Truth in Lending Act.[91] The Act includes provisions of S.1605,[92] introduced by Senator William Brock, and of S.867,[93] introduced by Senator Harrison Williams. The operative language of the Senate Act is:

> It shall be unlawful for any creditor or card issuer to discriminate on account of sex or marital status against any individual with respect to the approval or denial of any extension of consumer credit or with respect to the terms thereof or with respect to the approval, denial, renewal, continuation, or revocation of any open end consumer credit account or with respect to the terms thereof. Section 104 of this title does not apply with respect to any transactions subject to this section.[94]

Section 104[95] excepts credit for business or commercial purposes,

87. *Id.* § 311.03(c).

88. FHLMC-Sellers Guide Conventional, Part V, Credit Underwriting.

89. FNMA's guidelines are likely to be more effective than FHLMC's because of their loans while FHLMC's clientele, the savings and loans, characteristically hold their mortgages as investments.

90. S. 2101, Title III, 93d Cong., 1st Sess. (1973).

91. 15 U.S.C. §§ 1601-81t (1970).

92. S. 1605, 93d Cong., 1st Sess. (1973).

93. S. 867, 93d Cong., 1st Sess. (1973).

94. S. 2101, Title III, 93d Cong., 1st Sess. § 181 (1973).

95. 15 U.S.C. § 1603 (1970).

credit transactions of more than 25,000 dollars, and transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission. The removal of these exceptions clearly strengthens the Equal Credit Opportunity Act, since the unavailability of business loans for women is becoming more evident.[96]

As an amendment to the Truth in Lending Act, the law would be enforced through a number of federal agencies. The Board of Governors of the Federal Reserve System would be empowered to issue regulations, including compliance guidelines, which would be enforced by the Federal Trade Commission, with respect to most consumer credit transactions. Other enforcement agencies would include the United States Treasury Department, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board acting directly or through the Federal Savings and Loan Insurance Corporation, the Bureau of Federal Credit Unions, the Civil Aeronautics Board, the Department of Agriculture and the Interstate Commerce Commission.[97]

Fortunately, enforcement by this unwieldy conglomerate is augmented by the Truth in Lending Act provision for civil liability.[98] The existing law provides for a 100-dollar minimum recovery for violations of the disclosure requirements of the Act. This minimum liability provision has caused courts to disallow class actions rather than award 100 dollars to each member of an enormous class and thereby ruin businesses for technical infringements of the law.[99] Therefore, the Equal Credit Opportunity Act amends the Truth in Lending Act to allow a maximum recovery of 100,000 dollars or one percent of the creditor's net worth, whichever is less in class action suits.[100] The Senate Committee believes this amendment is necessary to provide meaningful penalties that will induce compliance with the law and which the courts will not be reluctant to impose.[101]

The Consumer Affairs Subcommittee of the House Banking and Currency Committee currently has before it several bills that

96. Of 33,948 loans made by the Small Business Administration (SBA) in fiscal year 1973, only 123 went to women according to a synopsis of a study done for the SBA by Jeanne Wertz, Women Entrepreneurs and SBA (March 21, 1973).

97. 15 U.S.C. § 1607(a) (1970). Section 203 of S. 2101, Title II, however, would remove the Interstate Commerce Commission and add the Farm Credit Administration.

98. 15 U.S.C. § 1640(a) (1970).

99. The leading case is Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972).

100. S. 2101, Title II, 93d Cong., 1st Sess. § 208 (1973).

101. S. Rep. No. 278, 93d Cong., 1st Sess. 14-15 (1973).

are similar to the one approved by the Senate.[102] Chairwoman Leonor K. Sullivan of Missouri held hearings on the enforcement of Truth in Lending over a period of months in 1973. During three days of these hearings she asked members of the credit industry, government regulatory agencies and women or consumer advocates to comment on the advisability of including in the House Truth in Lending amendments a provision to protect women from credit discrimination. Comment was virtually unanimous in favor of a nondiscrimination provision, but industry representatives suggested that problems would arise with prohibiting the consideration of marital status in credit decisions.[103]

Creditors have two basic concerns in regard to the marital status provisions. First, they consider marital status a valid indicator of credit performance,[104] in that divorced and separated people are less apt to pay than are married people. They also argue that the marriage relationship creates certain legal responsibilities between spouses that must be taken into account in some credit transactions.[105] For example, a spouse's signature is needed if real property is used for security in a state where an inchoate property interest arises by operation of law.

