

Management and Control of Community Property: Sex Discrimination in California Law

The purpose of this article is to focus on the sexually discriminatory aspects of California law governing management and control of community property, to analyze the constitutionality of that law, and to explore alternative systems designed to eliminate sex discrimination. This article is limited to considering possible reforms within the community property system, and will not deal with the merits of the community property system itself as compared to non-community property systems.

I. THE CURRENT LAW AND CRITICISMS THEREOF

A. CURRENT LAW

In California, it is the general rule that the powers of management and control of the community property are vested in the husband.¹

The only exception to this general rule is that, under Civil Code § 5124, the wife has the management and control of the community personal property earned by her, and the community personal property received by her as compensation for personal injury, until it is commingled with community property subject to the husband's management and control.² Just how broad is this statutory exception? Clearly, the wife has management and control of the money she earns.³ Apparently her management and control also extends to personal property in which she invests that money.⁴ But she does not

¹CAL. CIV. CODE § § 5105, 5125, 5127 (West 1970); 1 CALIF. CONTINUING EDUCATION OF THE BAR, THE CALIFORNIA FAMILY LAWYER 126 (1961) (hereinafter cited as CAL. FAM. LAWYER).

²CAL. CIV. CODE § 5124 (West 1970). It is noteworthy that this exception was not enacted until 1951. *But see also* CAL. CIV. CODE § 5127.5 (West Supp. 1972).

³*Id.*; CAL. FAM. LAWYER, *supra* note 1 at 127. For convenience, the text refers only to the wife's earnings, but should be read to include her personal injury recoveries as well where appropriate.

⁴It is not entirely clear whether "community personal property earned by her" includes personal property for which earnings are exchanged. It has been suggested that CAL. CIV. CODE § 171(c), which was the predecessor of § 5124, did not extend the wife's management and control to personal property purchased

have management and control of real property in which she invests her earnings.⁵ Furthermore, the wife loses management and control of her own earnings if she commingles them with other community property.⁶ There are, then, inherent restrictions in the statutory exception which limit its effectiveness in counterbalancing the husband's powers.

The significance of the exception is further diluted by certain social factors external to the statute. First, it is questionable whether married women are generally aware that they lose the legal power to manage and control their earnings if they commingle them or spend them in a certain way.⁷ As a result, they may lose management and control through action born of ignorance. Second, many married women work outside the home because their earnings are needed to supply the family with the bare necessities of life.⁸ Even if such a woman is aware of § 5124, family needs prevent her keeping her earnings safely uncommingled. Third, married women in this society are still encouraged to eschew paid employment for the role of housewife.⁹ As a result, over half of the married women in Califor-

with her earnings. CAL. FAM. LAWYER, *supra* note 1 at 127. See also 4 WITKIN, SUMMARY OF CALIFORNIA LAW § 59 at 2762 (7th ed. 1960) (hereinafter cited as WITKIN). But § 171(c) specifically referred to "community property money earned by her" (emphasis added), § 1, ch. 1102, 2 Cal. Stat. 2860 (1951). The word money was omitted from § 5124. VERRALL & SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY (2d ed. 1971) at 228 (hereinafter cited as VERRALL & SAMMIS) interpret § 5124 as giving the wife management and control until her earnings are commingled or transmuted into real property.

⁵CAL. CIV. CODE § 5127 (West 1970) gives the husband management and control of community real property. There is no cross-reference between § § 5127 and 5124 (as there is between § § 5125 and 5124) to indicate that real property purchased with the wife's earnings is excepted. See CAL. FAM. LAWYER, *supra* note 1 at 127; VERRALL & SAMMIS, *supra* note 4 at 228.

⁶CAL. CIV. CODE § 5124 (West 1970). VERRALL & SAMMIS, *supra* note 4 at 228.

⁷The author was unable to find any empirical studies on the extent of married womens' knowledge of California management and control law. However, Kathryn Gehrels, a San Francisco attorney with an extensive family law practice, who was former chairperson of the Family Law Committee of the California State Bar and a member of the 1966 California Governor's Commission on the Family, stated in a private interview that married women in California know very little about their legal rights, including their rights in the community property. Married women, she said, are shocked when they learn they have lost management and control of their own earnings simply by depositing those earnings in a joint checking account or otherwise commingling them.

⁸CALIFORNIA ADVISORY COMMISSION ON THE STATUS OF WOMEN, CALIFORNIA WOMEN (1969) at 12-14.

⁹Bem & Bem, *Case Study of a Nonconscious Ideology: Training the Woman to Know Her Place*, in BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 89 (1970). Regarding the argument that women choose to become housewives of their own free will, BEM & BEM, state at 93:

The free will argument proposes that a 21-year-old woman is perfectly free to choose some other role if she cares to do so; no one is

nia do not have any earnings.¹⁰ Fourth, women generally earn less than men.¹¹ Hence it is usually a relatively small portion of the community income that falls under the wife's management and control. As a result of both the inherent restrictions and these external factors, the §5124 exception shrinks in significance. It appears, then, that the bulk of the community property still falls under the husband's management and control. (For convenience, the community property under the husband's management and control will be referred to as the general community property¹² throughout the remainder of this article.)

The husband's powers of management and control over the general community property are extensive. The only limitations on his power over personal property are that he cannot make a gift of it without the wife's written consent¹³ and he cannot dispose of the home furnishings or of the clothing of the wife or minor children without the wife's written consent.¹⁴ The only limitation on his power over real property is that he cannot sell, convey, or lease it for longer than one year without the wife's joinder.¹⁵ The final limitation is that he cannot testamentarily dispose of more than half of the community property.¹⁶

standing in her way. But this argument overlooks the fact that the society, which has spent twenty years carefully marking the woman's ballot for her, has nothing to lose in the twenty-first year by pretending that she may cast it for the alternative of her choice. Society has controlled not her alternatives, but her motivation to choose any but one of those alternatives. The so-called freedom to choose is illusory and cannot be invoked when the society controls the motivation to choose.

Cf. Kay, Making Marriage and Divorce Safe for Women, 60 CALIF. L. REV. 1683, especially at 1690-1692.

¹⁰*Cf. U.S. DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1972) chart 346 (hereinafter cited as STATISTICAL ABSTRACT OF THE UNITED STATES): 40.8% of married women with husband present are in the labor force.*

¹¹In 1970, the median income of male employed civilians was \$8036; that of female employed civilians was \$3844. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 10 at chart 536. On the average, the working wife's earnings constitute less than one-third of the family income. *Id.* at chart 534. That means that in the average family where both spouses are employed, the husband earns twice as much as the wife.

¹²The term *general community property*, to indicate the community property under the husband's management and control, is adapted from CAL. FAM. LAWYER, *supra* note 1, § 4.36 at 134.

