

# The Discredited American Woman: Sex Discrimination in Consumer Credit

## I. INTRODUCTION

Discrimination against women borrowers is perfectly legal; there are no current provisions that forbid banks from discriminating against women if they choose to do so. Title VI of the Civil Rights Act of 1964 forbids discrimination against the beneficiaries of federally assisted programs, but it only applies to discrimination based on race, color, and national origin, not sex. Title VII of the same Civil Rights Act prohibits banks (as well as other employers) from discriminating on the basis of race, color, religion, national origin, and sex, but only applies to employment, and does not cover those seeking credit.<sup>1</sup>

Consumer credit<sup>2</sup> plays a tremendously important role in the economy and in our lives. The importance of credit to the general level of economic activity cannot be underestimated. "There is considerable thought that although credit practices do not directly cause cyclical change, they can have a marked effect on the magnitude and length of such periods."<sup>3</sup> Just as credit has been said to be the foundation of economic growth in the nation, so it is also the foundation upon which our standard of living rests. "The simple fact is the United States runs on credit. Just how many individuals would be able to buy homes, cars, and appliances without some form of

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<sup>1</sup>Testimony of Dr. Bernice Sandler, Executive Associate and Director of the Project on the Status of Education and Women, before the National Commission on Consumer Finance (hereinafter cited NCCF) at 4, May 22, 1972.

<sup>2</sup>Consumer credit may be defined as:

... including all short and intermediate-term credit extended through regular business channels to finance the purchase of commodities and services for personal consumption, or to refinance debts incurred for such purposes. It may be divided into two major types, instalment and noninstalment . . . The four principal classes of consumer instalment credit are automobile paper, other consumer goods paper, home repair and modernization loans, and personal loans. Noninstalment credit is divided into three major components: single-payment loans, charge accounts, and service credit.

J. CHAPMAN, *THE CONSUMER FINANCE INDUSTRY, ITS COSTS AND REGULATION*, 1 (1967).

<sup>3</sup>K. Rosenberg, *A Study in the Credit Practices of Selected Retail Firms* (unpublished thesis on file in the Economics Library, UC Berkeley), Jan. 1964, at 2.

credit? Not many."<sup>4</sup>

It is undisputed that credit is a necessary ingredient in the fabric of most families' lives;<sup>5</sup> any stricture upon the reasonable flow of credit will have drastic consequences on the individuals directly involved. "In the purchase of higher priced consumer goods, credit is practically a necessity if a sale is to be made."<sup>6</sup>

Women often experience discrimination in the granting of credit especially if they are married, separated, divorced, or widowed.<sup>7</sup>

Considerable discrimination is practiced by many consumer credit organizations against separated, divorced, widowed, and never married women because of marital status alone. Single parents, however, do not want any special consideration because they are raising children alone in a dual parent society, but they do want to be judged on their *own* merits as *individuals* and as responsible citizens.<sup>8</sup>

Today, women make up over 37% of the entire labor force, comprising 46% of the "white collar" force, 17.6% of the "blue collar" force, 65.8% of the "service" personnel, and 17.3% of the farm related workers.<sup>9</sup> In approximately 42% of the family units in 1969, both the husband and wife were employed in the labor force. In fact, the trend is toward increasing participation by women, especially older women, in the labor pool. "[M]arried women of all ages are increasing their rates of labor force participation."<sup>10</sup>

Yet despite this increased participation in the labor force by women, despite the fact that over 40% of all married women are working, and that some six million households have female heads, women are singled out for particularly harsh treatment by banks,<sup>11</sup>

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<sup>4</sup>R. COLE, CONSUMER AND COMMERCIAL CREDIT MANAGEMENT 3 (1968).

<sup>5</sup>"[A] credit system such as we have devised has provided the American consumer with the highest standard of living as measured by material goods and services than any civilization has ever known." *Id.* at 12.

<sup>6</sup>*Id.*

<sup>7</sup>See report submitted to the NCCF from George B. Williams, Executive Director of Parents Without Partners, Inc., May 23, 1972.

<sup>8</sup>*Id.* at 3.

<sup>9</sup>A. FERRISS, INDICATORS OF TRENDS IN THE STATUS OF AMERICAN WOMEN, 107, (1971).

<sup>10</sup>*Id.* at 103.

<sup>11</sup> A former Woman's Bureau employee who was single and earned about \$12,000 a year applied for a 90-day totally secured loan of \$5,000 from a District of Columbia bank.

She was in the midst of a transaction involving settlement in the purchase of a house in Virginia, and she needed the money as part of the down payment. She had a savings account of \$5,000 in a Massachusetts bank but could not withdraw it until she gave a 90-day advance notice to the bank. She thought the passbook would be evidence of available collateral. The loan officer at the bank reviewed her application and offered her \$300.

Testimony of Mrs. E. Koontz, Director of the Woman's Bureau and Deputy Ass't. Secretary of Labor, before the NCCF, at 4, May 22, 1972.

department stores,<sup>12</sup> credit card companies,<sup>13</sup> government loan agencies,<sup>14</sup> and even life and disability insurance companies.<sup>15</sup>

A 1971 survey of the lending policies of savings and loan associations conducted by the Federal Home Loan Bank Board revealed that only 22% of the banks would allow full credit for a working wife's income if she was age 25, had 2 school-age children, and worked full time as a secretary; 25% reported that they would count none of her income, 63% said they would count 50% or less of her income.<sup>16</sup>

There are several real obstacles which a married woman must face if she is attempting to establish her own credit, or even keep the credit she had prior to marriage.

<sup>12</sup>"A St. Paul school teacher could not get a charge account at a downtown department store since the application for the account had to be based on the husband's credit rating . . . [S]ince the husband was a student with no income they were refused the account." Testimony of Betty Howard, Director, Division of Womans' [sic] Affairs, Minneapolis Department of Human Rights, before the NCCF at 4, 5.

<sup>13</sup>One woman relates:

My husband uses his [Gulf Oil] card for business and keeps careful records . . . for his car. I use my car and use my own credit cards for gas, etc., so that when the bills pile in, he knows right away which belong to which car. . . [I] sent in the standard credit card application form to Gulf Oil with all information provided as it pertained to me — a wage earner in the five figure range, employed for the past four years . . . and received a letter in reply requesting that the form be completed by my husband!