Advocates of including marital status as a prohibited criterion cite two reasons. Not only would such a rule protect the woman who first applies for credit after she has been separated or divorced,[106] but it would also avoid the argument used by Hanover Manufacturers Trust in *Hoberman* that discounting a wife's income is not discrimination on the basis of sex because lenders are willing to dis-

102. H.R. 5414, H.R. 5599, H.R. 10109, H.R. 10162, H.R. 10311, H.R. 10603, H.R. 10675. The following bills have been referred to the Subcommittee on Bank Supervision and Insurance: H.R. 248, H.R. 3210, H.R. 3375, H.R. 10824.

103. *E.g.*, Statement of Harry N. Jackson on behalf of the National Retail Merchants Association, *Oversight Hearings, supra* note 8 (Nov. 6, 1973); Statement of John O. Zimmerman, President, General Motors Acceptance Corporation, *Oversight Hearings, id.* (Oct. 30, 1973); Statement of Evan Houseworth on behalf of the American Bankers Association, *Oversight Hearings, id.* (Oct. 30, 1973).

104. A survey of the Federal Home Loan Bank Board revealed that 64% of the savings and loans admit using a person's marital status as a factor in evaluating the loan applications. Eighteen percent indicated that marital status in and of itself could be grounds for automatic disqualification. Federal Home Loan Bank Board Survey of 100 Savings and Loan Associations, Summer 1971.

105. Statement of Matthew Hale, Counsel for The American Bankers Association, hearings on the Availability of Credit to Women before the National Commission on Consumer Finance (May 23, 1972); Statement of Edward Godwin on behalf of Mortgage Bankers of America, *Oversight Hearings, supra* note 8 (Oct. 31, 1973).

106. Statement of Sharyn Campbell for the National Organization for Women, *Oversight Hearings, supra* note 8 (Nov. 13, 1973).

count the husband's income instead.[107]

A related question raised by representatives of the credit industry is whether the proposed marital status provisions would be interpreted to preclude the creditor from inquiring about the marital status of an applicant. They argue that they must know whether a person is married in order to comply with certain state laws and to protect their interest in collateral to which a spouse may have a right.[108] In addition to the community property and multiple agreement statutes, wage assignment laws, tenancy by the entirety, and common-law dower are believed to require that a creditor know the marital status of the applicant.

Twelve states have wage assignment laws requiring either spouse to have the consent of the other before assigning his or her wages as collateral for a debt.[109] Seven other states require that a husband, but not a wife, obtain the spouse's signature.[110]

At common law, husband and wife held property as tenants by the entirety; neither alone could sever the tenancy or do anything to defeat the other spouse's right of survivorship.[111] In the twenty-two states that retain this form of ownership, combinations of statutes and judicial interpretations determine the rights and obligations of the spouses and their relationship to creditors.[112] In order for creditors to protect their interests in these states, they may need to obtain the signatures of both spouses before the property can be used as security.[113]

Common-law dower vests in the wife a life estate in one-third of the real property acquired during marriage.[114] In the seventeen states in which it still exists, if a husband alone executes a nonpur-

107. Statement of Margaret Gates, Co-Director, Center for Women Policy Studies, *Oversight Hearings, id.* (Nov. 13, 1973).

108. Statement of John Dillon, Executive Vice President of National Bank Americard (also representing Interbank), *Oversight Hearings, id.* (Oct. 30, 1973).