¹³CAL. CIV. CODE § 5125 (West 1970). The wife is similarly limited as to the community property under her management and control by § 5124.

¹⁴CAL. CIV. CODE § 5125 (West 1970).

¹⁵CAL. CIV. CODE § 5127 (West 1970). But note that the requirement that the wife join in transfers of real property applies only to voluntary transfers, not where property is attached in satisfaction of a judgment against the husband. *Grolemund v. Cafferata*, 17 Cal. 2d 679, 684, 111 P.2d 641, 643 (1941).

¹⁶CAL. PROB. CODE § 201 (West 1956): "Upon the death of either husband or

Except for these few limitations, the husband has the same powers of disposition over the general community property as he has over his own separate property.¹⁷ He can dispose of it for almost any purpose,¹⁸ regardless of whether the disposition benefits the marital community or only himself.¹⁹ He has the practical power to dissipate, squander, and mismanage it.²⁰ He can use it to pay his debts

wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent"

¹⁷CAL. CIV. CODE § 5125 (West 1970). VERRALL & SAMMIS, *supra* note 4 at 227-28.

¹⁸The courts have made a few attempts to protect the wife's interest in the community property: Because of his management and control over the community property, the husband has been held to occupy "the position of trustee for his wife in respect to her one-half interest in the community assets." *Vai v. Bank of America*, 56 Cal. 2d 329, 337, 364 P.2d 247, 251-52, 15 Cal. Rptr. 71, 75-76 (1961). *And see* *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (1949). But some courts seem to accept a rather low standard of accountability for the husband-trustee. *Cf. Williams v. Williams*, 14 Cal. App. 3d 560, 567, 92 Cal. Rptr. 385, 388 (1971): "We suspect that it would be extremely rare to find a man who has been married for many years who can account for every cent of his income during the marriage. Again, we question the wisdom of requiring the husband at his peril to be a bookkeeper."

Where the husband's separate estate was considerably larger than the community estate, and the amounts of alimony and child support obligations stemming from a prior marriage were substantially based on his large separate income, the court held that he must apportion the obligation between his separate income and community income, rather than paying it entirely from community income. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 563-64, 432 P.2d 709, 712, 63 Cal. Rptr. 13, 16 (1967). Where a husband used community funds to improve his separate property, the wife was entitled to compensation to the extent that her share of the community funds increased its value. *Somps v. Somps*, 250 Cal. App. 2d 328, 338, 58 Cal. Rptr. 304, 311 (1967). In *People v. Schlette*, 139 Cal. App. 2d 165, 293 P.2d 79 (1956), the court held that the husband's management and control did not give him the right to burn down and destroy community real property.

But note that the wife obtained no relief in these cases until the marriage was terminated, either by decree or by the death of the husband. These protections would appear to be considerably diluted if the wife cannot invoke them during marriage — i.e., if she has to choose between marriage and her property rights.

¹⁹"In California, there are ordinarily no separate as distinguished from community debts of the husband 'all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property.'" (Citations omitted.) *Weinberg v. Weinberg*, 67 Cal. 2d at 563, 432 P.2d at 711-12, 63 Cal. Rptr. at 15-16. If the husband can use the community property to pay his debts which were not incurred for the benefit of the community, then *a fortiori* he can similarly expend it where no debt has been previously incurred. *See* CAL. FAM. LAWYER, *supra* note 1 at 134; WITKIN, *supra* note 4, § 58 at 2761.

²⁰*Cf. dictum* in *Williams v. Williams*, 14 Cal. App. 3d at 566-67, 92 Cal. Rptr. at 388: The husband is not liable to the wife for loss due to improvident investment in speculative stock. *Cf. Grant, How Much of a Partnership is Marriage? — Community Property Rights Under the California Family Law Act of 1969*, 23 HAST. L. J. 249, 253-55 (1971). *Cf. Blumenfeld, Liability of Community and Separate Property for Contracts of Husband and Wife*, 22 CALIF. L. REV. 554, 555 (1934): The wife has no protection against the husband's dissipation of her earnings, since they are subject to his control. (Although her earnings are no

and obligations, whether incurred before or during marriage.²¹ He can do all this despite the fact that the wife has a vested one-half interest in the community property.²² Even if he has a substantial separate estate, he can exhaust the community property and keep his separate property intact.²³

The wife, on the other hand, has no legal power to dispose of the general community property on her own initiative. She cannot spend it and she cannot use it to pay her debts, even if incurred for the benefit of the community. Her creditors may not reach it — not even the wife's vested one-half interest — to satisfy a judgment against her.²⁴ The rationale is that to hold the general community property

longer subject to his control, this indicates that the wife has no protection against the husband's dissipation of that community property which is still subject to his control.)

²¹ The policy of protecting the husband's creditors outweighs the policy of protecting family income even from premarital creditors of the husband. Community property is therefore available to such creditors As such a creditor, a husband's first wife can levy against the community property of his second marriage for alimony payments due [T]he husband may also voluntarily discharge such obligations from community property. (Citations omitted.)

Weinberg v. Weinberg, 67 Cal. 2d at 563-64, 432 P.2d at 711, 63 Cal. Rptr. at 15. Grolemond v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641.

²²CAL. CIV. CODE § 5105 (West 1970): "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests"

Grolemond v. Cafferata, 17 Cal. 2d at 689, 111 P.2d at 646: The vestedness of the wife's interest has no bearing on the question of the liability of the community property for the husband's torts. The court said this decision was required by public policy, for otherwise a person injured by the separate act of the husband would have no redress where the husband's only property was community property. Hannah v. Swift, 61 F.2d 307 (1932): The wife contended that her vested one-half interest in the community property should be exempt from liability for her bankrupt husband's debts. She argued that her rights in her community property were just as sacred as any other person's property rights, and should not be subject to debts which she did not incur. The court rejected this contention without hesitation.

²³This conclusion is derived from the fact of the husband's management and control, the liability of the general community property for the husband's debts, and the absence of any legislative designation of priority of liability as between the general community property and the husband's separate property. *But see supra* note 18.

²⁴The general community property is not liable for the contracts of the wife made after marriage. CAL. CIV. CODE § 5116 (West 1970). There is an exception if the contract is for necessities, if the husband neglected to provide for the family's support. CAL. CIV. CODE § 5130 (West 1970). Coulter Dry Goods Co. v. Munford, 38 Cal. App. 231, 175 P. 900 (1918). CAL. FAM. LAWYER, *supra* note 1 at 135-36. That portion of the general community property which consists of the wife's commingled earnings is liable for her debts for necessities furnished while husband and wife are living together, apparently even without a showing that the husband failed to provide. CAL. CIV. CODE § 5117 (West 1970).