Testimony by Rep. Bella Abzug before the NCCF at 2; but *cf.* "Giving Credit Where Credit is Long Overdue," *Woman's Day*, Feb. 1973 at 152, wherein the author notes that "American Express and Carte Blanche are publicizing the fact that they offer credit cards (minimum income to qualify is about \$8500) to working wives without a husband's signature as well as to single women." Note, however, that such solicitation may merely be a prelude to less visible credit investigation practices that are equally as discriminatory as forcing a working woman to apply for a credit card in her husband's name. Unpublished letter to the Editor of *Ms Magazine* by Laura Monroe, Assoc. Director of ACLU of No. California, dated Jan. 12, 1973.

<sup>14</sup>*But cf.* Testimony of Quinton Wells, Director, Office of Technical and Credit Standards, Housing Production, and Mortgage Credit, Department of Housing and Urban Development, before the NCCF at 1:

FHA has never had any policies, procedures, or instructions specially designed for determining the eligibility of female applicants. However, FHA has, and always has had, instructions for determining whether the income of a working wife will be counted in support of the mortgage obligation.

<sup>15</sup> Recently a woman doctor in San Francisco wrote . . . about discrimination against women in life and disability insurance . . . Under the most desirable disability plan available, single women had to pay considerably higher premiums than men. One single woman's policy under the plan was not renewable after age 65. And the same woman was required, if partially disabled, to seek employment outside the profession after 24 months.

Testimony of Rep. Martha Griffiths before the NCCF at 4.

<sup>16</sup> Testimony by J. McElhone before the NCCF at 3, *The Economic Rationale for Mortgage Lending Standards Affecting Women Borrowers*.

Upon marriage a woman's credit rating undergoes a curious transformation. Many retail stores will simply not grant credit to a married woman in her own name.<sup>17</sup> In addition, a married woman with a steady job and an excellent credit rating will find it difficult — and sometimes impossible — to borrow money, open a charge account in her own name, or buy a car.<sup>18</sup> The husband encounters no such disabilities. In fact, it is usually the husband's credit rating which is taken into account when a married woman seeks to open a charge account. Of course, the account is in the husband's name.

Single women find that when they get married creditors will usually either notify them that their account is cancelled and ask for the return of the credit card, or find out the name of the husband and re-issue the account to him.<sup>19</sup>

This policy "gives the husband control of the couple's finances . . . and prevents the wife from ever establishing her own credit records."<sup>20</sup> The consequences of such policy are obvious. Upon the death of the husband or dissolution of the marriage, the wife is faced with a non-existent credit rating.<sup>21</sup>

This section will examine each facet of the married woman's problems in obtaining credit — an attempt to point out how deeply the social prejudices have become entrenched in the credit policies of many businesses and lenders.

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<sup>17</sup> When we got married, my husband had just lost the 1971 Chicago mayoral election, and, consequently, was between jobs. At that time we applied for a charge account at one of the world's largest department stores. On the form it asked for the husband's employer. I told the credit clerk that my husband didn't have an employer at the moment, and I offered to supply the name of my company and bank. "No," she said, "We don't care about the women — just the men."

Testimony of J. Friedman before the NCCF at 1.

<sup>18</sup> Testimony of Rep. Griffiths, *supra* note 15 at 4, 5.

<sup>19</sup> Testimony of Rep. Abzug, *supra* note 13 at 2.

<sup>20</sup> Testimony of Rep. Griffiths, *supra* note 15 at 5.

<sup>21</sup> Symposium of Women and the Law, "Credit: Are Women Treated Differently," on file at UC Davis Law Review Office, at 7.

After divorce, unless the woman has been adamant about insisting on credit in her own name, and assuming that she has been able to get it, she will not have any credit references to rely on in establishing new credit. [In addition] almost every retailer will cut her off from using her prior joint account, even though most will allow her husband to continue using it, since the account is in his name.

See also San Francisco Chronicle, Nov. 14, 1972 at 20; Testimony presented by State Rep. Goudyloch Dyer of Ill. before the NCCF; and Testimony of Betty Howard, Director, Division of Womans' [sic] Affairs, *supra* note 12 at 9:

I received a letter from a divorced woman whose income, including \$7,000 child support, totaled over \$18,000 last year . . . American Express refused to issue her a credit card, stating that her "individual income" was not large enough . . . [W]hen she pressed her request she was informed that alimony and child support cannot be considered in determining the maximum requirements.

As indicated, married women experience difficulty obtaining credit in their own names, even though prior to marriage they might have enjoyed an excellent credit rating. Representative Martha Griffiths, appearing before the National Commission of Consumer Finance in Washington, D.C., stated flatly, "Many lenders will not grant credit to a married woman in her own name."<sup>22</sup> The following letter from a disgruntled consumer is indicative of this policy:

I began working after graduation from college on Sept. 5, 1967. Until March 3, 1972, I was single, gainfully employed, and enjoyed a flawless credit rating . . . On March 4, 1972, I married. *Nothing else* changed! The fact of my marriage meant, however, that I had to reapply for credit at stores in Detroit where I had been charging and faithfully discharging my debts for the over 2 and 1/2 years since I moved here. Even though my income of over \$16,000 is the same as my husband's, I had to reapply for credit in *his* name.<sup>23</sup>

The married woman who desires only to have her old accounts reflect her married name often finds that the lender insists upon changing the account to her husband's name, even if her husband has less income, or no income at all.<sup>24</sup>

A woman who has proved herself responsible by paying her own bills for years is suddenly treated like a child who can't be trusted any longer. It's not only unfair and demeaning, but ridiculous and unreasonable that a woman should have to forfeit her economic identity simply because she changes her name.<sup>25</sup>

This widespread policy simply cuts off the married woman's line of credit. Unless she is fortunate enough or adamant enough to maintain her accounts in her own name, the married woman finds herself "discredited."

In most states, women who are married . . . find that credit, like domicile, follows the husband. A married woman thus receives credit *only* through her husband as his ward, and not as an individual. She is a non-person for credit purposes.<sup>26</sup>

Even more frustrating to the married woman is the fact that the husband's occupation and prior credit references are often used to determine their joint credit rating, irrespective of the wife's income

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<sup>22</sup>Testimony of Rep. Griffiths, *supra* note 15 at 3. See also Testimony presented by State Rep. Eugenia Chapman of Ill. before the NCCF at 1. "Many businesses automatically cut off a woman's credit when she notifies them that she has changed her name because of marriage."

