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## Dennis Kendig Discrimination Against Women in Home Mortgage Financing

In the last few years, the women's rights movement has directed national attention to a variety of areas in which women are assigned a subordinate status. One of these areas is the extension of credit. Unlike men, women are frequently required to obtain co-signers for small loans and married women are often unable to obtain charge accounts except under their husband's names. The largest credit transaction the average person ever faces is the purchase of a home. In this area too, there have been claims of discrimination against women.

The claims of discrimination have centered on the practice of lenders not to count all of a working wife's income when she applies with her husband for a mortgage. Since lenders use a formula based on a family's income to determine whether to make the loan or how large a loan to make, the result of omitting the wife's earnings is that the family will be offered a smaller loan, or none at all. Lenders have also been accused of being less likely to lend to a single woman than to a man. This report is the result of a detailed investigation into the bases for these claims.

These claims of discrimination have broad ramifications, for bias against women in home mortgage financing constitutes a serious barrier to the achievement of social and economic justice in the United States. Not only is the extension of mortgage credit often crucial to social advancement, but minority and poor families are disproportionately disadvantaged by discrimination against women.

Mortgage lending institutions bear a heavy social responsibility to behave fairly in their lending activities for

several reasons. First, the Housing Act of 1949 set as a national goal "a decent home and a suitable living environment for every family."<sup>1</sup> Mortgage lenders who unfairly discount the income of a working wife, thus disqualifying the family for a loan, or who treat single women differently from men are wrongly denying these people a home of their choice. Second, the number of people affected is very great. Literally millions of working couples and single women encounter unjustifiable obstacles in their quest for home ownership.<sup>2</sup> Third, for most families the purchase of a home is the largest credit transaction they will ever encounter and one to which a very high social priority is attached.

The ability to obtain mortgage credit to purchase a home can mean much more to a family than merely the adequacy of its shelter. It can mean living in a decent neighborhood, having access to good educational, health and recreational facilities, or even access to a decent job. This magnifies the importance of fair mortgage lending practices.<sup>3</sup>

The practice of income discounting is especially harmful to the home ownership aspirations of America's minority families. In black families it is more common for both partners to work. In 1969, among families in which the husband's income was \$10,000 or more, half of the black wives, but only 1/3 of the white wives, were in the labor force. Forty-four per cent of black wives with preschool children were in the labor force compared to 28 per cent of white wives.<sup>4</sup> Bureau of Labor Statistics data indicates that the labor force participation rate for nonwhite wives is 52.5%, contrasted with 39.7% for white wives. In the key age group 25-34, the corre-

sponding percentages are 59.4% and 38.0%.<sup>5</sup> Moreover, these working wives account for a substantial proportion of family income—26 per cent in the average family.<sup>6</sup> For families where the wife's income makes the difference between poverty and an acceptable living standard, the results of discriminatory practices can be devastating: the exclusion of the wife's income can effectively shut the minority couple out of the new home market.<sup>7</sup>

Similarly, single minority women are disproportionately harmed by arbitrary treatment compared to single white women because relatively more black women than white women participate in the labor force. In 1971, 42.6% of white women and 49.2% of nonwhite women were working.<sup>8</sup> This is true because a higher proportion of black women are separated, divorced, or widowed and must rely heavily on their own earnings for their support.<sup>9</sup>

In exploring the problem of sex discrimination in home loan financing, this report will be divided into three parts.

Part I discusses the extent of discrimination against women in this field. It concluded that such discrimination is widespread and takes two forms. First, lenders discount a working wife's income when she applies with her husband for a home mortgage. Second, lenders are less likely to make a loan to a single woman than to a man.

Part II analyzes the lenders' arguments that these discriminatory practices may be justified on economic grounds. It concludes that there is no economic justification for automatically discriminating against women applicants for mortgages

## I The Pattern of Discrimination

### A *Income Discounting*

The most common form of discrimination against women in home mortgage financing is the practice by lenders of discounting a married woman's income when she applies with her husband for a home mortgage. Lenders, in determining the amount of the loan they are willing to make, rely heavily on the income of the loan applicant. Because lenders believe the percentage of its income a family spends on housing to be an important determinant of loan risk, the greater the family income, the larger loan they are willing to grant. With few exceptions, lenders refuse to count 100 per cent of a working wife's income when computing family income, thus reducing the amount of the loan for which the applicant is eligible.

Evidence that this policy of discounting a wife's income is widespread comes from a variety of sources. Discounting is typically recommended in textbooks and treatises on mortgage lending. Hoagland's treatise on *Real Estate Finance*, while noting that the income of children should not be counted toward a borrower's resources, did not even mention the possibility of a wife's having an income.<sup>10</sup> The idea that a wife might have an income was acknowledged in the 1962 edition of Bryant's textbook, *Mortgage Lending*, but only in the following context:

Only the net income of the family as stated above should be taken into consideration, and the income of a wife under thirty-five years of age should not be considered.<sup>11</sup>

By 1965, the author of the "Analysis of the Borrower" section in Pease and Kerwood's *Mortgage Banking* had to take notice of

the trend in modern families...toward an increasing frequency of supplemental income beyond the primary wage earner's main job.<sup>12</sup>

However, the author apparently assumed that the primary wage earner would be male and noted that many wives found the additional expense necessary to maintain a household while working too great in proportion to their earnings to justify working for long periods, and that many wives left business life to raise their families. His conclusion:

This does not mean that their income should be totally overlooked. It does mean that such income should be considered relatively temporary in nature.<sup>13</sup>

With this emphasis in the literature on discounting a working wife's income, it is not surprising to find that many lenders have adopted a policy of discounting. Such is the case with commercial lenders across the nation.

and suggests that lenders should solicit more precise data from applicants in order to evaluate more objectively the likelihood of default or foreclosure.

Part III argues that present federal and state remedies are inadequate to prevent these forms of discrimination. The possible impact of the Equal Rights Amendment is also analyzed. The conclusion is reached that the various states should adopt statutes directed at eliminating discrimination against women in home mortgage financing.

Following the text of the report is a proposed state statute designed to prevent a wide range of discrimination against women in credit transactions.

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## 1 Commercial Lenders

Responding to a reader's inquiry, Bernard Meltzer, an expert on personal finance, reported in his column in the *Washington Post* that he had surveyed many mortgage lenders to ascertain their policy regarding recognizing a wife's income.<sup>14</sup> Assuring them anonymity in order to get his information, Meltzer discovered a general pattern in lending practices. In marriages of less than five years or where the wife had been working only a short time, no recognition was given to her income. With young married couples, no matter what their background, the wife's income was not recognized. If the wife was classified as a professional and was between the ages of 26 and 35, a lender might give half credit to her income. Over 35 years of age, it was customary to give full credit. If the wife was classified in a non-professional occupation, usually no allowance was made for her income up to age 35, half allowance between 35 and 42, and full credit beyond that age.

The Center for National Policy Review, a privately funded organization based at Catholic University Law School, has for some time been concerned with national policy relating to civil rights and urban problems. Staff member Steven Rohde, testifying before the National Commission on Consumer Finance, presented the Center's conclusions after their investigation of the problem of income discounting. The evidence indicated that conventional mortgage underwriting practices with regard to a wife's income were extremely diverse, but that only a few lenders were normally willing to give full credit to a wife's income.<sup>15</sup> Similar evidence comes from representatives of local lending institutions.<sup>16</sup>

More evidence comes from a recent survey of the savings and loan industry. The Federal Home Loan Bank Board conducted a survey of lending practices of savings and loan associations which included questions directed at this subject.<sup>17</sup> As one question, the associations were asked what credit they would allow for a working wife's income if she were age 25, had two school age children, and worked full time as a secretary. Twenty-five per cent of the respondents stated they would count *none* of her income and 63% stated they would count half or less. Only 22% of the responding institutions would have counted all of her income.<sup>18</sup>

## 2 V.A. Practice

The Veterans Administration also appears to give little weight to a working wife's income. Although the V.A. does not maintain records of the weight given wife's income, evidence that the weight is generally

low comes from individuals who have applied for V.A. loans and from realtors who have attempted to help such customers.