Nor is the general community property liable for the wife's torts during marriage. CAL. CIV. CODE § 5122 (West 1970). McClain v. Tufts, 83 Cal. App. 2d 140, 187 P.2d 818 (1947). Although the wife's earnings, when commingled, become part of the general community property under the husband's manage-

liable for the wife's debts would violate the husband's right of management and control.²⁵

The fact that the general community property is not liable for the wife's debts does not mean that those obligations simply disappear. Rather, the wife is still personally liable, and she must use her earnings²⁶ or resort to her separate property to pay the debt. If she has neither earnings nor separate property, the obligee cannot recover.

Of course, the husband can use the general community property to pay the wife's debts if he so chooses. But she has no legal power to compel such payment. The husband can also entrust money or credit cards to his wife, or otherwise empower her to act as his agent. Under the law of agency, if the wife has apparent authority to act for her husband, then contracts made by her are binding on him vis-à-vis the third party.²⁷ But mere possession of the general community property does not give the wife legal power of management and control. If she misappropriates it or uses it in violation of her husband's instructions, he has a cause of action against her.²⁸

ment and control, one case held that the wife's commingled earnings were liable for her tort, and for a contract action which replaced the tort. *Tinsley v. Bauer*, 125 Cal. App. 2d 724, 271 P.2d 116 (1954). But note that the wife's "earnings" in this case consisted of embezzled funds, the commingling consisted of depositing those funds in a bank account where they were mixed with a relatively small amount of general community property, and there was some indication of suspicion that the husband was involved in the embezzlement.

The husband's earnings are not liable for the wife's pre-nuptial contracts or torts. CAL. CIV. CODE § 5120 (West 1970). The wife's earnings and the general community property other than the husband's earnings are liable for the wife's pre-nuptial contracts, but not expressly for her pre-nuptial torts. *Id.*; WITKIN, *supra* note 4, § 60 at 2762; CAL. FAM. LAWYER, *supra* note 1 at 134.

Regarding the courts' refusal to partition the community property to pay the wife's debts, *see Smedberg v. Bevilockway*, 7 Cal. App. 2d 578, 46 P.2d 820 (1935); even after an interlocutory decree of divorce had been granted, *see In re Cummings*, 84 F. Supp. 65 (S.D. Cal., 1949). *Mithers v. Barasch*, 439 F.2d 1393, 1396-97 (9th Cir. 1971) questions the validity of *Cummings*, but *Mithers* involved liability for the husband's rather than the wife's debts after interlocutory decree.

²⁵ . . . [T]o hold the community property liable [for the wife's torts] would be not only an unwarranted interference with, and infringement upon, the husband's right to management and control, but it would also permit his property to be taken for what is, as to him, a nonexistent liability.

McClain v. Tufts, 83 Cal. App. 2d at 142, 187 P.2d at 819. *Compare Hannah v. Swift*, 61 F. 2d 307, discussed *supra* at note 22.

²⁶ Regarding the theory that the wife's earnings are liable for her debts even after commingling, *see supra*, note 24 and accompanying text.

²⁷ *See* CAL. FAM. LAWYER, *supra* note 1 at 134; WITKIN, *supra*, note 4, § 64 at 2765; *Hulsman v. Ireland*, 205 Cal. 345, 270 P. 948 (1928)

²⁸ *See Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (1971): A husband has a cause of action against his wife where she takes, secretes, and exercises exclusive control over community funds in violation of his right of management and control. *See also* SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964) at § § 145 and 155.

B. CRITICISMS OF THE CURRENT LAW

Despite a few inroads, California law still makes the husband dominant in managing and controlling the community property. Egalitarians are becoming increasingly aware and critical of the inequality of husband and wife under the law. Why must there be just one spouse in charge of the community property? And why must that one spouse always be the husband? If there must be a selection, why should it be based on sex rather than, for instance, financial aptitude?

The concession to the wife of limited management of her own earnings, granted in Civil Code §5124, does not overcome the inequality in the law. For the husband still has more control over his earnings (not to mention unearned community property) than the wife has over her earnings. And furthermore, any restriction of the wife's arena of control to her own earnings is sexually discriminatory, given the fact that widespread job discrimination reduces a woman's ability to earn,²⁹ and given the continuing social pressures on women to accept the unsalaried job of housewife rather than paid employment.³⁰ Since the housewife's contributions to the family facilitate her husband's ability to earn and the family's ability to save,³¹ should not the wife have some rights in the management and control of the husband's earnings?

An additional criticism is that the law requires the wife to resort to her separate property to pay her debts, while the husband is free to exhaust the community property for similar purposes. The courts of this state refuse to let the wife's vested interest in the community property stand in the way of the husband's creditors' recovering

²⁹Re the differential between salaries of men and women, see *supra* note 11. Re the contention that the differential results from sex discrimination, see, e.g., Weitzman, *Sociological Perspectives on Discrimination Against Working Women*, in TWENTIETH CENTURY FUND TASK FORCE REPORT ON WORKING WOMEN, (to be published in 1973).

³⁰See *supra*, note 9.

³¹*Cf.* Fernandez v. Wiener, 326 U.S. 340, 365 (1945). In a concurring opinion, Justice Douglas supports the validity of crediting all accumulations of community property to the husband for estate tax purposes, but states that "Much may be said for the community property theory that the accumulations of property during marriage are as much the product of the activities of the wife as those of the titular bread-winner." Horne, *Community Property — A Functional Approach*, 24 S. CAL. L. REV. 42, 47 (1950) (hereinafter cited as Horne):

It is submitted that, in the vast majority of families in this country today, husband and wife regard themselves as working partners in the marital enterprise with an equal undivided share in the family assets. Where the husband is the only wage earner, the wife justly regards her contribution in managing the household as equally important as his labors and feels that it entitles her to participate in his earnings.

See also Strauss v. Strauss, 148 Fla. 23, 3 So.2d 727, 728 (1941); VERRALL & SAMMIS, *supra* note 4 at 3.

therefrom on the ground that it would be unfair to deny redress,³² yet at the same time refuse to let the wife's creditors recover on the ground that it would be unfair to interfere with the husband's right of management and control.³³ How can the state justify such a bizarre contradiction? Is the husband's right of management and control so much more sacred than the wife's right of ownership? Is a creditor's right to redress so changeable that it can depend upon whether the debtor is male or female?

The unfair effects of the law on wives and their creditors are somewhat mitigated by the fact that many husbands apparently refrain from invoking their full legal powers. Indeed, many couples in California seem to share the responsibilities and power equally.³⁴ But the accommodations of practice do not justify the law nor exempt it from scrutiny.