<sup>23</sup>Testimony of Rep. Martha Griffiths, *supra* note 15 at 1.

<sup>24</sup>*Id.* at 5.

<sup>25</sup>Testimony of J. Friedman, *supra* note 17 at 2.

<sup>26</sup>Testimony of Rep. Abzug, *supra* note 13 at 1; See also Testimony of Lynne Litwiller, National Coordinator for Taxes and Credit for the National Organization for Women (NOW) before the NCCF at 3: "Case after case of documentation could be cited where women in high business and professional positions have been denied credit in their name and were forced to obtain credit only through their husbands."

or prior credit standing.<sup>27</sup> For loan purposes, a married woman's income, especially if she is a non-professional of child bearing age, is simply not considered unless the lending institution is assured she is not contemplating bearing a child.<sup>28</sup>

Admittedly, this rigid stance is being modified by many banks and retail stores who find themselves losing valuable customers.

[B]anks will continue to seek out the woman as depositor and borrower for a very simple reason inherent in the nature of present day banking. Bank 'supermarkets' offer essentially the same services. Thus, it is becoming increasingly difficult for the individual bank to find differentials that will catch the attention of new customers and attract those of competitors. Cognizance of the money women control has suggested one of these significant differentials to a great many alert banks and assures continued and growing attention to the credit needs of women.<sup>29</sup>

However, married working women still must pass lender-established criteria. One lending institution, the Northport Federal Savings & Loan Association, Northport, New York, sets forth guidelines to follow in allowing the wife's income to be counted:

If she is *not* professional or a teacher, and if of childbearing age, her income is considered from the following standpoint —

1. Does her employment give her leave of absence fully paid?
2. Does her employment give her leave of absence partially paid?
3. Does she contemplate discontinuing her employment and staying home to take care of her children?
4. How many children does she have?
5. Length of marriage without bearing a child?

The percentage of discount for a woman expecting to return to employment will depend on the above circumstances.<sup>30</sup>

In simple terms, lenders are, in many instances, making it difficult for good credit risks to obtain credit. This cannot make good business sense since it creates a feeling of ill will toward any lender who, without reasonable justification,<sup>31</sup> turns down an application for

<sup>27</sup> [A] married couple composed of a male student and a working woman may not be able to get credit because agencies will not consider her salary. This appears to be based on the premise that a woman of any age, whether of married or unmarried status, is likely to become pregnant at any time, and that should she become pregnant, she will immediately cease working and will not pay her bills. Testimony of Chapman, *supra* note 22 at 2.

<sup>28</sup> *Cf.* statement of Mrs. Charles M. Sullivan, Chairman of the Board of the Northport Federal Savings and Loan Association, Northport, N.Y., on behalf of the National League of Insured Savings Associations, before the NCCF, at 2, 3.

<sup>29</sup> Statement of the American Banker's Association before the NCCF, 4.

<sup>30</sup> Statement of Mrs. Charles M. Sullivan, *supra* note 28 at 2, 3. Note that in a survey conducted by the National League of Insured Savings Associations, replies indicated a similar approach in almost all instances.

<sup>31</sup> Under CAL. CIV. CODE § 5121, (material accompanying note 35 *infra*.) banks and retailers complain that they "can never determine when a woman has separate property." Telephone interview with Sandy Thompson, Legislative Aide to

credit by a married woman which she wishes in her own name, or even worse, cancels an old account by an established customer with a good payment record, requesting her to make a new application in her husband's name. The same is true of banks who refuse to consider a woman's assets in deciding whether to grant a home loan. Many local, smaller, independent businesses have realized that such refusals and demands could significantly affect their business, and, consequently, married women may have an easier time obtaining credit in these smaller, local retail outlets.<sup>32</sup>

The bases for many of these credit problems women face are social — generated by a once prevalent vision of a woman as a wife and mother and no more. As the United States Supreme Court succinctly stated in *Bradwell v. Illinois*:<sup>33</sup>

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.<sup>34</sup>

Legal justifications in the form of state laws do exist which could validly make a lender wary,<sup>35</sup> but more often than not these justifications are half-truths, misunderstood by the lender who uses them to deny credit to creditworthy women.

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Assemblyman Waxman, on April 5, 1973. Clearly, both banks and retailers are concerned that a married woman will commingle her separate property, thereby making it community property which, under CAL. CIV. CODE § 5116, is not liable for the contracts of the wife.

However, this contention ignores the fact that a married male may transfer all his property to his spouse, thereby making it her separate property and effectively precluding a creditor from reaching it under § 5121. There has been no showing that a woman is more likely to fraudulently transfer her property than a male, and any denial of credit to a married woman on this basis is discriminatory.

<sup>32</sup>Symposium *supra* note 21 at 8; see also Litwiller, *supra* note 26 at 6.

<sup>33</sup>83 U.S. (16 Wall.) 130 (1872).

<sup>34</sup>*Id.* at 141.

<sup>35</sup>See CAL. CIV. CODE § § 5116, 5121 (West 1970). § 5116 states:

The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by pledge or mortgage thereof executed by the husband. Except as otherwise provided by law, the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage.

§ 5121 adds: "The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts . . ."

Reading these provisions, a creditor will realize that a married woman with no earnings or separate property could be a risky borrower, since the community property is not liable for her debts unless secured by pledge or mortgage thereof executed by the husband. This is a valid justification for denial of individual credit where the married woman has no earnings or separate property, but becomes suspect when used to deny credit to a married working woman, or a wife who has separate property.

## II. THE RIGHT OF AMERICANS TO GO INTO HOCK SHALL NOT BE ABRIDGED ON ACCOUNT OF SEX

### A. WORKING WIVES

Where creditors attempt to justify denial of credit to women on the basis of state laws which impose civil and legal disabilities upon women, the need for strong federal legislation specifically attacking credit discrimination becomes patently obvious.<sup>36</sup>

Remedial state and federal legislation is needed since it is apparent that the present state laws do not provide adequate protection for married, single, divorced, separated, or widowed women trying to obtain credit, or keep the credit rating they have from disappearing upon marriage or dissolution of the marriage; and federal legislation in the area is non-existent. Such remedial legislation was recently introduced into the Illinois General Assembly.<sup>37</sup> The proposed bills would forbid credit card issuers from requiring a woman to reapply for credit upon marriage unless there were reasonable grounds to believe that such woman's individual financial status had deteriorated since her initial application for credit, and would also flatly prohibit creditors from awarding credit in a discriminatory fashion on the basis of sex or marital status.