109. ARIZ. REV. STAT. ANN. § 6-631 (Supp. 1973); COLO. REV. STAT. § 80-15-4 (1963); HAWAII REV. STAT. § 409-20 (1968); IOWA CODE ANN. § 536.17 (Supp. 1973); ME. REV. STAT. ANN. § 9-3085 (1964); MD. CODE ANN. art. 8, § 6 (Supp. 1973); NEB. REV. STAT. § 45-144 (1943); R.I. GEN. LAWS ANN. § 19-25-33 (1956); VT. STAT. ANN. § 8-2228 (1971); VA. CODE § 6.1-289 (1973); WASH. REV. CODE ANN. § 49.48.100 (Supp. 1972); WIS. STAT. ANN. § 214.15 (1957).

110. ARK. STAT. ANN. § 81-317 (1947); IND. STAT. ANN. § 40-208 (1965); MASS. ANN. LAWS ch. 154 §§ 2, 3 (1970); MINN. STAT. ANN. § 181.07 (1966); MONT. REV. CODES ANN. § 41-1506 (1947); PA. STAT. ANN. § 43-274 (1964); WYO. STAT. § 27-202 (1957).

111. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 229-30 (1963).

112. *Id.* at 230-35.

113. For a detailed discussion, see Huber, *Creditors' Rights in Tenancies by the Entireties,* 1 B. C. IND. COM. L. REV. 197 (1960).

114. See H. CLARK, LAW OF DOMESTIC RELATIONS 220 (1968).

chase money mortgage on his land, his wife's inchoate dower is superior to the rights of the mortgagee.[115] A husband is not, therefore, able to mortgage his property without his wife's signature.[116] When common-law or modified curtesy exists[117] or when dower has been extended to cover both spouses,[118] a wife must likewise have her husband's signature to convey real property.[119]

In these situations, the onus is upon the creditor to determine whether the consent of the spouse is required. Should a federal law prohibit him from attempting to learn a person's marital status, the burden of the risk of accepting an invalid wage assignment or security interest in real property will be placed on the creditor.

Another problem creditors would confront under proposed federal legislation involves state property laws that limit the control a married woman has over her property. The most obvious example is the community property law of Louisiana, which deprives married women of control over the community property, including their own earnings.[120] Under such a law a creditor might refuse a woman credit because he could not expect to obtain a judgment against the community. Although this policy would reflect sound business practice, it could be viewed as a violation of a law prohibiting discrimination on the basis of sex or marital status since the state laws which the creditor would be relying on are themselves discriminatory.

Because no analogous case has been decided by the Supreme Court, it is not clear what the result would be should a case challenging such a practice reach the courts. Even if the law or the record evidenced the intent of Congress that such state laws be preempted, the response of the judiciary could not be predicted.[121] The federal courts have been reluctant to interfere with the operation of state property laws, particularly those which pertain to intrafamilial rights,[122] in order to assert a federal right under the Supremacy Clause.

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115. 2 R. POWELL, REAL PROPERTY § 209(2) (1973).

116. 1 *id.* § 119.

117. *E.g.*, DEL. CODE ANN. §§ 25-101, -131 (Supp. 1970).

118. *E.g.*, D. C. CODE ANN. § 19-102 (1973).

119. POWELL, *supra* note 115, at § 119.

120. LA. CIV. CODE art. 2404 (West 1971).

121. *But see* remarks of Congresswoman Leonor K. Sullivan before the Consumer Federation of America *reprinted in* 120 CONG. REC. E 209 (daily ed. Jan. 28, 1974) in which she implies that Congress has the power to do so: "Some people suggest we solve the problem by pre-empting all state laws dealing with husband-wife relationships, including dower and curtesy, or the community property laws of Louisiana and several other states which give the husband complete control over the disposition of a wife's earnings." *Id.* at E 210.

122. *See, e.g.*, United States v. Yazell, 382 U.S. 341, 352. "Both theory and the preced-

The credit industry is expected to oppose, in the House of Representatives, a bill which subjects its members to these uncertainties. Proponents of such legislation may be forced to include a provision that would protect creditors from this dilemma. Because the problem arises in only a few states and because the offensive state laws are already subject to attack on equal protection principles, advocates of the bill might consider this compromise.

V. Conclusion

Sex discrimination in credit practices will not be eliminated by revising state domestic relations or property laws. This is true because the offensive practices are not, as has been suggested, dictated by the law. They are, rather, the result of erroneous or outmoded notions of women's role in society.