II. CONSTITUTIONALITY

To determine the validity of California's management and control laws, they will be tested against the Uniform Operations Clause and the Privileges and Immunities Clause of the California Constitution and the Equal Protection Clause of the Constitution of the United States.³⁵

A. EQUAL PROTECTION THEORY

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Amendment XIV, § 1

³²See *supra*, note 22.

³³See *supra*, note 25. Of course, commercial creditors can protect themselves from such an unfair outcome by refusing to extend credit to married women. This reaction creates another unfair result, *viz.* that, in an economy which depends upon credit to operate, women are frequently denied credit. See Article, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C.D. L. REV. 61 (1973) (hereinafter cited as Article). Tort victims, of course, do not have the luxury of choosing the sex and marital status of their tortfeasors.

³⁴See LANDIS & LANDIS, *BUILDING A SUCCESSFUL MARRIAGE* (5th ed. 1968) at 364-65: "In many families the responsibility is equally divided. The couple has a joint checking account and both use their judgment in spending." See also DUVALL & HILL, *BEING MARRIED* (1966) at 250-54.

³⁵The anticipated effect of the Equal Rights Amendment on California community property law will not be considered here. On this subject, see Article, *supra* note 33, and Wendelin, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System*, 6 LOYOLA OF LOS ANGELES L. REV. 66 (1973). For an article considering the constitutionality of male management under the federal Equal Protection Clause, see Bendheim, *Community Property: Male Management and Women's Rights*, 1972 LAW AND SOCIAL ORDER 163 (hereinafter cited as Bendheim).

“All laws of a general nature shall have a uniform operation.”

California Constitution, Article I, § 11

“ . . . nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.”

California Constitution, Article I, § 21

The Uniform Operations Clause and the Privileges and Immunities Clause of the California Constitution have been held to be substantially equivalent to the Equal Protection Clause of the United States Constitution.³⁶ Indeed, taken together, sections 11 and 21 of Article I of the California Constitution are referred to as the California Equal Protection Clause.³⁷ Consequently, the following discussion of equal protection theory applies to both the federal and state Equal Protection Clauses.

The Equal Protection Clause does not require that state legislation treat all persons exactly alike. Rather, it requires that the state treat all persons *similarly situated* alike.³⁸ The courts have developed a dual standard for determining whether a state law which treats persons differently is valid under the Equal Protection Clause:

1. PERMISSIVE STANDARD:

The permissive standard is the general rule, applying to all cases not qualifying for the strict standard. To meet the permissive standard, the law must serve a legitimate state objective³⁹ and the classification must be reasonably related to the attainment of that objective.⁴⁰ There is a presumption that the statute is constitutional, and the burden is on the challenger to prove otherwise.⁴¹ Moreover, a discriminatory statute will not be struck down if the court can conceive of any legitimate objective or any state of facts to justify it.⁴²

³⁶Serrano v. Priest, 5 Cal. 3d 584, 596 note 11, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

³⁷Cf. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 16-17, 485 P.2d 529, 538, 95 Cal. Rptr. 329, 338 (1971).

³⁸McLaughlin v. Florida, 379 U.S. 184, 190 (1964). Datta v. Staab, 173 Cal. App. 2d 613, 623, 343 P.2d 977, 983 (1959). For an exhaustive analysis of the federal Equal Protection Clause, see *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969) (hereinafter cited as *Developments*).

³⁹The objective of promoting inequality, where inequality is not required to promote the general welfare, is not a legitimate objective. *Developments, supra*, note 38 at 1081. *E.g.*, the mere desire to discriminate against a certain class, or to give a favored class special privileges, are constitutionally impermissible purposes. Cf. Loving v. Virginia, 388 U.S. 1, 11 (1967).

⁴⁰McGowan v. Maryland, 366 U.S. 420, 425 (1961). McLaughlin v. Florida, 379 U.S. at 190. *In re King*, 3 Cal. 3d 226, 232, 474 P.2d 983, 987, 90 Cal. Rptr. 15, 19 (1970). *Developments, supra* note 38 at 1077-87.

⁴¹McGowan v. Maryland, 366 U.S. at 425. *Developments, supra* note 38 at 1078-87.

⁴²McGowan v. Maryland, 366 U.S. at 426. *Goesaert v. Cleary*, 335 U.S. 464,

2. STRICT STANDARD:

The strict standard is invoked when the classification involved is suspect.⁴³ There is no official explanation by the U.S. Supreme Court of how to determine if a particular classification is suspect. The common denominator of the classifications which that court has clearly labeled suspect — *viz.* race⁴⁴ and national origin⁴⁵ — seems to be that the trait is congenital and immutable,⁴⁶ that it bears no relation to ability to perform or contribute to society,⁴⁷ and that it denotes inferiority and second class citizenship.⁴⁸

In order to meet the stricter standard, the state interest served by the classification must be *compelling*,⁴⁹ not merely legitimate. Furthermore, the classification must be *necessary*,⁵⁰ not merely reasonably related, to the attainment of that interest. Instead of enjoying a presumption of validity, the state bears the burden of proof.⁵¹

466-67 (1948). *Developments, supra* note 38 at 1077-1079.

⁴³See *McLaughlin v. Florida*, 379 U.S. at 192; *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *In re King*, 3 Cal. 3d at 232, 474 P.2d at 987, 90 Cal. Rptr. at 19; *In re Gary W.*, 5 Cal. 3d 296, 306, 486 P.2d 1201, 1209, 96 Cal. Rptr. 1, 9 (1971).

⁴⁴*McLaughlin v. Florida*, 379 U.S. at 192. *Loving v. Virginia*, 388 U.S. at 9. *Korematsu v. United States*, 323 U.S. at 216.

⁴⁵*Cf.* *Korematsu v. United States*, 323 U.S. 214, 216.

⁴⁶See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340; *Developments, supra* note 38 at 1126-27. See also *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971).

⁴⁷*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

⁴⁸*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 19, 485 P.2d at 540, 95 Cal. Rptr. at 340. *Developments, supra* note 38 at 1127. It is interesting to note that the author of *Developments in the Law — Equal Protection* distinguished racial and sexual classifications on the ground that, while both are congenital and immutable, the latter does not apply a stigma of inferiority to women. Thus the author, despite the considerable intellectual sophistication exhibited in the analysis of racial discrimination, appears to have naively swallowed that old chivalrous line that the reason male legislators deny basic human rights to women is that women are superior. Despite all the "superior-woman-on-the-pedestal" rhetoric, society in fact regards the female sex as inferior. See, e.g., *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 19-20, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41. *Cf.* MYRDAL, AN AMERICAN DILEMMA (Twentieth Anniversary ed. 1962) at 1073 (essay: *A Parallel to the Negro Problem*). At 1077, Myrdal notes that women are generally considered to be *morally* superior to men, but that "most men have accepted as self-evident, until recently, the doctrine that women had inferior endowments in most of those respects which carry prestige, power, and advantages in society"

⁴⁹*McLaughlin v. Florida*, 379 U.S. at 192; *In re King*, 3 Cal. 3d at 232, 474 P.2d at 987, 90 Cal. Rptr. at 19; *In re Gary W.*, 5 Cal. 3d at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9.