California has become increasingly aware of sex discrimination in the granting of retail credit. One provision of the Song-Beverly Credit Card Act of 1971 states: "No card issuer shall refuse to issue a credit card to any person solely because of that person's race, religious creed, color, national origin, ancestry or sex."<sup>38</sup> Note, however, that this provision does not establish any lender criteria as to when an issuer should issue a credit card, nor does it allow credit cards to a woman in her own name if that is not the practice of the issuer. This provision treads softly on the basic problem of establishing women not only as creditworthy, but as creditworthy *individuals* capable of handling credit in the same manner as a male consumer, and does not initiate any substantive change in the present law regarding a woman's establishment of credit.

Perhaps the most comprehensive bill relating to women and retail credit in California is proposed Assembly Bill 312,<sup>39</sup> which prohibits denial of credit to women under "designated conditions" and provides a civil remedy for violation of such provisions:

- (a) No married woman shall be denied credit in her own name if her earnings or separate property are such that a man possessing the

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<sup>36</sup>Litwiller, *supra* note 26 at 10.

<sup>37</sup>See Ill. House Bills 4390 and 4391 (Introduced by Reps. Dyer and Chapman), 1972.

<sup>38</sup>CAL. CIV. CODE § 1747.80 (West 1973).

<sup>39</sup>Cal. A.B. 312 (Feb. 8, 1973) (Introduced by Waxman and Berman).

same amount of property or earnings would receive credit.

(b) No unmarried woman shall be denied credit if her property or earnings are such that a man possessing the same amount of property or earnings would receive credit.

(c) A credit reporting agency shall, upon the request of a married woman, maintain a credit file in her name separate from that of her husband in the same manner as a file is maintained for a sole or single female.

(d) For the purposes of this section, 'credit' means obtainance of money, property, labor, or services on a delayed-payment basis.

1812.31 Any person who willfully violates the provisions of this chapter is liable for each and every such offense for the actual damages and five hundred dollars in addition thereto, and such woman may petition the court to order the person violating any such subdivisions to extend credit upon such terms, conditions, and standards as he normally utilizes in granting credit to males.<sup>40</sup>

The most revolutionary aspect about this bill is that its existence rests upon the hitherto legislatively unarticulated premise that, indeed, women are treated differently from men in the area of credit. In addition it recognizes the right of both married and unmarried women to enjoy credit equality with men in the following situations: (1) Where the unmarried woman's property or earnings are such that a man with the same property or earnings would receive credit, and (2) Where the married woman's earnings or separate property are such that a man possessing the same property or earnings would receive credit. The latter, however, may not take into account California's community property law vesting sole management and control in the husband, and could be construed to place a disability on a wife who has no property or "earnings."

California, one of the eight community property states in the nation,<sup>41</sup> has various statutory provisions relating to a married woman's income, both separate and commingled, which clearly play a major role in shaping the misconceptions many lenders have concerning the married woman's financial status.

These misconceptions rest, in large part, upon one fundamental attribute common to most community property systems — that the administration and control of the community property rests in the hands of the husband.<sup>42</sup> California is no exception;<sup>43</sup> but it should be noted that Texas recently amended its laws regarding the extent of the husband's management and control over the community prop-

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<sup>40</sup>*Id.*

<sup>41</sup> Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

<sup>42</sup> W. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* 322 (1943).

<sup>43</sup> See CAL. CIV. CODE § § 5125, 5127 (West 1970). See Article, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U.C.D. L. REV. —.

erty.<sup>44</sup> Generally, Texas law now provides that each spouse shall have sole management, control, and disposition of that community property which he or she would have owned if single. Where the community property is commingled, the mixed or combined community property is subject to the joint management, control, and disposition of the spouses unless the spouses otherwise provide.

Although not entirely satisfactory, since a non-working spouse — most often the wife — will have no property to control,<sup>45</sup> the statute does allow joint disposition and control of commingled community property. From a creditor's standpoint, this is highly relevant, since joint control allows the wife to "burden" the community with her contracts. Although as yet unconstrued by Texas courts, the probable result of the Texas law should be to allow married women credit without relying on the traditional creditor devices of requiring the husband to be the "real" account holder while naming the wife his "agent."

Under California law there is no similar analysis. California Civil Code Section 5125 provides that the husband has the "management and control of the community personal property, with like absolute power of disposition as he has of his separate estate."<sup>46</sup> In addition, his liabilities can be enforced against the community property, while those of his wife can rarely be so enforced.<sup>47</sup>

This fact has not been lost on creditors who, characteristically, seek as financially secure a party as possible when extending credit. Since a creditor may reach the community property to satisfy the debts of the husband but not those of the wife unless for "necessaries,"<sup>48</sup> lenders employ devices which have become institutionalized. The foremost of these is requiring the married woman to apply or reapply for credit in her husband's name. The rationale behind this is that the account becomes the husband's, and the wife becomes his agent; thus, the purchases by the wife are impliedly

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<sup>44</sup>See VERNON'S TEXAS CODES ANNOTATED, FAMILY CODE § 5.22 (West Supp. 1972). Subdivision (b) states:

If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney or other agreement in writing.

<sup>45</sup>See VERNON'S TEX. CODES, FAMILY CODE § 5.22(a) (West Supp. 1972).

<sup>46</sup>Wilcox v. Wilcox, 21 Cal. App. 3d, 457, 458, 98 Cal. Rptr. 319, 320 (1971).

<sup>47</sup>Spreckels v. Spreckels, 116 Cal. 339, 343, 48 P. 228, 229 (1897); *but see* CAL. CIV. CODE § 5116 (West 1970), which allows the community property to be made liable for the wife's debts if secured by pledge or mortgage of the husband.

<sup>48</sup>See CAL. CIV. CODE § 5130 (West 1970).

agreed to by the husband.<sup>49</sup>

This, of course, allows the community property to be made available in the event the creditor brings suit to recover monies owed him.