In general, it seems that unless a wife of child-bearing age has a long work history and can produce a doctor's certificate stating that she cannot bear children, her income will be largely disregarded.<sup>19</sup>

The following excerpt from testimony before the National Commission on Consumer Finance offers an illustration of how this policy can result in economically qualified applicants being denied loans.

Mrs. Johnson is 29 years old, and works full time for the Dade County Department of Housing and Urban Development as a Family Relocation Advisor at a salary of \$475 a month. She has worked steadily since she was 16 years old, and has been employed full-time since she graduated from high school. During this entire period, the longest period she has not been working was for two months when she gave birth to her only child 8 years ago in a previous marriage.

When she and her husband applied for a V.A. mortgage loan last fall, it was determined that in order to be able to qualify for the loan, it would be necessary that her income be counted. She was informed by the mortgage company, however, that V.A. would not count her income because she was "a woman of childbearing age." On the other hand, the mortgage company informed Mrs. Johnson that she could have her income counted if she either obtained a doctor's certificate stating that she could no longer have children or if she signed an *affidavit* stating that she is practicing birth control under the supervision of her physician and planned to continue to practice birth control and have no more children. The mortgage company even typed out and handed her its recommended version of the affidavit. When Mrs. Johnson rebelled at what she considered a blatant invasion of her rights, the official of the mortgage company stated this was a common practice and even showed her from the files, while blotting out the name, several other affidavits from women in a similar position as Mrs. Johnson.

Mrs. Johnson refused to sign such an affidavit and was denied the loan. This refusal to count Mrs. Johnson's income was particularly unconscionable because of the clear facts of her own work history and motivation. Not only had she been consistently employed for 13 years, but she has found the time and energy to take enough night courses to total two years of college credit. As she continues to work for her degree, the opportunities for further job advancement will continue to increase.

Before moving to Florida, Mrs. Johnson had owned a home herself in South Carolina and had a good payment record. Finally it should be noted that the apartment Mr. and Mrs. Johnson currently reside in requires a monthly rent which is almost \$50 more than the monthly payment that the mortgage would have required. The Johnsons have never had any difficulty in paying their rent.

As Mrs. Johnson pointed out to me, she and her husband can't qualify for a Section 235 loan because her income *is* counted as part of the family income, thus making their total family income too high. Yet at the same time they can't qualify for a V.A. loan because, for these purposes, her income is *not* counted.<sup>20</sup>

It is important to note that the policy which resulted in the Johnson's being denied the loan would not likely be revealed in a statistical survey of lending practices because many women yield to the pressure and sign affidavits in order to obtain a loan.

### 3 F.H.A. Practice

The Federal Housing Administration (F.H.A.) has never had any policies, procedures or instructions specifically designed for determining the eligibility of female applicants. However, the F.H.A. has always had instructions for determining whether the income of a working wife will be counted toward support of the mortgage obligation.<sup>21</sup>

Prior to October, 1965, the income of a young wife was not counted. The income of the husband alone had to suffice to support the mortgage. This policy was based on the belief that many working wives quit working after having their first child, either voluntarily or because few employers provided maternity leave with job retention rights.<sup>22</sup>

Since October, 1965, the income of a majority of all working wives has been counted in support of the mortgage.<sup>23</sup> F.H.A.'s underwriting manual emphasizes the substantial increase in wives' employment as a characteristic of family life, and with regard to younger couples, adds the following:

This steadily increasing trend in wife employment as a characteristic of the family life of the younger couples seems attributable to the willingness of both husband and wife to work for a better standard of living during their early married life than would otherwise be possible.<sup>24</sup>

With regard to the possibility of pregnancy, the F.H.A. manual states:

The principal element of mortgage risk in allowing the income of working wives as effective income is the possibility of its interruption by maternity leave. Most employers recognize this possibility provide for maternity leave, with job retention, as an inducement of employment. With strong motives for returning to work any failure to do so after maternity leave would probably be due to causes which would be unpredictable and would represent such a very small percentage of volume that it could be accepted as a calculated risk.<sup>25</sup>

This policy change reflects a recognition of the trend of increased stability of the employment of working wives. This trend is indicated by F.H.A. statistics: in 1964, the wife worked in 27% of the cases insured; this figure increased to 44% in 1970.<sup>26</sup> Under present policy, a wife's income will be disallowed only where she has been employed only a few months and the employment itself is not definitely established. Of all cases in which the wife worked, F.H.A. counted her income in 73% of the cases in 1964 and 89% of the cases in 1970. The 11% in 1970 were not counted because they presented instances of uncertainty regarding the wife's continued employment, for example, if she were young, recently married, and on her first job. Occasionally, an older working wife had an erratic employment pattern over the years.<sup>27</sup>

The F.H.A. statistics may, however, underestimate the extent of persistent discrimination against women. The 89% figure is 89% of the cases where loan applications were approved. F.H.A. does not keep statistics on characteristics of borrowers on rejected applications nor does it keep records analyzing the reasons for loan rejections. It is at least possible that despite the statistics, F.H.A. fails to count the wife's income in a large number of cases and this fact is lost because rejection of the wife's income led to rejection of the entire loan application. The experience of officials in F.H.A.'s mortgage credit section indicates that this is not the case,<sup>28</sup> but there is presently no way to verify this claim.

### 4 Secondary Market Programs

The practice of income discounting by major institutional lenders such as savings and loan associations is affected by developments in the national secondary market operations of the Federal National Mortgage Association (F.N.M.A.) and the Federal Home Loan Mortgage Corporation (F.H.L.M.C.).

F.N.M.A. was authorized by the Emergency Home Finance act of 1970 to purchase and sell conventional

mortgages in order to facilitate the flow of credit for residential mortgage financing. The same act created a second federal corporation, F.H.L.M.C., also to buy and sell conventional mortgages.<sup>29</sup> F.N.M.A. deals primarily with mortgage bankers and commercial banks, while F.H.L.M.C. limits its operations to savings and loan associations.

Recognizing that the great diversity in mortgage instruments, procedures, and underwriting criteria would be a barrier to the development of an effective secondary market, both F.N.M.A. and F.H.L.M.C. have devoted much effort to the establishment of standard mortgage forms and credit underwriting criteria to be used by lenders seeking to sell their mortgages to these agencies.

In the first draft of its proposed criteria, F.N.M.A. recommended that the income of a working wife be counted at 50 per cent.<sup>30</sup> F.N.M.A. officials believed this figure to be relatively generous by comparison to the typical policy of mortgage lenders. Under criticism by numerous organizations concerned with protecting the rights and interests of racial and ethnic minorities, working people, consumers, women and senior citizens, F.N.M.A. issued revised guidelines in December, 1971.<sup>31</sup> The discriminatory features of the earlier guidelines were deleted, and a prohibition on discrimination on account of race, color, religion, sex, age or national origin in the fixing of terms of loans and in servicing loans was added. While eliminating the arbitrary 50 per cent rule F.N.M.A. left vague what standard should instead be applied. The operative language relating to the joint income of a husband and wife states:

The key determination to be made is whether the circumstances reasonably indicate that the income, jointly or severally, will continue in a manner sufficient to liquidate the debt under the terms of the note and mortgage.<sup>32</sup>

The vagueness of this new language leaves open the possibility that many mortgage originators will interpret and apply it in a discriminatory manner.