⁵⁰*Cf.* *Loving v. Virginia*, 388 U.S. at 11; *Korematsu v. United States*, 323 U.S. at 216; *In re King*, 3 Cal. 3d at 232, 474 P.2d at 987, 90 Cal. Rptr. at 19; *In re Gary W.*, 5 Cal. 3d at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9.

⁵¹*Cf.* *McLaughlin v. Florida*, 379 U.S. at 196; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 16, 485 P.2d at 539, 95 Cal. Rptr. at 339.

B. APPLICATION OF THE CALIFORNIA EQUAL PROTECTION CLAUSE TO CALIFORNIA MANAGEMENT AND CONTROL LAW

In the landmark case of *Sail'er Inn, Inc. v. Kirby*, the California Supreme Court held that sex is a suspect classification.⁵² Thus sex classifications, such as those in California's management and control laws, are subject to the strict standard of scrutiny. For the classification to be upheld, the state must show that it is necessary to the accomplishment of a compelling state interest.

The first step in analyzing the validity of the classification is to isolate the objectives of the management and control laws. The principal objectives appear to be to protect the rights of the spouses in the community property,⁵³ to protect the rights of creditors seeking payment from the community property,⁵⁴ and to balance these interests when there is a conflict. An additional objective is to protect the community property, by preventing dissipation and avoiding uncoordinated and inconsistent action by the spouses⁵⁵ (e.g., where each spouse, unbeknownst to the other, contracts to sell a particular property, or where each writes a check for the balance of the bank account), while at the same time facilitating its use and transfer.⁵⁶

These certainly seem to be legitimate state objectives. For the sake of argument, assume that they are even compelling state interests. Then the next question in the analysis is whether the sex classification is necessary to the attainment of those objectives.

Is the classification necessary to protect the rights of creditors? The best argument in support of that contention seems to be this: that there must be a single representative of the marital community with whom a creditor can deal, secure in the knowledge that the other member of the community does not have the power to dispose of the assets from which he expects to collect the debt.

⁵²*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 17-20, 485 P.2d at 539-41, 95 Cal. Rptr. at 339-41: "We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment." (Note that while the involvement of a fundamental interest was mentioned, it was not made necessary to the invoking of the strict standard.)

⁵³*Cf. McClain v. Tufts*, 83 Cal. App. 2d at 142, 187 P.2d at 819 (General community property held not liable for wife's debts. Objective: protection of the husband's right of management and control); *Weinberg v. Weinberg*, 67 Cal. 2d 557, 563-64, 432 P.2d 709, 712, 63 Cal. Rptr. 13, 16 and *Somps v. Somps*, 250 Cal. App. 3d 328, 338, 58 Cal. Rptr. 304, 311 (Husband had to reimburse community for certain expenditures of community property. Objective: protection of the wife's interest in the community property).

⁵⁴*Grolemund v. Cafferata*, 17 Cal. 2d at 689, 111 P.2d at 646. *Horne*, *supra* note 31 at 46.

⁵⁵*Cf. Horne*, *supra* note 31 at 60.

⁵⁶*Vai v. Bank of America*, 56 Cal. 2d at 339-40, 364 P.2d at 253, 15 Cal. Rptr. at 77.

But there are several flaws in this argument. First of all, many married couples commonly disregard the law and share management powers.⁵⁷ Every wife who receives a joint checking account, a credit card, or cash from her husband has the practical power to dispose of the community assets. The absence of widespread chaos in the marketplace indicates that this power is not frequently abused and that shared management and control is quite workable. Hence, it is not necessary to vest sole management and control in one spouse.

Second, even if it were necessary that one spouse have sole management and control, that does not mean that it is necessary to select that one spouse on the basis of sex.⁵⁸

Third, tort victims and other involuntary obligees do not have the luxury of choosing the sex of their obligor. The sex classification is clearly detrimental to involuntary creditors if the obligor is female. Furthermore, in practice, even commercial creditors have married women as debtors, whether because the debt was contracted before marriage, or because she misrepresented her marital status, or for other reasons.⁵⁹ The sex classification injures these creditors, too. Therefore, the sex classification is not only unnecessary, but actually detrimental to the goal of protecting creditors' rights.

Is the classification necessary to protect the rights of the spouses? As a result of sex classification, the wife is deprived of a major incident of ownership in respect to the general community property — *viz.* the right of management and control.⁶⁰ As a further result, she does not even enjoy the same rights of control over her own earnings as the husband has over his.⁶¹ Due to sex classification, the wife cannot prevent the mismanagement and dissipation of the general community property by her husband, despite her vested title.⁶² Hence, the classification by sex is not only unnecessary, but clearly detrimental to the goal of protecting the wife's rights in the community property.

Is the classification by sex necessary to protect the husband's rights in the community property? The sex classification as to the

⁵⁷See *supra* note 34 and accompanying text, and Horne, *supra* note 31 at 47 and 60.

⁵⁸See *infra* notes 75-80 and accompanying text.

⁵⁹It is doubtful that commercial creditors can afford to deal only with husbands. The flow of commerce would surely be inhibited if creditors insisted that every magazine subscription, and every load of dirty clothes dropped at the laundry, had to be approved in advance by the husband. To keep the wheels of commerce turning, many creditors seem willing to assume that the wife is empowered to act for the community.

⁶⁰See *supra* notes 24-28 and accompanying text.

⁶¹See *supra* notes 1-6 and accompanying text. The wife loses management and control of her earnings if she commingles them or invests them in real property. The husband does not lose management and control of his earnings as a result of such action.

⁶²See *supra* notes 20 and 22.

liability of the community property for debts has been justified as necessary to protect the husband's "right" of sole management and control.⁶³ This conveniently overlooks the fact that granting the husband sole management and control is itself a sex classification. In effect, then, arguing that the sex classification is necessary to protect the husband's sole management and control is tantamount to saying that the sex classification is necessary to preserve the sex classification.

Since community property is owned jointly and equally by two people,⁶⁴ and since it is logically impossible for two people to exercise *sole* management and control with respect to the same property, it follows that *sole* management and control cannot be a right incident to ownership of community property. Therefore, granting the husband sole power of management and control is not justifiable on the ground that sole management and control is his community property right. And, in turn, the fact that sex classification in the liability of community property for debts is necessary to preserve the husband's power of sole management and control does not mean that such a classification is necessary to protect his rights in the community property. Indeed, since the respective rights of the spouses in the community property are equal, classification by sex can never logically be necessary to the protection and balancing of those rights.