[F]or contractual relations, there are various safeguards [the creditor may use]. The most satisfactory are found in the California Civil Code based upon the theory of consent by the husband . . . It is there provided that the community property will be liable if secured by a pledge or mortgage executed by the husband, or if the wife acts as agent for her husband.<sup>50</sup>

These so-called "safeguards" merely serve to perpetuate the inequities of the present credit system. The married woman receives credit as an appendage of her husband, not as an individual, even though sections 5116 and 5121 of the California Civil Code both clearly state that the separate property<sup>51</sup> or earnings of the wife are liable for her own debts contracted before or after marriage. "The major obstacle to women being treated equally in seeking credit is the stereotype still pervasive in today's society, of a woman as wife, mother and homebody."<sup>52</sup>

Lenders and creditors are unable or unwilling to believe a married woman who is working will not simply stop working or get pregnant. Apparently working on the theory that "anatomy is destiny," lenders appear to believe that a woman in her child-bearing years is "very likely to get pregnant," and is considered a "bad credit risk."<sup>53</sup>

Children do not preclude a woman's participation in the labor force, although statistics do show that the presence of children six years of age or younger tends to restrict the labor force participation rate of married women.<sup>54</sup> Many employers provide extended leaves for women, often with pay; and many women do return to work soon after the birth of the child. In addition, a woman may defer the birth of her first child, or decide not to bear a child, and these women should not be penalized by a lender simply because they *may* bear a child, or are, in the lender's estimation, likely to bear a child.

Married women who work and/or have separate property should encounter no problems receiving credit as individuals since California law allows creditors to reach their assets as if they were single. The reality is that creditors ignore this possibility and concentrate instead on the husband as the source of income. This is not to say that the

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<sup>49</sup>See, e.g., *Hulsman v. Ireland*, 205 Cal. 345, 270 P. 948 (1928); *Meyer v. Thomas*, 37 Cal. App. 2d 720, 100 P.2d 360 (1940).

<sup>50</sup>Comment, *Community Property — Wife's Interest — Creditor's Rights*, 23 S. CAL. L. REV. 237, 241 (1950).

<sup>51</sup>*Cf.* CAL. CIV. CODE § 5107 (West 1970).

<sup>52</sup>Howard, *supra* note 12 at 10.

<sup>53</sup>*Id.*

<sup>54</sup>FERRISS, *supra* note 9 at 373.

creditor would not be justified in requiring that the loan be secured through the husband since, in many instances, the peculiar facts of a particular situation may reasonably warrant the lender to seek security for fear of fraud or insufficient assets held by the woman.

However, in the typical situation, the husband's income, assets, and payment record are seen by the lender as the sole considerations in deciding whether or not to grant credit to the wife, notwithstanding the wife's assets, job, or past payment record.

## B. THE DILEMMA OF NON-WORKING WIVES

Most of the previous discussion has presumed the wife to have separate property or earnings which creditors can reach<sup>55</sup> without resort to fictional devices. Where a married woman does not work, does not own separate property, or her property is commingled,<sup>56</sup> another question arises. That is, can the wife's interest in the community property be subjected to satisfy the wife's debts. In short, the answer is no.<sup>57</sup> In *Grolemund v. Cafferata*,<sup>58</sup> the California Supreme Court indicated, in dicta, that section 5105 of the Civil Code (formerly section 161a) did not alter the situation with respect to the wife's interest remaining subject to the husband's management and control over the community property.

[T]he enactment of section 161a of the Civil Code, defining the interests of the spouses in community property, has not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control.<sup>59</sup>

In effect, the court agreed that the wife's interest in the community was present, existing, and equal, but was not vested so far as to allow the wife's portion to be subject to her debts.

The concept of a present interest in property has affected the wife in at least two ways, neither of which have a substantial impact upon the use by her of community property during her lifetime. First, because of her present interest, statutory actions with respect to community property which accrue to her during her lifetime are not forfeited at her death, but pass to her personal representative . . .

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<sup>55</sup>See text accompanying note 35, *supra*.

<sup>56</sup>*Cf.* CAL. CIV. CODE § 5110, (West 1970); *also see* *Grolemund v. Cafferata*, 17 Cal. 2d 679, 683, 111 P.2d 641, 643 (1948):

As to the blending of separate and community property, the general rule is that the confusion of these, so that each is indistinguishable from the other, renders the mass community property.

<sup>57</sup>See generally, Comment, *Liability of Community and Separate Property for Contracts of Husband and Wife*, 22 CAL. L. REV. 554 (1933-34); Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240 (1965-66)

<sup>58</sup>17 Cal. 2d 679, 111 P.2d 641 (1948).

<sup>59</sup>*Id.* at 689, 111 P.2d 641 at 646.

Second, a wife is able to file her own income tax return indicating community property as income.<sup>60</sup>

The *Grolemund* court found no difficulty, however, in finding that the community property *was* liable for satisfaction of the husband's debts.<sup>61</sup>

The reason for allowing a married woman to escape her lawful debts is by no means clear. It would appear that public policy would demand that such interest be subject to the claims of creditors.<sup>62</sup>

The present result of *Grolemund* is that a creditor is given a legal justification to avoid contracting with a married woman who is neither working nor has extensive property. Any stricture on the ability of any married woman to contract in her own name and render the community property liable for her debts will reduce the availability of credit to that woman. The judicial construction of section 5105 and the plain language of section 5116 makes such a stricture inevitable. Both deny the married woman access to her portion of the community. The wife who does not work is clearly discriminated against since she cannot fall back upon sections 5116 or 5121 which allow the separate property or earnings of the wife to be liable for her contracts. The wife who does work may fare slightly better if she manages to convince the lender or retail creditor of her legal rights under sections 5116 or 5121. There is no valid reason for requiring a working wife — who legally is as secure a party as her working husband — to undergo the same discriminations that non-working wives face. This may sound harsh, but under the present system of law in California, non-working wives with no separate property are particularly vulnerable to legal riposts from creditors who are well aware that they would have no recourse if payments should stop from a married woman who has an account in her own name. Ostensibly, working women should not have the same problem. Such is not the case. Even if working the married woman labors under a severe handicap. Unless she separates her earnings from those

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<sup>60</sup>Comment, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System*, 6 LOYOLA L. REV. 66, 83, n. 106 (1973).

<sup>61</sup>See e.g., *Coffee*, Estate of, 19 Cal. 2d 248, 120 P.2d 661 (1941); *Nichols v. Mitchell*, 32 Cal. 2d 598, 197 P.2d 550 (1948); *County of Alameda v. Aberle*, 268 Cal. App. 2d 424, 73 Cal. Rptr. 926 (1968); *Wolff v. Hoaglund*, 11 Cal. App. 3d 227, 89 Cal. Rptr. 778 (1970).