F.H.L.M.C. has issued more positive guidelines which state:

If there are two borrowers both of whom have full time employment, a determination should be made as to whether both will probably work for several years (normally at least 20% of the mortgage term).<sup>33</sup>

The guidelines make it clear that the possibility of temporary leave, such as maternity leave, is not a basis for discounting any portion of an applicant's income. Also, if either spouse has part-time work, the income it generates is to be counted if it is likely to be stable for three years.

These guidelines may have a positive impact on the practices of many mortgage lenders. Mortgage bankers may feel reasonably confident that F.N.M.A. will not refuse to purchase a mortgage merely because a liberal underwriting policy is followed in counting a working wife's income. Mortgage bankers in particular may be encouraged to change their current policies because they make loans with the idea of selling them. To the extent they feel they have a reliable outlet for a mortgage, they will have less reason not to originate the loan.

The potential impact on savings and loan associations is less predictable. The secondary market is not as significant to savings and loan associations because savings and loan associations generally originate mortgages with the idea of holding them as investments rather than selling them. It is only over the long term that the real potential for change in the policy of savings and loan associations can be realized.

Change in institutional lending practices will depend on the extent to which F.N.M.A. and F.H.L.M.C. actually implement the policies they adopted in their guidelines. If these agencies were to refuse to purchase mortgages made on the basis of these revised criteria, mortgage lenders would cease to originate such loans. So far the agencies have only indicated they will purchase loans that are made under a non-discriminatory policy. They could take the further step of stating they will refuse to purchase loans from lenders who arbitrarily discount all or part of a working wife's income.<sup>34</sup> Such a stance would have the potential for significant immediate impact.

## B *Single Women*

Another common form of discrimination against women in home mortgage financing is the practice of treating a single female loan applicant differently from a single male. There is little statistical data indicating the full extent of this problem, because the only agencies in a position to gather this data—the Federal Home Loan Bank Board, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation—have not collected and analyzed data on the sex of loan applicants.

However, the Bank Board's survey of lending practices<sup>35</sup> provides some evidence of the problems single women are likely to encounter when applying for a mortgage. While the questionnaire did not ask directly whether the sex of an applicant was a factor in evaluating a loan application, it did ask if marital status was a factor. Almost 2/3 of the savings and loan associations responded that marital status was a factor in deciding on loan applications, and 18% said that a sufficiently unsatisfactory answer to the question about marital status would disqualify the applicant *per se* from receiving a loan.<sup>36</sup>

The Bank Board has not released the answers to a followup question which inquired what particular marital status would disqualify the applicant,<sup>37</sup> so any interpretation of the statistics must be somewhat speculative. It seems clear, however, that applicants would not be disqualified because they were married and living together, so it must be that the disqualifying marital status must be in one or more of the following categories: single, divorced, widowed or separated.

Discrimination on the basis of marital status harms women more than men because more women than men fall into these categories. According to the 1970 Census, 14½ million women fall into the categories of separated, divorced and widowed, but only 5 million men.<sup>38</sup> Added to this is the fact that fewer single men than women seek home mortgages because men are less likely than women to have children living with them. To the extent that men in these categories do not seek mortgages, therefore, discrimination on the basis of marital status may become the functional equivalent of discrimination on account of sex.<sup>39</sup>

Several witnesses before the National Commission on Consumer Finance testified to the prevalence of discrimination against single women.<sup>40</sup> One witness presented a particularly striking case history to the Commission:

This woman was 28 years old, divorced, the holder of a master's degree, and was earning a salary of \$12,000 when she decided last summer to buy a \$34,500 townhouse. With \$9000 in cash and no debts, she was optimistic about obtaining a loan. That optimism soon faded. She applied to several mortgage lenders in the district and received several rejections. Some explained that the area was risky, yet these same lenders had been recommended by her realtor because they often made loans in that area. Another eventually rejected her application due to a suddenly discovered shortage of funds. The fact that she had no established credit was also a negative factor. Unfortunately, her credit applications had also been rejected by several credit card companies.

This story does have a happy ending. After explaining her plight to an influential friend, this young woman got a little assistance. Her friend was on exceptionally good terms with the president of a local lending institution. A loan interview was set up with the president, and she soon had her loan. And after becoming a homeowner, she found it much easier to obtain other types of credit. She now owns her own home, a car, and has several credit cards.<sup>41</sup>

The troublesome question is: would there have been such a happy outcome for a less informed, less educated, and less wealthy woman who did not have influential friends?

## II The Economic Justification for Discrimination Against Women in Home Mortgage Financing

### A *Income Discounting*

Lenders do not give the income of working wives full credit because they assume the women are temporary workers. If a wife is of childbearing age and is not classed as a professional, little weight will usually be given to her income. Lenders typically reason that if her income were counted as a qualifying factor for the loan and she were to leave the labor force, the family's ability to support the mortgage would be impaired and the likelihood of default increased.

This discounting policy is not justifiable on economic grounds for two major reasons. First, the probability of delinquency or default is not particularly sensitive to the percent of income devoted to housing expense. Second, the income of a working wife cannot in the majority of cases be expected to shrink or evaporate during the early years of the mortgage.

### 1 Expense-to-Income Ratio

Lenders generally believe that the percentage of income which a family spends on housing is an important determinant of loan risk. This is why lenders usually establish maximum ratios for housing expense to income and will rarely make a loan which would produce a larger ratio. Although the standard varies by lender and between areas of the country, the ratio is typically set at 20 or 25 per cent.<sup>42</sup> Thus, an applicant whose income is \$10,000 will be considered for a loan of no greater amount than will yield annual payments totaling \$2,000-2,500.

The average working couple, who in 1970 earned \$13,259, of which the wife accounted for \$3,473 or 26.2%, would qualify for a loan requiring \$276 in monthly housing expense from a lender operating under the 25% rule who counted the wife's income.<sup>43</sup> Were the wife then to leave the labor force, the ratio of housing expense to income would jump to 33.9%. Had the lender anticipated such a shift, he would not have made the loan. The question is: does such a shift really convert a sound loan into a risky loan?

Recent research has begun to provide an answer. According to a study by John Herzog and James Earley for the National Bureau of Economic Research,<sup>44</sup> the percentage of income spent on housing is not significantly related to loan risk. Instead, the most important risk-governing factors were found to be the loan-to-value ratio, the presence of junior financing, and the purpose of the loan.<sup>45</sup> George von Furstenberg, author of several respected studies of F.H.A. and V.A. loans, similarly maintains that the loan-to-value ratio is the key determinant of loan quality.<sup>46</sup> Other delinquency and foreclosure studies have been attempted by governmental agencies and private groups. They conclude that

factors other than the loan to income ratio best predict default, and indicate that this ratio is not an especially useful indicator.<sup>47</sup>

Thus, to the extent that the housing expense-to-income ratio is an unreliable indicator of risk, lenders relying on it are denying loans without an adequate economic justification.

## 2 Likelihood of Wife's Income Terminating

The second reason lenders discount a working wife's income is their belief that such income is likely to terminate during the early years of the mortgage. It appears, however, that this expectation is largely unfounded.