Is the classification by sex necessary to the protection of the community property? Vesting sole management and control of the general community property in one spouse might facilitate its free use and transfer, and it might help avoid uncoordinated and inconsistent action. But it is not at all apparent that these goals cannot otherwise be achieved — *i.e.*, that it is absolutely necessary to have a single manager. After all, many couples already share management and control responsibilities in practice, with no sign of impending chaos.⁶⁵

Furthermore, even if it were established that it was necessary to have just one manager, that still would not justify selecting that manager on the basis of sex. It might conceivably be true that it is necessary to vest sole management powers in the spouse with the greater financial or managerial aptitude, or the spouse with the most free time to devote to the matter. But it is not conceivable that these goals can only be accomplished by appointing the male spouse sole manager.

⁶³See *McClain v. Tufts*, 83 Cal. App. 2d at 142, 187 P.2d at 819, quoted *supra* note 25.

⁶⁴CAL. CIV. CODE § 5105 (West 1970): "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests"

⁶⁵See *supra* note 34 and *Horne*, *supra* note 31 at 47 and 60.

As to the objective of preventing dissipation of the community property, the classification by sex is not effective. All the classification accomplishes is to limit the power to dissipate to the husband. But clearly, the husband alone can dissipate the general community property just as quickly and foolishly as two spouses working together. In fact, the sex classification can actually be said to facilitate dissipation of the general community property, by depriving the wife of any legal power to prevent it.

The above analysis indicates that sex classification is not necessary to the achievement of the judicially identified objectives of the management and control laws. Therefore, given the designation of sex as a suspect classification and given the concern of the California Supreme Court for women's rights indicated in *Sail'er Inn*, there is every reason to expect that the classification, if tested, would be struck down under California's Equal Protection Clause.

C. APPLICATION OF THE FEDERAL EQUAL PROTECTION CLAUSE TO CALIFORNIA MANAGEMENT AND CONTROL LAW

Two questions will be considered in this section: Is the strict standard applicable? If not, is California law valid under the permissive standard?

1. IS THE STRICT STANDARD APPLICABLE?

As stated above, the strict standard is applicable if the classification is suspect. The United States Supreme Court has not yet recognized sex as a suspect classification. When sex discrimination has been challenged under the Equal Protection Clause in the past, the court has applied the permissive standard. And, prior to 1971, the court always held that the classification by sex was valid.

In 1971, in *Reed v. Reed*,⁶⁶ the U.S. Supreme Court for the first time held a statutory sex classification in violation of the Equal Protection Clause. The Idaho statute involved gave males preference over equally qualified females in appointment of estate administrators.⁶⁷ The purpose of the statute, as defined by the Idaho Supreme Court, was to eliminate controversy and minimize hearings on the merits. The court held that classification by sex was not reasonably related to this purpose.⁶⁸

This decision appears to mark a change in the court's attitude towards sex discrimination. Classification by sex does not appear to be markedly more unreasonable or arbitrary in relation to the ob-

⁶⁶404 U.S. 71 (1971).

⁶⁷*Id.* at 73.

⁶⁸*Id.* at 76.

jective of the statute in *Reed* than in relation to those objectives in some of the earlier cases where the classification was sustained.⁶⁹

The fact that the court in *Reed* did not designate sex a suspect classification and thus apply the strict standard does not necessarily indicate continued reticence on the court's part to recognize sex discrimination as a serious legal wrong. There is another possible explanation — *viz.* the court's tendency to resolve an issue on the narrowest possible ground.⁷⁰ Therefore, the fact that the strict standard was not applied here, where the permissive standard was dispositive, does not necessarily indicate that the court would not apply the strict standard in a situation where the permissive standard is inadequate to strike down sex discrimination.

There are cogent reasons for the U.S. Supreme Court to designate sex a suspect classification.⁷¹ All of the problems attaching to race, which make it a suspect classification, also apply to sex:

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. . . . 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

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior

⁶⁹*E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) sustained a Washington statute which established minimum wages for females but not for males, on the ground that women must be protected from powerful employers and ". . . from conditions of labor which have a pernicious effect on their health and morals." *Id.* at 386. *Compare* *Goesaert v. Cleary*, 335 U.S. 464, in which a Michigan statute restricting the employment of women as bartenders was sustained on the ground that society must be protected from the pernicious effect on its health and morals which women acting as bartenders would cause.

⁷⁰*Cf.* *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 498 (1941): The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Cf.* *Sanks v. Georgia*, 401 U.S. 144, 150-53 (1970) on the principle of prudent restraint. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 22 (1972) (hereinafter cited as Gunther).

⁷¹*But see* Professor Gunther's observation that the Burger court is reluctant to expand the scope of the Warren court's "new" equal protection, and is particularly discontent with the dual strict-permissive standard. Gunther, *supra*, note 70 at 12.

persons in numerous laws relating to property and independent business ownership and the right to make contracts. (Citations omitted.)⁷²

Furthermore, there is persuasive authority in that the California Supreme Court, in *Sail'er Inn*, and at least one federal court⁷³ have recognized sex as a suspect classification.

In light of the above, it seems quite possible that the U.S. Supreme Court will recognize sex as a suspect classification. If so, then California's sexually discriminatory management and control laws would be invalid under the federal Equal Protection Clause, on the same theory as that discussed above for the California Equal Protection Clause.

2. IF THE STRICT STANDARD IS NOT APPLICABLE, IS CALIFORNIA MANAGEMENT AND CONTROL LAW VALID UNDER THE PERMISSIVE STANDARD?

To be constitutional, a classification must be reasonable, not arbitrary, and based on some ground of difference reasonably related to the legitimate objective of the state law involved.⁷⁴ The objectives of the management and control laws, discussed above, are to protect the community property and to protect and balance the respective rights of creditors and spouses therein. The question to be answered is whether classification by sex is reasonable in relation to those objectives. Is there some difference between the two classes involved — *viz.* male spouses and female spouses — which is reasonably related to the stated objectives and can therefore justify treating the two classes differently?

As a starting point for the analysis, consider the possible purposes of the classification. If the only purpose served by the classification is to promote male dominance, then the purpose is legally impermissible,⁷⁵ and the classification is invalid even under the permissive standard. What other functions might the legislature have intended the classification to perform?

The legislature may have enacted the classification in order to avoid the need for hearings on the merits when there are disputes between husband and wife or between creditor and the non-debtor spouse.⁷⁶ But avoidance of hearings on the merits was the very

⁷²*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 18-19, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

⁷³*United States ex rel. Robinson v. York*, 281 F. Supp. 8, 14 (D. Conn. 1968.)