Women need an effective legal remedy for credit discrimination. Twenty-two states and the District of Columbia have laws, most of which were enacted in the past year, that address this problem, but few of them are comprehensive enough or well enough enforced to be effective. Although credit practices may be attacked on equal protection grounds, no such case has yet been decided.

The federal financial regulatory agencies could promulgate and enforce rules forbidding discrimination, but to date only the Federal Home Loan Bank Board has done so. The federal credit bill,[123] which has been approved by the Senate, would require that these and other agencies regulate the credit industry with respect to discrimination on the basis of sex and marital status. It would also permit aggrieved persons or a class to sue in federal court for damages. Whatever credit legislation is finally approved by the Congress should provide for both courses of action. Only a strong, well enforced federal law, accompanied by efforts to educate both consumers and the credit industry, can be expected to overcome a tradition of discrimination and guarantee that women get the credit they deserve.

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ents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damages if the state law is applied."

123. S. 2102, Title III, 93d Cong. 1st Sess. (1973).

APPENDIX A

A COMPARATIVE VIEW OF COMMUNITY PROPERTY LAWS

	Wife's Earnings	*Wife's Personal Injury Recoveries*	*Management of Community*	*Power Over Community Personalty*
ARIZONA	Remain part of community. ARIZ. REV. STAT. § 25-211 (Supp. 1973)	Remain part of community. ARIZ. REV. STAT. § 25-211 (Supp. 1973)	Each spouse has equal management, control, and disposition rights, and equal power to bind the community. ARIZ. REV. STAT. § 25-214 (Supp. 1973)	Each spouse has equal power to control, manage, dispose of, or bind community personalty. ARIZ. REV. STAT. § 25-214 (Supp. 1973)
CALIFORNIA	Remain part of community, but she may control them unless she commingles them with community property managed by her husband. CAL. CIV. CODE § 5124 (West 1970)	Same as earnings, except husband may reimburse himself or the community for wife's medical expenses. CAL. CIV. CODE § 5124 (West 1970)	Husband is exclusive manager, but wife may manage whole community to the extent necessary to support her children. CAL. CIV. CODE §§ 5125 (West 1970) 5127.5 (Supp. 1974)	Husband may sell or encumber it without wife's consent, except disposition of furnishings of the home or her clothing requires her written consent. CAL. CIV. CODE § 5125 (West 1970)
IDAHO	Remain part of community, but she may control them. IDAHO CODE § 32-913 (1963)	Remain part of community, under husband's control. *Labonte v. Davidson*, 31 Idaho 644, 175 P. 588 (1915)	Husband is exclusive manager. IDAHO CODE § 32-912 (1963)	Husband may sell or encumber it without wife's consent. IDAHO CODE § 32-912 (1963)
LOUISIANA	Remain part of community. LA. CIV. CODE art. 2404 (West 1971)	Wife's separate property (Husband's are community property). LA. CIV. CODE arts. 2402, 2334 (West 1971)	Husband is exclusive manager. LA. CIV. CODE art. 2404 (West 1971)	Husband may sell or encumber it or give it away without wife's consent. LA. CIV. CODE art. 2404 (West 1971)
NEVADA	When one spouse gives written authority to the other to use her/his own earnings, they are considered a gift from the one spouse to the other and are considered separate property. Otherwise, she has control of her own earnings when using them for care of family. NEV. REV. STAT. 123.190, 123.230 (1973)	If wife sues alone, recovery is her separate property. NEV. REV. STAT. § 41.170 (1973)	Husband is exclusive manager. NEV. REV. STAT. § 123.230 (1973)	Husband may sell or encumber it or give it away without wife's consent. NEV. REV. STAT. § 123.230 (1973)