<sup>62</sup>Comment, *supra* note 50 at 239. See also *In re Cummings*, 84 F. Supp. 65 (S.D. Cal. 1949) which held California affords no effect to interlocutory decrees in a bankruptcy context. Even at this stage, the court indicated a wife's interest in her portion of the community had not vested to the extent that the trustee in bankruptcy could exercise any power over it. *But cf. In re Barasch*, 439 F. 2d 1393, 1396 (9th Cir. 1971) which questioned the result in *Cummings*, noting that "the precise status of a subsequently appealed interlocutory divorce decree is uncertain."

of her husband, in the absence of an agreement or understanding between the spouses that they are to be the wife's separate property, prevailing California law provides that such earnings may acquire the character of community property by the process of commingling property in such a manner as to make it impossible to trace the property so commingled into specific property now owned or held.<sup>63</sup>

The creditor may resort to the remedies implied in California Civil Code section 5116 and, through a court judgment, garnish the wife's wages; however the fear here is that the wife may simply quit working, thereby cutting off any access the creditor may have to his money.<sup>64</sup>

Both California law and preconceived stereotypical notions of married women account for the continued reluctance on the part of most lenders to extend credit to married women as individuals, rather than as extensions of their husbands. The area of retail credit is one which has largely been ignored by legislators, yet it affects the lives of millions of single, married, divorced, and widowed women. "Credit discrimination on the basis of sex is not only irrelevant and unfair but a peculiarly paralyzing form of denial of opportunity."<sup>65</sup>

### III. THE EQUAL RIGHTS AMENDMENT: A SOLUTION?

As written, the proposed Equal Rights Amendment appears quite simple. The amendment reads, in part, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."<sup>66</sup>

Yet this amendment, which is now fighting for its constitutional life,<sup>67</sup> should have a pervasive influence upon over half of the population of the United States who have not been afforded equality of rights under the law.<sup>68</sup>

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<sup>63</sup>*E.g.* *Metcalf v. Metcalf*, 209 Cal. App. 2d 742, 26 Cal. Rptr. 271 (1962); *also see* *Austin v. Austin*, 190 Cal. App. 2d 45, 49, 11 Cal. Rptr. 593, 595 (1961):

Where separate and community funds were commingled, as they were here, in a single bank account, in undisclosed amounts, the court would have been warranted in concluding that the entire amount constituted community property.

<sup>64</sup>CAL. CIV. CODE § 5130 (West 1970). The legal doctrine of "necessaries" permits a wife to purchase articles necessary for her support and charge it to her husband. However, the scope of this doctrine has been so narrowed by judicial interpretation that it is practically useless to creditors.

<sup>65</sup>Abzug, *supra* note 13 at 2.

<sup>66</sup>H.R. J. Res. 208, 92nd Congress, 1st Sess. (1971).

<sup>67</sup>As of this writing, the legislatures of twenty-eight states have ratified the proposed Equal Rights Amendment, while eleven state legislatures have rejected it. This leaves eleven states who have not yet acted, and of these eleven, ten must ratify the amendment if it is to pass in 1973.

<sup>68</sup>*See generally*, Comment, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* 84 HARV. L. REV. 1499 (1971); Brown,

The legal and extralegal disabilities which women still have today . . . range from laws prohibiting women from working in certain occupations and excluding women from certain colleges and universities and scholarship programs, to laws which restrict the rights of married women and which carry heavier criminal penalties for women than for men.<sup>69</sup>

The necessity for such an amendment can hardly be doubted; the Fifth and Fourteenth Amendments have not been interpreted as providing equal rights for women.<sup>70</sup> As late as 1963, the President's Commission of the Status of Women stated: "In no 14th Amendment case alleging discrimination on account of sex, has the United States Supreme Court held that a law classifying persons on the basis of sex was unreasonable and therefore unconstitutional."<sup>71</sup>

This is not to say that the Equal Protection Clause could not serve as a watchdog over discriminatory sexual classifications. Most assuredly it could, and some progressive federal and state courts have so held.<sup>72</sup>

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. [cite] The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.<sup>73</sup>

The impact of the Equal Rights Amendment will be obvious and direct. Those laws which arbitrarily classify women as deserving of distinct and separate treatment with no basis other than the fact that they are women will be invalidated. However, the amendment will

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Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871 (1971); Rawalt, Emerson, and Weaver, *The Equal Rights Amendment*, 57 WOMEN LAWYERS J. (1971).

<sup>69</sup>Testimony of Rep. Florence Dwyer, The "Equal Rights" Amendment, Hearings Before the Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, 91st Cong. 1st Sess., at 28 (1971).

<sup>70</sup>*Cf.* Testimony of Rep. Martha Griffiths before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary on the Equal Rights Amendments, 91st Cong., 1st Sess., (1971); *see also* Reed v. Reed, 404 U.S. 71 (1971), in which the Supreme Court for the first time found a sex-based classification in violation of the Equal Protection Clause of the 14th Amendment. However, the Court's decision did not give a clear indication of how far the Court is prepared to go in finding differential treatment according to sex invalid under the 14th Amendment.

<sup>71</sup>*Report of the Committee on Civil and Political Rights* at 34 (1963).

<sup>72</sup>*Cf.* *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329, (1971); *also see* *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth v. Stauffer*, 214 Pa. 113, 251 A.2d 718 (1969); *U.S. v. York*, 281 F. Supp. 8 (D. Conn. 1968).

<sup>73</sup>*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340.

not only deal with women; men, too, will be protected against sex discrimination.<sup>74</sup>

The fundamental legal principle underlying the Equal Rights Amendment . . . is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based upon the irrelevant fact of sex.<sup>75</sup>

In the area of the proposed amendment's affect upon community property laws, "it is . . . clear that the amendment is in fact intended to affect state marital property systems and will definitely include community property systems."<sup>76</sup> Should the amendment be construed in California to allow for equal management and control of community property, it is probable that the easing of credit for married women would ensue, since the lender would no longer be able to justify denying a married woman credit in her own name absent any legitimate legal basis.