⁷⁴*Reed v. Reed*, 404 U.S. at 75-76. *See also supra* note 40.

⁷⁵*See supra* note 39.

⁷⁶The term *non-debtor spouse* is used here to indicate the spouse other than the one who incurred the debt.

purpose of the sex distinction in *Reed*, and the court held that this was not a valid justification for sex classification.⁷⁷

The legislature may have enacted the classification in the belief that family finances could be managed more efficiently if there was just one spouse in control. It is conceivable, though far from certain, that vesting management and control powers in just one spouse might promote good management, and thus justify treating the spouses differently. But, to be valid, the classification must be based on some criterion reasonably related to the goal of good management, such as financial or managerial ability, not on sex.⁷⁸

The legislature may have enacted the classification in the belief that control of the finances should be reserved to the wage-earner. But if that is the goal, there is no rational reason to treat female wage-earners differently from male wage-earners,⁷⁹ so the sex classification is invalid. Furthermore, even ignoring the sex classification, a classification based on financial contribution is itself contrary to the underlying theory of the community property system: the recognition that marriage is a partnership, and that the contribution of each partner is equally valuable, whether in dollars or labor.⁸⁰

Perhaps the legislature had some other purpose in mind in enacting the sex classification, though none is readily apparent. But, regardless of the intended purpose of the classification, its actual effect appears to be detrimental to the overall legislative goal of protecting the community property and the various interests therein.⁸¹ Therefore, the classification can hardly be considered reasonable.

In the past, when the U.S. Supreme Court has applied the permissive standard, it has accorded state laws a strong presumption of validity and refused to strike them down if there was any conceivable statutory objective or state of facts which could justify the classification.⁸² Given a healthy imagination and a preference for upholding state law, a resourceful court could presumably find some conceivable — if farfetched — basis for justifying any nonsuspect classification. And sure enough, there has been observed in the decisions of the Warren court an almost perfect correlation between the application of the permissive standard and the upholding of the challenged classification.⁸³

It has been suggested, however, that the Burger court is taking a somewhat different approach to equal protection cases — that it has

⁷⁷ *Reed v. Reed*, 404 U.S. at 76.

⁷⁸ See *supra* note 65 and accompanying text.

⁷⁹ See *supra* note 60.

⁸⁰ VERRALL & SAMMIS, *supra* note 4 at 3. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971) at 236-37.

⁸¹ See *supra* section II B.

⁸² See *supra* notes 41 and 42.

⁸³ Gunther, *supra* note 69 at 18-19.

been willing to use the Equal Protection Clause as an interventionist tool without resort to the language of strict scrutiny.⁸⁴ The *Reed* case, in which the court struck down a sexually discriminatory state statute without invoking the strict standard, is certainly consistent with this theory. *Reed*, then, seems to represent a new equal protection approach and an increased concern for women's rights, both of which strengthen the possibility that California's sexually discriminatory management and control laws will be held invalid under the federal Equal Protection Clause, even if the U.S. Supreme Court does not designate sex a suspect classification.⁸⁵

III. ALTERNATIVES

A. IN GENERAL

There are two basic alternatives to California's system of vesting sole management and control in the husband. One is shared management and control by husband and wife. The other is allocation of sole management and control based on some criterion more valid than sex.

The State of Texas recently adopted a dual system, under which each spouse has sole management and control over that community property (e.g. earnings) which would be his or her separate property if he or she were unmarried. If these separately managed properties are commingled, they become subject to joint management and control.⁸⁶

Allocating management and control on the basis of who earned the money, as in Texas, avoids the inherent sex discrimination for which California management and control law has been criticized. But this system still has two major flaws. First, it is still sexually discriminatory — albeit indirectly — since, as previously stated, a woman is generally unable to earn as much as a man,⁸⁷ and in fact is pressured to assume the role of housewife,⁸⁸ in which case she has no earnings at all. Secondly, regardless of sex discrimination, basing community property rights on financial contribution is inconsistent with the fundamental theory of California's community property

⁸⁴*Id.* at 12.

⁸⁵An Arizona trial court has recently declared that state's community property laws unconstitutional on the ground that sex classifications in the granting of management and control powers deprive the wife of equal protection of the laws and due process. 232 *The Sacramento Bee* (April 6, 1973) at A19. The article did not state whether the court had applied the strict or permissive standard.

⁸⁶TEX. FAM. CODE § 522 *et seq.* (Vernon 1971); McKnight, *Texas Community Property Law — Its Course of Development and Reform*, 8 CAL. WESTERN L. REV. 117, 137-39 (1972).

⁸⁷*See supra* notes 11 and 29.

⁸⁸*See supra* note 9.

system: that the contribution of each spouse is equally valued, whether in money or services.⁸⁹

Theoretically, it would be possible to allocate sole management and control powers on some other basis, such as managerial skill. But any such allocation would raise the practical problem of determining which spouse is the more skilled manager, and would not solve the problem of creditors' rights. Furthermore, it seems an unnecessary governmental interference in private lives. The state may have a valid interest in ensuring that neither spouse deprives the other of his or her rights, but it also seems desirable to restrict the role of the law to resolving serious conflicts, and maximize the spouses' freedom to fashion their own system of management and control.

What, then, of a system of shared management and control? Under a system of shared control, there are two alternative rules that could be adopted. One is that each spouse, acting alone, has the power to control and dispose of the community property (for convenience, this will be referred to as *equal* control). The other is that neither spouse can dispose of the community property acting alone — any transaction involving the community property must be agreed upon by both spouses in advance. (For convenience, this will be referred to as *joint* control).

What result would ensue if California adopted a scheme of joint control? This would certainly protect one spouse from irresponsible spending sprees by the other. But it would just as certainly injure creditors, inhibit commerce, and seriously inconvenience the spouses.

What result would ensue if California adopted a scheme of equal control? The fact that the community property would be liable for all debts of both spouses would provide increased protection for creditors. But the power of an irresponsible spouse to dissipate the community property weakens the protection of the other spouse.

Carried to the extreme, neither alternative is entirely satisfactory. Clearly, some modifications are necessary in order to produce a system which is fair to both spouses and to the creditors. The author offers the following modified version of equal control as a model. It is one attempt to construct a system which is not sexually discriminatory and which effectively serves the legislative objectives of protecting the community property and protecting and balancing the interests therein.⁹⁰

⁸⁹See *supra* note 79.