It is commonly acknowledged that the three major determinants of a wife's labor force status are: the family's child care needs (determined by the number and ages of any children), the wife's level of education and age, and the family's economic status (as measured by the husband's income).<sup>48</sup> Of these factors, the family's child care needs is most important.<sup>49</sup> For several reasons, however, it is not accurate for a lender to assume that all wives will permanently leave the labor force due to the presence of children.

First, wives who have no children generally continue to be labor force participants. About 2/3 of childless wives between the ages of 25 and 34, and 72 per cent of those between the ages of 20 and 24 were in the work force in 1969.<sup>50</sup> Wives who do not become mothers also have long worklife expectancies. A 30 year old working wife with no children can be expected to work 27 more years; if she is 35, her worklife is 24.4 years.<sup>51</sup> These figures make it clear there is no economic justification for discounting the income of a working wife who is unlikely to become a mother.

Second, a substantial number of women return to work after their children have begun school. Half of all wives with children between the ages of 6 and 17 years of age were in the labor force in March, 1971.<sup>52</sup> Among black mothers with school age children the proportion is 2/3.<sup>53</sup> A woman of 35 who has had her last child and has rejoined the labor force has a worklife expectancy of 24 more years.<sup>54</sup> These figures make it clear that the incomes of women who have completed their families and returned to work should be viewed as stable and that automatic discounting is economically unjustified.

Third, in recent years there has been a marked increase in the labor force participation rates for mothers with pre-school children. In the last ten years the participation rates for young mothers (ages 20-24) rose from 18 per cent to 33 per cent,<sup>55</sup> and in 1971 29.6 per cent of wives with children under 6 years of age were in the labor force.<sup>56</sup> Although this participation rate is substantially lower than that of wives with school age

children, it has been rising rapidly and may grow further as improved child care opportunities are made available. These figures demonstrate that it is erroneous for a lender to discount a wife's income on the assumption that she will necessarily leave the labor force if she has pre-school children.

Although some wives do get pregnant and leave work, the question that needs to be answered is: how many wives will quit work and refuse to return to work if by so doing they will be unable to meet their mortgage payments and will allow a foreclosure on their mortgage?

A study by the U.S. Savings and Loan League<sup>57</sup> indicates that loans to families where the husband's income accounted for 100% of family income actually had a higher likelihood of being delinquent than loans to families where the husband's income was only a portion of family income.<sup>58</sup> As the percentage of family income earned by the husband decreased, the likelihood of the loan's being delinquent also decreased. The study failed to control for a number of other variables that might predict delinquency but the results are very suggestive because the trend of recent years has been toward the increased reliability of the income of working wives.

More importantly, it appears that if lenders were really concerned about screening out risky loans, they could easily refine the data received from applicants. The practice of automatically discounting a wife's income by 50, 75 or 100 per cent unless she is a professional is an extremely blunt administrative device that has the potential for being both overinclusive and underinclusive. It is overinclusive when it results in the discounting of the income of a woman who would in fact be a reliable labor force participant throughout the term of the mortgage. It is underinclusive when it results in counting the income of an older, professional wife who nevertheless intends to stop working and have children. Coupled with the fact that the housing expense-to-income ratio may be an unreliable determinant of risk, it is clear that lenders need to develop more sensitivity to the changing roles of women in our society and to solicit more precise data from applicants in order to evaluate more fairly the likelihood of default or foreclosure.

## B Treatment of Single Women

The policy which treats single women differently from single or married men is likewise not justifiable on economic grounds.



A single woman is regarded as a poor risk for two reasons:

- 1 she is assumed to have less regard for her obligations than, say, a married man; and
- 2 it is thought likely she will leave the labor force and be unable to support the mortgage.<sup>59</sup>

There are several reasons for doubting the validity of these assumptions.

First, it appears that the credit reliability of women is superior to that of men, and there seems to be no difference in risk between married and single borrowers.<sup>60</sup> Moreover, the Herzog and Earley study supports the conclusion that marital status is unrelated to delinquency and foreclosure risk.<sup>61</sup> Hence, there is no reason to conclude that single women tend to treat their obligations more lightly than others.

Second, the majority of single women are in the labor force, and single women who remain single have particularly long worklife expectancies. Based on 1960 census data, a woman entering the workforce by age 20 who never marries can be expected to work for 45 years, a longer worklife than the average man. Women who are divorced or widowed and working at age 35 can also be expected to work for a long time—divorcees for 29 more years and widows for 27 more years.<sup>62</sup> Thus, if a woman applicant can be expected to remain single, the lender has no reason to regard her income as less stable than that of a married man. Whether she can be expected to marry depends primarily on her age, with the probability dropping substantially after age 30.<sup>63</sup>

Third, the changes most likely to occur in a young woman's marital and work force status will not generally result in a depletion of the income supporting her mortgage. When the loan applicant is young, the probabilities are greater that she will marry. But none of the probable consequences of marriage increase the riskiness of her loan. If a female mortgagor marries, she and her husband may choose to live elsewhere and sell or rent the property. Whether she continues to work is then much less important to the lender. If her house is used as the family residence, it will probably be converted to joint tenancy with the husband cosigning the note. Thus, if the wife continued to work, the mortgage would be supported by two incomes rather than one, hardly a cause of concern to the mortgagee. If the wife were to leave the labor force, it is probable that the substitution of her husband's income would result in a lower payment-to-income ratio because men generally have higher paying jobs.

For a lender to reject a single woman's application without analyzing in detail the specifics of her particular situation therefore appears to be wholly without economic justification.

### C *Business Practices of Lenders*

The materials discussed above indicate that the discriminatory practices of mortgage lenders are not justified on economic grounds. Nevertheless, lenders commonly argue that fully counting a wife's income and making loans to women on the same basis as men constitute unsound business practices. Until this notion is dissipated, lenders will continue discriminating against women in home mortgage financing.

Indeed, bias against female loan applicants does not constitute a sound business practice. A group of 180 economists stated:

Arbitrary exclusion of persons who have the economic capacity to participate in the market place is a distortion of our economic system and cannot be considered 'sound and economical home financing'.<sup>64</sup>

By relying on discriminatory lending practices, lenders deny themselves potentially profitable loans, arbitrarily limiting their market choice.<sup>65</sup> Discrimination for non-economic reasons is really an unsafe and unsound business practice because:

it results in an economic cost not only to those discriminated against but also to those who do the discriminating.<sup>66</sup>

Thus it is error to maintain that lenders would be doing their investor-shareholders a disservice by making more loans to women and counting a working wife's income. Lenders would do their owners and their country more of a service by evaluating loan applications on the basis of those factors studies have shown to be directly related to risk, and not on the basis of outmoded images of the behavior of women in our society.<sup>67</sup>

## III *The Need for State Legislation*

Strictly enforced federal and state legislation is needed to provide an adequate legal remedy for the victims of discrimination in obtaining home mortgage financing. Legislation is needed because there exist no adequate federal statutory, executive, administrative or constitutional remedies. The Equal Rights Amendment is not yet law and it is not immediately clear that it would provide an adequate remedy even if adopted. Nor, is there presently a satisfactory remedy under most state laws.