Power Over Community Realty	*Post-Separation Accumulations*	*Division of Community Upon Divorce*	*Alimony*
Joinder is required for acquisition, disposition, or encumbrance of an interest in real property. ARIZ. REV. STAT. § 25-214(c) (Supp. 1973)	Remain part of community. ARIZ. REV. STAT. § 25-211, 213 (Supp. 1973)		
Husband has sole management right, but joinder of wife is required before he can encumber or convey it. Cal. Civ. Code § 5127 (West 1970)	Both wife's and husband's are separate property. CAL. CIV. CODE § 5118 (Supp. 1974)	Subject to a few exceptions, the community must be divided equally. CAL. CIV. CODE § 4800 (West 1970) § 4800(b)(1) (Supp. 1974)	Available to both spouses. CAL. CIV. CODE § 4801 (Supp. 1974)
Husband has sole management right, but joinder of wife is required before he can encumber or convey it. IDAHO CODE § 32-912 (1963)	Wife's are separate property; husband's are community property. IDAHO CODE § 32-909 (1963)	Community is divided equally or as the court deems just. IDAHO CODE § 32-712 (1963)	Available only to wives. IDAHO CODE § 32-704 (1963)
Husband has sole management right and joinder of wife is required only when he is dealing with the family homestead. LA. CIV. CODE art. 2404 (West 1971)	Wife's are separate property; husband's are community property. LA. CIV. CODE art. 2334 (West 1971)	Community must be divided equally. LA. CIV. CODE art. 2406 (West 1971)	Available only to wives and limited to 1/3 husband's income. LA. CIV. CODE art. 160 (West Supp. 1974)
Husband has sole management right, but joinder of wife is required before he can encumber or convey it. Either spouse may give the other, by written power of attorney, the complete power over community real property. NEV. REV. STAT. 123.230 (1973)	Wife's are separate property; husband's are community property. NEV. REV. STAT. § 123.180 (1973)	Community is divided according to what is just and equitable. NEV. REV. STAT. § 125.150(1) (1973)	Available only to wives. NEV. REV. STAT. § 125.150 (1973)

NEW MEXICO	Remain part of community. N.M. STAT. ANN. § 57-4A-2 (Supp. 1973)	Remain part of community. N.M. STAT. ANN. § 57-4A-2 (Supp. 1973)	Spouses have equal powers of management, except husband is presumed to be sole manager of commercial community personal property, unless wife assumes her rights in writing. § 57-4A-7.1 (Supp. 1973)	Either spouse alone has full management powers, except only the spouses named in a document of title or a written agreement with a third party may manage the named personalty. § 57-4A-8 (Supp. 1973)
TEXAS	Remain part of community, but she may control them. TEX. FAMILY CODE § 5.22(a)(1) (1973)	Those attributable to loss of earning capacity are community property; the rest are separate property. Injured spouse has control of both. TEX. FAMILY CODE § 5.01, 5.22 (1973)	Each spouse has sole management rights over that part of the community each would have owned if single, and they have joint powers over the rest of the community. TEX. FAMILY CODE § 5.22 (1973)	If husband is sole wage-earner, he may sell or encumber it or give it away without wife's consent. TEX. FAMILY CODE. § 5.22(a) (1973)
WASHINGTON	Remain part of community. WASH. REV. CODE § 26.16.030 (Supp. 1972)	Remain part of community, except, if recovered from husband, wife may keep some as separate property. *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972)	Each spouse has equal power to manage & control, community. WASH. REV. CODE § 26.16.030 (Supp. 1972)	Each spouse has equal power to manage, control, and bind it. WASH. REV. CODE § 26.16.030 (Supp. 2)