⁹⁰For a proposal providing for equal control of transactions involving less than \$500, and joint control for transactions over \$500, see Bendheim, *supra* note 35 at 173. Polish law provides for equal management for "ordinary" transactions, and joint management for "extraordinary" transactions. D. Lasok, *Polish Family Law*, 16 LAW IN EASTERN EUROPE (1968) at 94. The ordinary/extraordinary dividing line seems preferable to a dollar amount, since the reasonableness of the

B. MODEL SYSTEM OF JOINT CONTROL

The basic rule of this system is that husband and wife have equal management and control of community property. Their rights and powers are equal. Each spouse is empowered to act as agent for the community. In return, each spouse has a duty not to act to the detriment of the community.

Each spouse, acting alone, has the power to dispose of the community property.⁹¹ But, if one spouse breaches his or her duty, and uses the community property in a manner detrimental to the community interests, the aggrieved spouse has a cause of action for accounting and mismanagement.⁹² The ultimate remedy would consist of reimbursement of the community from the wrongdoer's separate property. If there is insufficient separate property, the judgment would be treated as a continuing obligation to be satisfied out of any subsequently acquired separate property, or by an adjustment when the community property is ultimately partitioned.

This raises two important questions. First, how does one determine whether a disposition is detrimental to the interests of the community?⁹³ Second, is immediate partition (during marriage) de-

amount would vary greatly depending on the financial circumstances of the family.

⁹¹This would not apply to property for which ownership is registered in the names of both husband and wife. In such cases, they would have to act jointly.

⁹²Some readers may object that this encourages inter-spousal litigation, contrary to public policy. But inter-spousal actions involving property interests have long been accepted practice. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971), § 122. And although the cases involving protection of the wife's interests, mentioned *supra* note 24, were not litigated until the marital relationship was terminated, there was no objection to litigation during marriage in *Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 mentioned *supra* note 28, where the husband was seeking protection of his interests.

Perhaps the general acceptance of inter-spousal property litigation during marriage rests on an understanding that a dispute between husband and wife does not necessarily signal the dissolution of the marriage, and that marital harmony may be better served by a fair adjudication than by allowing the dispute to fester. *Self. v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962), which approved inter-spousal litigation even in non-property cases, indicates increasing concern for the individual rights of family members, and a growing unwillingness to sacrifice those rights just to preserve an appearance of marital harmony.

As an alternative to litigating every case, it might be worthwhile to establish an arbitration panel. This would meet the objections both that formal adversary proceedings are inappropriate in a family dispute, and that the courts will be clogged if these disputes are admitted.

⁹³Presumably it would be detrimental to use the community property for purposes which, under current social mores, violate the "marriage vows" (*e.g.*, to finance an extra-marital sexual relationship, or discharge an obligation to support a child who was the issue of such a relationship). A couple could, by mutual agreement, define their own marital interests rather than relying on social mores.

In the absence of an express agreement, it would presumably be permissible to use the community property for purposes which are not beneficial to the community, but which are neither directly offensive to it (*e.g.*, for a hobby not

sirable or necessary to effectuate this remedy? Further study is needed to provide satisfactory answers to these questions.

As to the spouses' contracts, torts, and other legal obligations, the community property is liable unless the obligation was incurred to the detriment of the community interests. In that case, the debtor-spouse's separate property is primarily liable. In the absence of sufficient separate property, the community property is liable, but only to the extent of the debtor-spouse's one-half share. Any community property used to pay a "detrimental" debt creates an obligation to be satisfied out of subsequently acquired separate property or by an adjustment upon partition.

This protects the creditor by allowing him to reach the entire community property in most cases. Admittedly the good faith creditor is no less deserving of redress in cases of "detrimental" debts, but his rights must be weighed against those of the non-debtor spouse. The creditor is still protected to the extent of being able to reach at least one-half of the community property. And the non-debtor spouse is protected to the extent of keeping his or her one-half share of the community property intact.

IV. CONCLUSION

If California's current management and control laws are challenged under the state or federal Equal Protection Clause, there are cogent reasons to expect the laws to be struck down. But while a court can strike down the existing system, it cannot enact an entire new system in its place — that is a legislative function. Consequently, if California's current laws are held invalid, there will follow a period of confusion until the courts decide, on a case by case basis, such basic questions as what debts the community property is liable for, and whether both spouses have to sign a contract to make it binding on the community property. It seems to be in the best interest of the citizens of California for the legislature to prevent that period of confusion and commercial uncertainty by taking the initiative and enacting a new, non-discriminatory system of management and control.

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shared by the other spouse, or to pay alimony or child support obligations resulting from a previous marriage). This seems fair because, since each spouse contributes to the community property, he or she should be able to draw on it for personal needs. And obligations such as alimony are foreseeable at the time of marriage, so the non-debtor spouse may be deemed to have consented to sharing them.

Another use of community property which might be treated as detrimental is an expenditure which, on its face, is beneficial or neutral to the interests of the

Addendum

After this article went to press, the U.S. Supreme Court handed down another major sex discrimination decision — *Frontiero v. Richardson*, 41 U.S.L.W. 4609, No. 71-1694 (5-14-73). Since the case involved the federal government, it was based upon the Fifth Amendment Due Process Clause, but the analysis is applicable to the Fourteenth Amendment Equal Protection Clause as well.

Under the federal statutes involved, for purposes of allowing certain dependents' benefits, the spouses of servicemen were conclusively presumed to be dependents, but the spouses of servicewomen were deemed dependent only if they were in fact dependent for over one-half of their support. The sole purpose of the classification by sex was administrative convenience. The court held, 8-1, that this was an unconstitutional discrimination by sex.

Even more important, the court dealt squarely with the question of whether sex is a suspect classification. Mr. Justice Brennan, joined by Justices Douglas, White, and Marshall, in the plurality opinion, concluded that sex is a suspect classification. Mr. Justice Stewart agreed that the statutes worked an invidious discrimination, but did not reach the issue of sex as a suspect classification. Mr. Justice Powell, joined by Chief Justice Burger and Mr. Justice Blackmun, in a concurring opinion, argued that this was not the proper case for determining if sex is a suspect classification, for two reasons. First, because the classification involved is invalid even under the permissive standard, the decision should be rested on that narrower basis. Second, in view of the fact that the Equal Rights Amendment has been passed by Congress and is now being considered for ratification by the states, the court should let the issue be resolved by the legislative process. (This second reason is unconvincing. While ratification of the ERA may automatically make sex a suspect classification, there will be no resolution if the Amendment is not passed. That is, mere defeat of the ERA would not operate to amend the Constitution to decree sex a nonsuspect classification.)

The fact that sex was not held to be a suspect classification by a majority of the court does not affect the California Supreme Court's holding in *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), that sex is a suspect classification, at least as regards the California Constitution.

community, but which is clearly beyond the community's means. This is something that would have to be decided on a case-by-case basis, based on the individual circumstances of each case.