### A *Federal Remedies*

#### 1 *Statutory Remedies*

There is presently no federal statutory provision that

prohibits discrimination against women in home mortgage financing. Title VI of the Civil Rights Act of 1964 forbids the discrimination against the beneficiaries of federally assisted programs, but it applies only to discrimination on the basis of race, color and national origin—not sex.<sup>68</sup> Title VII of the same act prohibits employers, including banks, from discriminating on the basis of race, color, religion, national origin and sex, but applies only to employment.<sup>69</sup> The Civil Rights Act of 1968 prohibits discrimination in housing lending on the basis of race, creed, color and national origin—but not sex.<sup>70</sup>

Legislation which would strike at discrimination against women in home mortgage financing has been introduced in Congress by Representative Abzug of New York. Her bill<sup>71</sup> would prohibit discrimination by financial institutions or any other persons on the basis of marital status or sex in connection with federally-related mortgage transactions. As an aid to effective enforcement, it would also require any parties to any such transaction to submit appropriate reports thereon containing specified information. Also, it provides for both civil and criminal liabilities. The bill was referred to the House Committee on Banking and Currency where it failed to receive a favorable report. It has been reintroduced in the 93d Congress.

## 2 Executive Remedies

Federal executive remedies are also inadequate. Executive Order 11246 covers banks (who are federal contractors because of their relationship with the Federal Reserve), prohibiting discrimination against women and other minorities, but only with respect to employment.<sup>72</sup>

## 3 Administrative Remedies

The banking and savings and loan industries are among the most heavily regulated industries in the United States. Many aspects of the activities of lending institutions are supervised by various administrative agencies in an effort to promote a variety of social and economic objectives.<sup>73</sup> To date, however, none of these agencies has promulgated regulations or guidelines prohibiting discrimination against women in home mortgage financing. The only guidelines presently in use which bear on the matter are those established by the F.H.A. and F.H.L.M.C.,<sup>74</sup> and these lack effective enforcement mechanisms.

One should note that the Federal Deposit Insurance Corporation has recently proposed regulations barring discrimination in real estate lending,<sup>75</sup> but they do not cover discrimination on the basis of sex. A coalition of several public interest groups has petitioned<sup>76</sup> the F.D.I.C. to amend the guidelines to prohibit sex discrimination as well, but no change has yet been made.

## 4 Constitutional Remedies

Finally, a judicial remedy seems unavailable because judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment is unlikely to bar discrimination against women in home mortgage financing. The Supreme Court has held that the Equal Protection Clause is applicable to discrimination on the basis of sex,<sup>77</sup> but has thus far failed to designate sex differentiation cases as ones appropriate for strict scrutiny. In sex discrimination cases, the Supreme Court has not yet found the occasion to apply the “fundamental interest” test or the “suspect classification” formula.<sup>78</sup>

The fundamental interest test applies only where the particular right claimed to be infringed is a “fundamental” one; the Court is divided as to what kinds of rights and interests are sufficiently “fundamental” to warrant strict scrutiny.<sup>79</sup> Nonetheless, the fundamental interest test would likely not be applied to any but the most important areas in which women are treated differently from men, such as voting and employment.

When a statute classifies on a basis “inherently suspect” the Court has said it will apply “the most rigid scrutiny”<sup>80</sup> to the enactment. Thus, a statute distinguishing on the basis of race or ancestry embodies a “suspect” or “invidious” classification and, unless supported by the most compelling affirmative justification, will not pass constitutional muster.<sup>81</sup> The Court refused to apply the suspect classification test in one sex discrimination case,<sup>82</sup> however, though appellant relied primarily on this line of argument<sup>83</sup> and the similarities between race and sex discrimination are striking.<sup>84</sup> Thus it appears unlikely that the Court will subject legislation to strict scrutiny because it classifies on the basis of sex.<sup>85</sup>

## B The Equal Rights Amendment

It is possible that the adoption of the proposed Equal Rights Amendment<sup>86</sup> would make unconstitutional discrimination against women in home mortgage financing. For several reasons, however, state and federal legislation should nevertheless be enacted.

First, the Equal Rights Amendment has not been ratified by the requisite number of states. For this proposed amendment to become law, three-fourths of the states must ratify it within seven years of its passage by Congress. This means that 38 states must ratify the proposed Amendment by March 22, 1979. As of April, 1973, the legislatures of 28 states had ratified the proposal.

Second, even if the Equal Rights Amendment were ratified by the requisite number of states, it would not take effect for another two years.<sup>87</sup> Thus, if the ratification process were to slow down, the Amendment might not be in operation before 1980. Discrimination against women in home mortgage financing is a serious enough problem to warrant a quicker response.

Third, it is problematical whether the Equal Rights Amendment, even if ratified in time, would reach this type of discrimination. The Amendment provides that equality under the law shall not be denied or abridged "by the United States or by any State". Like the Fourteenth and Fifteenth Amendments, the legal effect of the Amendment is confined to "state action". How this much-debated and increasingly complex legal concept would be applied in the context of women's rights remains to be seen.

Constitutional doctrines pertaining to state action, developed primarily in the context of racial discrimination, embody two concepts:

- 1 that the existence of state action depends on the nature and degree of state involvement; and
- 2 that state action depends on the function being performed.

The degree of state involvement may range all the way from a direct prohibition of certain conduct to the maintenance of conditions in the society that permit private activity to exist. The type of function may range from a clearly governmental activity, such as the election of public officials, to purely personal relationships, such as private social gatherings.<sup>88</sup>

The problem is to determine whether the activity of home mortgage financing is part of the public sector, in which different treatment on account of sex would be prohibited, or is part of the private sector, in which different treatment would be permitted. Supporting its inclusion in the public sector would be the presence of pervasive federal and state regulation of the banking and savings and loan industries. The Supreme Court's recent holding in the *Moose Lodge* case,<sup>89</sup> however, indicates that such a conclusion is questionable. In *Moose Lodge*, a Negro guest of a member of the Lodge, a private club, was refused service in the club's dining room and bar solely because of his race. In suing for injunctive relief, he contended that the discrimination was state action, and thus a violation of the Equal Protection Clause of the Fourteenth Amendment, because the state liquor board had issued the club a private club liquor license. The District Court found state action in what it considered to be the "pervasive" nature of the regulation of private clubs by the state liquor board.<sup>90</sup> The Supreme Court reversed, stating:

However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise.<sup>91</sup>

Justice Rehnquist stated the general test as follows:

Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discrimination," *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.<sup>92</sup>

It is unclear whether federal and state regulation of banks and savings and loan associations provides the necessary state action. On the one hand, such regulation probably cannot be said to encourage sex discrimination, and the situation would be analogous to that in *Moose Lodge*. On the other hand, a bank or savings and loan association is a much more public organization than a private social club and the activity of originating mortgage loans has a much broader impact than the serving of liquor.

The question is further clouded by the fact that discrimination on the basis of sex has not yet received as much national attention as discrimination on the basis of race. It is possible that the Court could find state action in a racial discrimination case and not find state action on analogous facts in a sex discrimination case. The concept of state action should be vigorously applied up to the point necessary to achieve the objectives of the Equal Rights Amendment if it is adopted. But it is not possible at this point, to predict with any certainty how those objectives will be viewed by courts over the years.<sup>93</sup>

Even if sex discrimination by lenders is found to be state action under a newly enacted Equal Rights Amendment, a statutory enactment may still be in order.

Enforcement of a constitutional prohibition is a much more protracted and uncertain process than enforcement of a well-drafted statute. Litigation is invariably a lengthy process. If the Supreme Court gave priority to cases dealing with other areas of women's rights, such as employment rights, protective labor legislation, or alimony, decisions on discrimination in home mortgage financing could be years away. Such delay is not likely in the enforcement of a statute.