Joinder required for all conveyances or mortgages except purchase-money mortgages. § 57-4A-7 (Supp. 1973) - - - - - - - - - - - - - - - - Joinder of both spouses required when both names are found on document of title. § 57-4A-8 (Supp. 1973)	Remain part of community. N.M. STAT. ANN. § 57-4A-2 (Supp. 1973)	Unequal division of community "especially suitable for the needs of each" spouse is allowed upon divorce. *Sparks v. Sparks*, 84 N.M. 267, 502 P.2d 292 (1972)	Available to both spouses. N.M. STAT. ANN. § 22-7-13 (Supp. 1973)
Joinder of wife required if property under joint control or for homestead. TEX. FAMILY CODE § 5.22, § 5.81 (1973)	Remain part of community. TEX. FAMILY CODE § 5.22 (1973)	Community is divided as court deems just and right. TEX. FAMILY CODE § 3.63 (1973)	No permanent alimony—only temporary alimony and permanent support pursuant to agreement between spouses. TEX. FAMILY CODE § 3.59 (1973)
When husband is managing, wife must join before he can sell, encumber, or convey it. WASH. REV. CODE § 26.16.030(3) (Supp. 1972)	Both wife's and husband's are separate property. WASH. REV. CODE § 26.16.140 (Supp. 1972)	Community is divided according to what is just, equitable and right. WASH. REV. CODE § 26.08.110 (1961)	Available to both spouses. WASH. REV. CODE § 26.08.110 (1961)

APPENDIX B

State Credit Laws

State	*Date*	*Type*	*What Protected*
ALABAMA		None	
ALASKA	1972	Public Accommodations ALASKA STAT. § 18.80.230 (Supp. 1972)	Sex
		Home Finance Statute ALASKA STAT. § 18.80.250 (Supp. 1972)	Sex
ARIZONA		None	
ARKANSAS		None	
CALIFORNIA	10-1-73	Credit Statute CAL. CITY. CODE § 1812.30 (Supp. 1973)	Sex Married women's uncommingled or separate property
COLORADO	6-7-73	Consumer Statute COLO. REV. STAT. ¶ 73-1-109 (SUPP. 1973)	Sex
	6-14-73	HOUSING STATUTE COLO. REV. STAT. § 69-7-5 (Supp. 1973)	Sex and Marital Status
CONNECTICUT	6-13-73	Credit Statute Public Act # 73-573	Sex and Marital Status
DELAWARE		None	
DISTRICT OF COLUMBIA	11-16-73	Human Rights Law Title 34 D.C. RULES AND REGS. (1973)	Sex and Marital Status
FLORIDA	10-1-73	Anti-Discrimination Statute FLA. SESS. LAWS Ch. 73-251 (1973)	Sex and Marital Status
GEORGIA		*	
HAWAII		*	
IDAHO		*	
ILLINOIS	1973	Credit Card Statute ILL. ANN. STAT. Ch. 121 1/2 § 385.1 (Smith-Hurd 1973)	Sex and Marital Status
INDIANA		None	
IOWA		*	
KANSAS	1972	Anti-Discrimination Act K.S.A. §§ 44-1017, 44-1009 (C) (1972)	Sex
KENTUCKY		*	
LOUISIANA		None	
MAINE		*	

To What/Whom Statute Applies	*Enforcement Provisions*
Public Accommodations	Administrative Remedy
Home Financing	Administrative Remedy
Obtainance of money, property, labor, or services on a deferred payment basis; credit reporting agency must, upon written request, identify in report credit history of each spouse and of their joint accounts.	Private right of action—actual damages + $250. Injunctive relief
Consumer credit sale, lease, loan by seller, lessor, lender whose unpaid balance from previous year exceeds $1 million. Home financing	Private right of action—actual damages hut not less than $100 or more than $1,000 + costs and attorney's fees.
Any creditor	Administrative remedy—Commission of Human Rights and Opportunities
Home financing Public accommodations	Administrative remedy—Office of Human Rights or Private right of action—damages.
Loaning money, granting credit	Private right of action—compensatory + punitive damages + attorney's fees.
Issuing credit cards; must consider financial status of couple if requested; must consider individual's status if requested to issue card to individual.	None
Public accommodations Home financing	Administrative remedy—Commission on Civil Rights.