If California law provided that a husband and wife should have joint management and control of the community property it would be clear that the wife's present, existing, and equal interest would include the right to possess and use the community property to the same extent as her husband.<sup>77</sup>

Thus, the principle that "during the husband's life the community property is subject to his debts"<sup>78</sup> would be expanded to include the wife. Of course, "voluntary agreements between the husband and wife regarding management and control would be unaffected since sex is not a determinative factor in their operation."<sup>79</sup>

There remains, however, a fear in some quarters that the Equal Rights Amendment will be given short shrift by the courts; that the amendment would suffer the same fate as the Privileges and Immunities Clause under the Fourteenth Amendment.<sup>80</sup> Faced with interpreting this clause for the first time in *The Slaughter-House Cases*,<sup>81</sup> the Supreme Court severely narrowed its applicability.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish

<sup>74</sup> 117 CONG. REC. H. 9360 (daily ed. Oct. 12, 1971) (remarks of Rep. Edwards); 118 CONG. REC. S. 4140 (daily ed. Mar. 17, 1972) (remarks of Sen. Cook).

<sup>75</sup> Rawalt, Emerson, and Weaver, *supra* note 68 at 12.

<sup>76</sup> Comment, *supra* note 60 at 68.

<sup>77</sup> *Id.* at 91.

<sup>78</sup> *Grolemund v. Cafferata*, 17 Cal. 2d 679, 687, 111 P.2d 641, 645.

<sup>79</sup> Comment, *supra* note 60 at 92, 96. Note, however, that as respects the effect of the Equal Rights Amendment upon present laws, the author states: "[T]here appears to be no basis upon which current sexual classifications could be upheld under the Equal Rights Amendment."

<sup>80</sup> U.S. CONST. AMEND XIV, § 1.

<sup>81</sup> 83 U.S. (16 Wall) 36 (1872).

to state here it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.<sup>82</sup>

This view disregards important distinctions between the legislative history surrounding passage of the Fourteenth Amendment Privileges and Immunities Clause and legislative action respecting the Equal Rights Amendment. The debates in Congress on drafts of the Fourteenth Amendment point up these differences. “[M]ost of the discussion of the ‘privileges and immunities’ was confused and, it must be said, much was vacuous.”<sup>83</sup> One representative of the Joint Committee on Reconstruction recalled that “[t]he part relating to ‘privileges and immunities’ came from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him.”<sup>84</sup>

In contrast, the legislative intent to be gleaned from the drafting of the Equal Rights Amendment is far from ambiguous. The proposed amendment has been introduced in various forms in Congress since 1923. Both the House of Representatives and the Senate Judiciary Committee have held hearings on the measure, and have reported the amendment to the full House and Senate. Before 1972, the Senate twice passed the amendment, once in the 81st Congress on Jan. 25, 1950, and in the 83rd Congress, on July 16, 1953. On both these occasions, the amendment included the “Hayden rider,” which stated: “The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex.” It is significant that the Senate Judiciary Committee had stated that this rider was “not acceptable to women who want equal rights under the law.”<sup>85</sup> The present draft of the proposed Equal Rights Amendment does not include such a rider; and it is made plain by this omission that the drafters did not intend to allow present discriminatory or “benign” state or federal laws based on sex to have any continuing validity under the Equal Rights Amendment. Clearly, this vast storehouse of legislative history cannot be dismissed by the courts; but, instead, the courts must give effect to the manifest purposes that, in the light of

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<sup>82</sup>*Id.* at 74, 75.

<sup>83</sup>BARRETT, BRUTON, and HONNOLD, *CONSTITUTIONAL LAW — CASES AND MATERIALS* 620 (3d Ed. 1968).

<sup>84</sup>C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STANFORD L. REV.* 5, 19 (1949).

<sup>85</sup>S. REPORT NO. 1558, 88th Congress, 2d Sess., at 2.

the amendment's legislative history, appears from its provisions considered as a whole.

#### IV. THE "STATE ACTION" LIMITATION: WILL IT PRECLUDE THE ERA'S APPLICATION IN THE AREA OF RETAIL CREDIT?

Under either an equal protection approach or the Equal Rights Amendment, a threshold issue is whether the action sought to be prohibited falls within the "state action" limitation. The "state action" doctrine is usually encountered in the context of Fourteenth and Fifteenth Amendment civil rights cases.<sup>86</sup>

Almost all of those traditional American liberties which we espouse are liberties protected against the action of the government, state or federal, and not against the action of the individual.<sup>87</sup>

It has, however, become increasingly difficult to distinguish between so-called "state action" and private action, since the Supreme Court's characterization of what is "state action" has tended to be based on a case-by-case analysis rather than a specific set of criteria.<sup>88</sup>

The rhetoric of the courts — seeking to find 'state action' — is not particularly helpful analytically and obscures the underlying policy considerations. In one sense there is always state action because the state law either forbids or permits private action. Hence, the appropriate question may be whether under the circumstances of the particular case it is a denial of equal protection for the state (making legal) the discrimination by the private person or group involved.<sup>89</sup>

Such an analysis was utilized by the Supreme Court in *Palmer v. Thompson*,<sup>90</sup> where the opinion, per Mr. Justice Black, stated: "Here there has unquestionably been 'state action' . . . The question, however, is whether this closing of the pools is state action that denies 'the equal protection of the laws' to Negroes."<sup>91</sup>

These same principles may be controlling under the Equal Rights Amendment with regard to sex discrimination in the granting of

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<sup>86</sup>See *Hodges v. U.S.*, 203 U.S. 1, 14 (1905), "[T]hat the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of." See *Brown, Emerson, Falk, and Freedman*, *supra* note 68 at 905.

<sup>87</sup>J. Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 351 (1963).

<sup>88</sup>*Cf. Reitman v. Mulkey*, 387 U.S. 369, 378 (1966). "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations."

<sup>89</sup>E. Barrett, *Syllabus for Constitutional Law II*, on file at the UC Davis Law Review office, at 28.

<sup>90</sup>403 U.S. 217 (1971).

<sup>91</sup>*Id.* at 220.

consumer credit. Again, as in an examination of "state action" under the Equal Protection Clause, the question presented is whether by permitting any store, bank, or credit agency to establish sex-based criteria in the granting of credit, the state has denied the individual her equal rights under the law. Of course, where it can be shown that the state itself is a party to the alleged discrimination, as where a state would permit a state-chartered bank to practice discriminatory lending policies, the "state action" is revealed and no further analysis is necessary. In such case, the state "[b]y its inaction . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."<sup>92</sup>

However, in the sphere of "private action," the public impact of such discriminatory policies, and the very nature of the enterprises involved, such as retail stores which do not restrict their clientele to a particular sex, would probably militate toward a finding of state action. Here, too, the state by its inaction has denied the affected individuals their equal rights under the law. "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires . . . The problem is different, however, where the public domain is concerned . . ." <sup>93</sup> In the granting of consumer credit, the public domain is very much involved, and a state's acquiescence to such discrimination by "private" individuals or institutions may reasonably be held to involve "state action."