### C State Remedies

There is no remedy currently available under the laws of most states. The Illinois state constitution prohibits discrimination on the basis of sex in employment and the rental or sale of property,<sup>94</sup> and provides that the equal protection of the laws shall not be denied or abridged on account of sex by the state or any of its units of local government.<sup>95</sup> The Hawaii state constitution provides that no person shall be discriminated against in the exercise of his civil rights because of sex.<sup>96</sup>

The enjoyment of civil and political rights is not protected in all state constitutions, however, and among those which include the provision, most do not prohibit discrimination on the basis of sex.<sup>97</sup>

Several states have enacted legislation prohibiting discrimination on the basis of sex in housing and housing financing.<sup>98</sup> However, many of these statutes are public accommodation laws and do not specifically prohibit discrimination in mortgage lending.<sup>99</sup> Several other states presently have statutes pending in their legislatures and Washington state has recently amended its human rights legislation to cover real estate transactions.<sup>100</sup> More legislation is needed, however, to combat effectively the various forms of discrimination against women in home mortgage financing.

#### D *Features of a Proposed Statute*

The Appendix contains a statute designed to prohibit discrimination against persons on the basis of sex or marital status in any credit transaction. Discrimination on the basis of marital status is prohibited because it would have a discriminatory impact on women since more women than men are separated, divorced, or widowed.

Following the pattern of other antidiscrimination statutes, the term "discrimination" is not explicitly defined. It is understood that the Fourteenth Amendment's "equal protection" standard should be used to evaluate creditor practices. Thus a *prima facie* case of sex discrimination would be established when a person showed that a procedure, practice, or act complained of affects a person of a particular sex differently than it affects a person who, except for sex or marital status, is similarly situated.

The statute prohibits "creditors" from such discrimination, with the definition of creditor paralleling that in the Federal Truth in Lending Act. The statute is not designed to provide state control over federally chartered and licensed financial institutions.

All phases of a credit transaction would be covered by the statute, including any advertising by a creditor designed to encourage application for credit, the application itself, all acts incident to the evaluation of an application, and the actual credit sale.

The statute provides for a variety of enforcement measures. First, the Banking Commissioner or other similarly situated state official, is given extensive powers to promulgate such regulations as are necessary to carry out the purposes of the act, to receive and act on complaints, to seek voluntary compliance with the act, to require records to be maintained by creditors sufficient to demonstrate compliance with the act, and to issue cease and desist orders against any creditor not in compliance with the act. He may also institute pro-

grams to educate persons with respect to credit practices and problems, and make studies appropriate to carry out the purposes of the act. He is given general subpoena powers and may request the Attorney General to enjoin any violation of the act or regulations adopted thereunder.

Second, any person discriminated against by a creditor may bring an action to recover damages, plus costs and reasonable attorney's fees.

Third, there is criminal liability for any creditor, or creditor's officer, director, or employee who willfully and knowingly violated the act.

## A Bill

An Act prohibiting discrimination on the basis of sex or marital status in credit transactions.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

### Section 1 Definitions

As used in this Act:

- (a) "Commissioner" means the Bank Commissioner;
- (b) "credit" means the right granted by a creditor to a person to defer payment of debt or to incur debt and defer its payment;
- (c) "creditor" means any person who regularly extends or arranges for the extension of credit for which the payment of a finance charge or interest is required whether in connection with loans, sale of property or services or otherwise. The provisions of this Act apply to any such creditor, irrespective of his or its status as a natural person or any type of organization;
- (d) "invitation to apply for credit" means any communication, oral or written, by a creditor which encourages or prompts an application for credit;
- (e) "application for credit" means any communication, oral or written, by a person to a creditor requesting an extension of credit to that person or to any other person, and includes any procedure involving the renewal or alteration of credit privileges or the changing of the name of the person to whom credit is extended;
- (f) "extension of credit" means all acts incident to the evaluation of an application for credit and the granting of credit;
- (g) "credit sale" means any transaction with respect to which credit is granted;
- (h) "credit transaction" means any invitation to apply for credit, application for credit, extension of credit or credit sale.

### Section 2 Prohibited Discrimination

It shall be unlawful for any creditor to discriminate on the basis of sex or marital status against any person in any credit transaction.

### Section 3 Enforcement. Commissioner's Powers Duties

- (a) The Commissioner shall (1) issue such regulations as are deemed necessary to further the purposes of this Act, (2) receive and act on complaints, (3) take action designed to obtain voluntary compliance with this Act, and (4) commence proceedings on his own initiative;
- (b) In order to accomplish the purposes of this Act, the Commissioner may (1) counsel persons and groups on their rights and duties under this Act, (2) establish programs for the education of persons with respect to credit practices and problems, and (3) make studies appropriate to effectuate the purposes and policies of this Act and make the results available to the public;
- (c) The Commissioner may by regulation require the maintenance of records related to credit transactions sufficient to evidence the adoption of policies calculated

to produce compliance with this Act and the Commissioner or any authorized representative may examine such records on the premises of the creditor, and make copies thereof;

(d) The Commissioner may request the Attorney General to bring an action in the [Superior Court] to enjoin any person from violating this Act or regulations adopted pursuant to this Act;

(e) The Commissioner shall report annually to the Governor on this administration of this Act. For that purpose the Commissioner is authorized to conduct research and make appropriate studies. The report shall include a description of the procedures and policies of his office; the policies followed in deciding whether to examine creditors subject to this Act; a statement of the types of credit discrimination problems of both creditors and debtors which have come to his attention; the disposition of such problems under existing law, and if any involved criminal prosecution, the reason his administrative powers were inadequate to solve them; and a general statement of the activities of his office. The report shall not identify the persons against whom he has taken action.

(f) After a hearing held upon not less than ten nor more than thirty days' notice, the Commissioner may order a creditor or a person acting in behalf of a creditor to cease and desist from engaging in violations of this Act, and in that connection he may exercise the subpoena powers contained [elsewhere in the general statutes]. Any person aggrieved by an order to the Commissioner under this subsection may appeal in the manner provided [elsewhere in the general statutes].

### Section 4 Civil Liability

Any creditor who discriminates on the basis of sex or marital status against any person in any credit transaction shall be liable to that person in an amount equal to the sum of:

- (a) any specific damages, except that the liability under this paragraph shall not be less than one hundred dollars in any individual action; and
- (b) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

### Section 5 Criminal Liability

(a) Any creditor who willfully and knowingly violates the provisions of Section 2 of this Act shall be fined not more than five thousand dollars for each violation.

(b) Any director, officer or employee of any creditor who willfully and knowingly violates the provisions of Section 2 of this Act shall be fined not more than five thousand dollars or imprisoned not more than six months, or both, for each violation.