MARYLAND	7-1-73	Credit Statute MD. CODE ANN. art. 83, §§ 128(e) & 153C(b) Home Financing Statute MD. CODE ANN. art. 48B, § 23(a) (1973)	Sex and Marital Status
MASSACHUSETTS	1973	Credit and Services Statute MASS. GEN. LAWS Ch. 151B, § 4(14)	Sex and Marital Status
MICHIGAN		*	
MINNESOTA	8-1-73	Human Rights Act MINN. STAT. §§ 363.03.2(3) & 363.03.7 (1973)	Sex and Marital Status Sex
MISSISSIPPI		None	
MISSOURI		*	
MONTANA		None	
NEBRASKA		None	
NEVADA		None	
NEW HAMPSHIRE		None	
NEW JERSEY	1972	Civil Rights Statute N.J. STAT. ANN. § 10.5-12 (Supp. 1973)	Sex and Marital Status
	1973	Banking Commission Directive	
NEW MEXICO		None	
NEW YORK	2-6-74	N.Y. EXEC. LAW § 296-a	Sex and Marital Status
NORTH CAROLINA		None	
NORTH DAKOTA		None	
OHIO		*	
OKLAHOMA		*	
OREGON	10-73	Public Accommodation Statute O.R.S. § 30.670 (1973)	Sex and Marital Status
PENNSYLVANIA		**	
RHODE ISLAND	5-11-73	R.I. GEN. LAWS § 34-37-4.1 (Supp. 1973)	Sex and Marital Status
SOUTH CAROLINA		None	
SOUTH DAKOTA	1972	Human Relations Act S.D.C.L. §§ 20-13-21, 20-13-23 (Supp. 1973)	Sex
TENNESSEE		*	

Retail credit accounts; consumer credit; amends married women's property act to specifically include retail credit accounts home financing.	Administrative remedy, Commission of Small Loans may issue cease and desist orders—no personal recovery.
Unlawful to deny, terminate credit or adversely affect credit standing.	Private right of action—actual damages; if no actual damages, special damages of not more than $1,000 + attorney's fees. Administrative remedy—Commission Against Discrimination.
Home financing Extension of credit	Administrative remedy—Department of Human Rights
Public accommodations; mortgage lenders Prohibiting inquiries into birth control practices of bank credit applicant.	Administrative remedy—Division on Civil Rights.
Creditors, lenders, insurers	Administrative remedy—complaint to Superintendent of Banks or Attorney General.
Legislative intent to prohibit discriminatory credit practices.	Private right of action—compensatory + punitive damages + attorney's fees or file complaint with Commissioner of Bureau of Labor.
Financial organizations and credit granting commercial institutions.	Administrative remedy
Public accommodations; consumer credit; home financing.	Administrative remedy.

TEXAS	8-27-73	Credit Statute TEX. REV. CIV. STAT. ANN. art. 5069-2.07 (Supp. 1974)	Sex
UTAH	5-8-73	Civil Rights Act UTAH CODE ANN. § 13-7-3 (Supp. 1973)	Sex
VERMONT	2-12-74	Credit Statute 8 V.S.A. § 1211, 9 V.S.A. §§ 2362 & 2410	Sex and Marital Status
VIRGINIA		None	
WASHINGTON	6-7-73	Anti-Discrimination Statute WASH. REV. CODE ANN. § 49.60.5 (Supp. 1973)	Sex and Marital Status
WEST VIRGINIA		Human Rights Statute W. VA. CODE ANN. § 5-11-9(f) (Supp. 1973)	Sex
WISCONSIN	8-4-73	Credit Statute WISC. STAT. ANN. § 138.20 (Cumm. Supp. 1973)	Sex and Marital Status
WYOMING		None	

* Indicates that some legislation on the subject of women and credit has been introduced into the state legislature.
**Pennsylvania Department of Banking has promulgated proposed nondiscrimination regulations.

Creditors, lenders	Private right of action—actual damages or $50, whichever is greater + court costs.
Places of public accommodation; enterprises regulated by the state, including all institutions subject to regulation under the Utah Uniform Commercial Credit Code.	Private right of action for damages; violators will be considered public nuisances and may be enjoined in a suit brought by the Attorney General.
Lending institutions, retail installment contracts, retail charge accounts.	License may he suspended.
Deny open or closed end credit transaction.	Private right of action—injunctive relief, actual damages & costs and attorney's fees; administrative remedy—Human Rights.
Public accommodations	Administrative remedy
Financial organizations or any other credit granting commercial institution.	$1,000 fine