## V. A GLIMPSE OF THE FUTURE

The Equal Rights Amendment will have a direct and immediate effect upon those laws giving the husband sole power to manage and control the community property. It will also act as a spur to legislators to enact non-discriminatory legislation to supplant those laws which could be invalidated.<sup>94</sup>

Neither sex should be considered as the obvious manager, rather, individual circumstances and capabilities should be taken into account. Thus the amendment would not allow the management and control laws to remain unchanged.<sup>95</sup>

As a result, banks, credit agencies, and retail stores which are affected by the amendment will be forced to give equal weight to the

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<sup>92</sup>Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). See also Lewis, *Burton v. Wilmington Parking Authority — A Case Without Precedent*, 61 COL. L. REV. 1458 (1961).

<sup>93</sup>Moose Lodge v. Iris, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting).

<sup>94</sup>*Cf.* Cal. S.C.R. No. 83 (Nov. 8, 1972) (Introduced by Dymally and Moscone) which proposes creating a joint committee whose purpose it would be to conform the California codes to the proposed Equal Rights Amendment.

<sup>95</sup>Comment, *supra* note 60 at 90.

wife's income and assets. The practice of forcing a creditworthy woman to take out credit as an agent of her husband will probably not be tolerated under the amendment, unless some reasonable basis other than that of sex can be used to justify the procedure, and it applied equally to both sexes.

Upon ratification by the requisite number of states, there will be a two-year "grace period" in which the states and federal government will presumably attempt to legislatively resolve the conflicts which will assuredly arise once the amendment takes effect. After ratification, the courts may play a large part of this process. "In cases challenging statutes under the Equal Rights Amendment, the courts will be faced with essentially two alternatives: either to invalidate the statute or to equalize its application to the two sexes."<sup>96</sup>

This consideration — that the courts will have such a choice — and the certainty of such conflicts under the Equal Rights Amendment should alert both state and federal legislative bodies that the two-year period preceding implementation of the amendment should be wisely used to study those laws which do not equally apply to both sexes and devise new ones based on a state and federal policy of non-discrimination.

Those statutes which bear most directly upon sex discrimination in credit in California — the sole management and control provisions of the community property statutes (§ § 5125, 5127 of the Civil Code) — could be altered legislatively in several ways, including extending application of the management and control laws to include both spouses, or allowing each spouse to have sole management and control of that community property which he or she would have owned if single.<sup>97</sup> In addition, the state must take an affirmative role in introducing specific legislation designed to curb discriminatory practices in the area of consumer credit.<sup>98</sup>

The *Report of the National Commission on Consumer Finance* recommends:

[T]hat states undertake an immediate and thorough review of the degree to which their laws inhibit the granting of credit to creditworthy women and amend them, where necessary, to assure that credit is not restricted because of a person's sex.<sup>99</sup>

Such remedial legislation would substantially end sex discrimination in the granting of consumer credit in California. By allowing equal control and management of the community property or some similar scheme which would not favor the husband over the wife or vice versa, the state would be legislatively altering present law by allowing

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<sup>96</sup> Brown, Emerson, Falk, and Freedman, *supra* note 68 at 913.

<sup>97</sup> Comment, *supra* note 60 at 91.

<sup>98</sup> Cal. A.B. 312 (Feb. 8, 1973) (Introduced by Berman and Waxman).

<sup>99</sup> REPORT OF THE NCCF at 153, Dec. 1972.

the wife's debts contracted during marriage to be paid out of the community, thereby giving the wife a present, equal, existing, and vested right in the community, coequal with her husband in the management and control. Thus the creditor would no longer need the "agency" device, nor would the creditor be forced to secure a pledge or mortgage executed by the husband, since the community would be liable for the debts of both spouses.

## VI. CONCLUSION

The human species, according to the best theory I can form of it, is composed of two distinct races, the men who borrow, and the men who lend.<sup>100</sup>

Credit has become a necessity of life, not only to men but to women as well; however it is not enough to say that women have the use of credit cards — albeit not in their own names — and that is a sufficient recognition of their credit rights. This view ignores the woman as an individual and once again relegates her to a second-class citizenship no matter how competent or intelligent she may be. Interestingly, discrimination in retail credit is a low-visibility discrimination, little noticed by men and silently suffered by women. In most cases the lender will not admit to its existence, rationalizing a refusal on traditional lender-established criteria which is weighted in favor of the male borrower and against the female. Equalizing legislation is long overdue. The subtle and not so subtle discrimination suffered by women in the area of retail credit flies in the face of the changing role women have begun to play as individuals in society, standing equally with men. To allow such anachronistic notions about women and credit to stay rooted in soil which is no longer suited for them would be to do women a disservice that can be neither morally nor legally defended.

The Equal Rights Amendment is one solution, but it is not truly necessary to assure women equal credit rights if legislators would recognize the disparity between men and women in the area, or the Equal Protection Clause could be utilized to assure women equal rights. Unfortunately, courts have been slow in accepting sex as a "suspect classification,"<sup>101</sup> and legislators, both national and state, have had little success in introducing legislation designed to correct the credit problems of women.<sup>102</sup> A constitutional amendment will eliminate a haphazard pattern of state laws and provide a uniform

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<sup>100</sup> Charles Lamb, *The Two Races of Men*, An Essay, 1820, 1823.

<sup>101</sup> *But cf. Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

<sup>102</sup> *E.g.* The NCCF has disbanded and no new government agency appears prepared to deal with this problem.

foundation for the fostering of non-discriminatory state and federal legislation.

The Equal Rights Amendment will not make a bad credit risk into a good one. Reasonable standards used in a non-discriminatory fashion will not be affected by implementation of the amendment. What it will do is force credit granting institutions to apply the same standards to women as are used for men. "The Amendment will establish fully, emphatically, and unambiguously the proposition that before the law women and men are to be treated without difference."<sup>103</sup>

*David Ira Brown*

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<sup>103</sup> Brown, Emerson, Falk, and Freedman *supra* note 68 at 980.