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- 1 12 U.S.C. § 144.
- 2 Testimony of J. McElhone, Economist, Federal Home Loan Bank Board, before the National Commission on Consumer Finance, May 22, 1972 at 3.
- 3 Testimony of S. Rohde, Center for National Policy Review, Catholic U. School of Law, before the National Commission on Consumer Finance, May 22, 1972 at 2-3.
- 4 E. Waldman, "Marital and Family Characteristics of the U.S. Labor Force," 93 *Monthly Labor Review* 18 (May, 1970) at 12.
- 5 Petition of the American Friends Service Committee, Inc., *et al.* before the Federal Deposit Insurance Corporation in the matter of Fair Housing Lending Practices, Notice of Proposed Rulemaking, Nov. 1, 1972 at 20.
- 6 McElhone, *supra* note 2 at 13.
- 7 *Id.* at 19.
- 8 U.S. Department of Labor, Manpower Administration, 1972 *Manpower Report of the President* at 162.
- 9 U.S. Bureau of the Census, Census of Population: 1970, General Population Characteristics, Final Report PC(1)-B1 United States Summary, Table 54: Household and Family Characteristics by Race and Size of Place: 1970, at 1-278.
- 10 H. Hoagland, *Real Estate Finance* (1954) at 296-7.
- 11 W. Bryant, *Mortgage Lending* (1962) at 144-5.
- 12 P. Jackson, Jr., "Analysis of the Borrower," in Pease and Kerwood, *Mortgage Banking* (1965) at 213.
- 13 *Id.*
- 14 B. Meltzer, *Washington Post*, Feb. 13, 1971 at D9.
- 15 Rohde, *supra* note 3 at 4.
- 16 *E.g.*, interview with loan interviewer at Connecticut Savings Bank, New Haven, Conn., Nov. 10, 1972; interview with loan officer at First New Haven National Bank, New Haven, Conn., Nov. 10, 1972.
- 17 Federal Home Loan Bank Board Survey of 100 Savings and Loan Associations, Summer, 1971.
- 18 *Id.* The Bank Board has attempted to minimize the significance of these results by pointing out that only 74 savings and loan associations responded to the survey, and that they were not selected by any scientific sampling technique so the results cannot be regarded as necessarily representative of the industry. (Letter from J. McElhone to the author, Nov. 9, 1972; Rohde, *supra* n.3 at 5).
- On the other hand, it is likely that the results considerably *understate* the extent of discriminatory lending practices. The Board's methodology was to send out the questionnaire to the 100 associations considered most likely to cooperate (Rohde, *supra* n. 3 at 5-6). The 74 respondents have, compared to the rest of the industry, relatively liberal lending policies as measured by their willingness to participate in federal subsidy and insurance programs. For example, 58% of the respondents claimed they made 90% loans to families in low-income or minority-group neighborhoods, and 2/3 would make 95% loans if permitted. Also, 40% said they made H.O.A.P. loans, 58% made loans in HUD or state-financed subsidized housing programs, and 30% indicated an interest in purchasing participations in loans on subsidized housing (Federal Home Loan Bank Board Survey, *supra* n. 17). It is instructive that of the savings and loan associations thought by the Bank Board to be willing to cooperate and evidencing liberal lending patterns in other areas, a vast majority nevertheless would automatically discount the income of a working wife.
- Another reason the survey may tend to understate the extent of discriminatory lending practices is the fact that the specific question asked was conducive to a liberal lender response. First, the woman in the hypothetical had two school age children and no pre-school children, hence there had been a number of years since she had her last child, minimizing the likelihood of her having additional children. Second, she had a full-time job which apparently had required some degree of training. There is nothing in the question to suggest that she was likely, even temporarily, to leave the labor force. Yet only 22 % of the lenders responding to the questionnaire would give full credit to her income.
- 19 McElhone, *supra* n. 2 at 3.
- 20 Rohde, *supra* n. 3 at 6-7.
- 21 Testimony of Q. Wells, Director, Office of Technical and Credit Standards, Housing Production and Mortgage Credit, Department of Housing and Urban Development, before the National Commission on Consumer Finance, May 23, 1972 at 1.
- 22 *Id.*
- 23 F.H.A.'s policy is to count either all of a wife's income or none of it.
- 24 VII F.H.A. Underwriting Manual, Home Mortgages, § 71924.
- 25 *Id.*
- 26 Wells, *supra* note 21 at 1.
- 27 *Id.* at 2.
- 28 Rohde, *supra* note 3 at 22.
- 29 84 Stat. 450 (1970).
- 30 Rohde, *supra* note 3 at 17.
- 31 *Id.* at 20.
- 32 *Id.*
- 33 *Id.* at 19.
- 34 *Id.* at 22.
- 35 Federal Home Loan Bank Board Survey, *supra* note 17.
- 36 *Id.*
- 37 Letter from J. McElhone, *supra* note 24; Rohde, *supra* note 3 at 13.
- 38 Census of Population: 1970, *supra* note 9.
- 39 Rohde, *supra* note 3 at 14.
- 40 *Id.* at 12-13; McElhone, *supra* note 2 at 4-5; testimony of J. Farry, President, United States Savings and Loan League, before the National Commission on Consumer Finance, May 23, 1972 at 4.
- 41 McElhone, *supra* note 2 at 5.
- 42 *Id.* at 9.
- 43 *Id.*
- 44 J. Herzog and J. Earley, *Home Mortgage Delinquency and Foreclosure* (1970).
- 45 *Id.* at 50-52, 54, 58-60, 62-63. The fact that the payment-to-income ratio variable tested out as a statistically non-significant factor in determining delinquency and foreclosure risk was a surprise to the authors who expected it to vary directly with such risk. They point out in their analysis (at 51) that the fact that this variable did not appear related to risk could be evidence that lenders have been successful in controlling this aspect of risk. Since the sample included only those loans which had been made and therefore passed the screening process of lenders who may have used the 20-25 per cent rule, it is theoretically possible that loans with dangerously high ratios were already filtered out. Were that the case, the observed results would be only the random variability in the ratio rather than variability which would be indicative of risk. However, the fact remains that the payment-to-income ratio variable failed to satisfy the significance tests at either the 1% or 5% levels when the equations were pooled (at 54), making it highly unlikely that the ratio is a reliable indicator of risk.
- 46 McElhone, *supra* note 2 at 10.
- 47 A V.A. study published in 1962 (V.A. Report of Loan Service and Claims Study, Washington, D.C., April, 1962) covered all V.A. guaranteed loans in default as of December 31, 1960 plus all new defaults reported during the first four months of 1961. It concluded that claims appeared to be directly related to longer initial term-to-maturity and loan-to-value ratio.

An F.H.A. study published early in 1963 (F.H.A., F.H.A. Experience with Mortgage Foreclosures and Property Acquisitions, Wash., D.C., Jan. 1963) was based on several types of analysis, concluding that the age of loan, the price of the house, the size of the down payment and the term of the loan were important factors in determining whether foreclosure would occur. It also concluded that borrower characteristics were more important than property and location characteristics but failed to test for the sex of the borrower as a factor.

A study published by the Housing and Home Finance Agency in 1963 (H.H.F.A., Mortgage Foreclosures in Six Metropolitan Areas, Wash., D.C., June, 1963) was based on a survey of six metropolitan areas from 1961 to 1962. It concluded that the number of foreclosures was positively affected by loan-to-value ratio, term of loan, age of loan, presence of junior financing, and housing expense-to-income ratio.

Finally, the United States Savings and Loan League conducted a national survey (U.S.S. and L.L., Anatomy of the Residential Mortgage, Chicago, 1964) covering 38 institutions. It found that those loans most prone to delinquency exhibited a high loan-to-value ratio or a high purchase price or a situation in which the borrower had a larger number of dependents.

None of these studies is as helpful as the Herzog and Earley study in analyzing the riskiness of loans which rely on a wife's income for their support. The government studies, for example, concentrated only on foreclosure as a performance indicator, making no attempt to analyze what factors might be associated with delinquency. Nor was there much effort to determine why some delinquencies resulted in foreclosure and some did not. On the other hand, the Savings and Loan League study looked at the causes of delinquency but ignored foreclosure altogether.

The findings also are difficult to evaluate in going from one study to another because they were based on different methods of statistical analysis. For example, in the H.H.F.A. report, the analysis was confined almost exclusively to simple frequency distributions of the characteristics of the loans foreclosed. Whether the distributions represented anything other than the distribution of all loans, good and bad, is impossible to tell from the study. In addition the studies performed no significance testing, used small samples, and defined variables in a variety of ways. Finally, the study with the best data base, the Savings and Loan League study, made no attempt to investigate the causes of foreclosure, but centered its attention on loan, property and borrower characteristics in general and the difference in those characteristics for current loans versus delinquent loans.

On the other hand, the Herzog and Earley study tried to remedy these research shortcomings. Its research strategy was to study loan delinquency as well as foreclosure, to use sample

data for good as well as bad loans, to cover conventional as well as F.H.A. and V.A. loans, and to study the loans made by each of three major types of mortgage lenders. Multiple regression analysis, supplemented by Lorenz-type tests of the "risk indexes" developed from the regressions, was used as the framework for the study.

Thus the results of the Herzog and Earley study deserve special weight in evaluating the validity of the economic rationale commonly given by lenders for discounting a working wife's income.

- 48 McElhone, *supra* note 2 at 14; Background Paper for Twentieth Century Fund Task Force on Working Women (unpublished and untitled), Chapter 1 at 5-8.
- 49 McElhone, *supra* note 2 at 14.
- 50 *Id.*
- 51 *Id.*
- 52 U.S. Bureau of the Census, Census of Population: 1970, General Social and Economic Characteristics, Final Report PC(1)-C1 United States Summary, Table 101: Employment Status by Sex and Size of Place: 1970 at 1-407; 1972 *Manpower Report of the President*, *supra* note 8 at 195. See also Waldman, *supra* note 4 at 20.
- 53 McElhone, *supra* note 2 at 15.
- 54 *Id.*
- 55 *Id.* at 16.
- 56 Sources cited, *supra* note 51.
- 57 U.S. Savings and Loan League Study, *supra* note 48.
- 58 *Id.* at 66.
- 59 McElhone, *supra* note 2 at 6.
- 60 D. Durand, *Risk Elements in Consumer Installment Financing*, (1941), 74-75.
- 61 Herzog and Earley, *supra* note 44 at 52, 59-60, 62.
- 62 U.S. Department of Labor, Manpower Administration, "Work Life Expectancy and Training Needs of Women," Manpower Report No. 12 (May, 1967), cited in U.S. Department of Labor, Women's Bureau, 1969 *Handbook on Women Workers*, at 7.
- 63 McElhone, *supra* note 2 at 11.
- 64 "Statement of Economists" (March 20, 1972) at 1. The statement was endorsed, among others, by the last five chairmen of the President's Council of Economic Advisers: Paul McCracken, Arthur Okun, Gardner Ackley, Walter Heller and Raymond Saulnier.
- 65 G. Becker, *The Economics of Discrimination* (1957).

- 66 "Statement of Economists", *supra* note 71 at 1.
- 67 Throughout this discussion the assumptions have been honored that delinquencies and foreclosures are unprofitable events, that lenders suffer significant economic losses when loans go bad, and that they are justified in avoiding any loan which may be risky. Such assumptions may not be true in fact. It is possible for a lender to profit from a bad loan by buying the foreclosed property at a deflated price and selling it later at a substantially higher price. There is a cost represented by the loss of reputation or goodwill that would accrue to a lender who made a high number of loans that went bad (see McElhone, *supra* note 2 at 7-8). On the other hand, if national policy supports the making of loans to risky borrowers, such as minority groups in traditionally risky neighborhoods, the lender may be under an affirmative obligation to make risky loans. Should the issue of discrimination against women in home mortgage financing come to national prominence it is not inconceivable that lenders would be encouraged to make objectively risky loans in order to rectify an unfortunate past practice.
- 68 42 U.S.C. §§ 2000d to 2000d-4 (1964).
- 69 42 U.S.C. §§ 2000e to 2000e-12 (1964).
- 70 42 U.S.C. § 3605.
- 71 H.R. 15114, 92nd Congress, 2d Sess.(1972).
- 72 Executive Order No. 11246 as amended by Exec. Order No. 11375, 3 C.F.R. 402.
- 71 H.R. 15114, 92nd Congress, 2d Sess. (1972).
- 72 Executive Order No. 11246 as amended by Exec. Order No. 11375, 3 C.F.R. 402.
- 73 Rohde, *supra* note 5. The Federal Home Loan Bank Board oversees and examines the nation's savings and loan associations; the Comptroller of the Currency supervises and examines national banks; the Board of Governors of the Federal Reserve System supervises and examines state chartered banks that are members of the Federal Reserve System; and the Federal Deposit Insurance Corporation performs the same function over state chartered banks that are F.D.I.C. insured but are not members of the Federal Reserve System. The nation's mortgage bankers are the only major class of mortgage originators that are not covered by the federal regulatory scheme.
- 74 Text accompanying footnotes 29-34, *supra*.
- 75 Proposed F.D.I.C. Regs. §§ 338.1-338.8, 37 Fed. Reg. 19385 (Sept. 20, 1972).
- 76 Petition, *supra* note 5.
- 77 *Reed v. Reed*, 404 U.S. 71 (1971).
- 78 B. Brown, T.I. Emerson, G. Falk, A. Freedman, "The Equal Rights Amendment:

A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 872, 879-80 (1971).

79 *Id.* at 880.

80 *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

81 *Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

82 *Reed v. Reed*, *supra* note 84. In this case the Supreme Court unanimously declared unconstitutional an Idaho statute that gave men preference over women in administering deceased persons' estates.

83 Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971).

84 Note, "Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?" 84 Harv. L. Rev. 1499, 1507-9 (1971).

85 Even if the Court were to designate the ability to obtain a home mortgage a fundamental interest or sex a suspect classification, it does not follow that all treatment differing by sex would be outlawed. All these categories do is place the party doing the discriminating in the position of showing a more compelling reason than usual for the differentiation. Although the standard of proof is higher, it may theoretically still be met.

86 Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

House Joint Resolution 208, March 22, 1972, U.S. Code, Cong. and Admin. News, 92nd Cong., 2nd Sess. at 835.

87 *Id.*, § 3.

88. Brown, *et al.*, *supra* note 85 at 905.

89 *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

90 *Irvis v. Moose Lodge No. 107*, 318 F. Supp. 1246, 1248-50 (Pa. 1970).

91 *Moose Lodge*, *supra* note 97 at 176-7.

92 *Id.* at 173.

93 If state action were found, the practice of income discounting and the differing treatment of single women would both violate the Equal Rights Amendment. The basic principle of the Amendment is that sex is not a permissible factor in determining the rights of any person (Brown, *et al.*, *supra* note 85 at 889). Differentiation in treatment

may rest upon particular characteristics of the persons affected, such as credit worthiness or likelihood of employment termination, but under the Amendment the existence of such a characteristic to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. Thus, lenders who discounted the income of a working wife or treated a single woman differently from a man without reference to the specific characteristic of that wife or single woman that they reasonably believed contributed to the riskiness of the loan would be violating the Amendment.

94 Ill. Const., Art. 1, § 17.

95 *Id.*, § 4.

96 Hawaii Const., Art. 1, § 4.

97 See, e.g., Conn. Const., Art. 1, § 20; N.Y. Const., Art. 1, § 11; Mich. Const., Art. 1, § 2.

98 Colo. Rev. Stats., 69-7-5(b) and (c); Idaho Code, 67-5909 (7) and (8); Ind. Stats., 40-2308 (a) and (b); Kan. Stats., 44-1001, 1016, 1017; Laws of Mass., 151B, § 4 (3B), (6) and (7); N.H. Rev. Stats., 354-A: 8(V); N.J. Stats., 10: 5-12(g), (h) and (i); N.Y. Exec. Law, § 296.5(e); Penn. Stats., 43-955(h)(1) and (2); S.Dak. Comp. Laws, 20-13-20, 21.

99 Cf. Laws of Mass., 151B, § 4 (3B), (6) and (7) to N.H. Rev. Stats., 354-A: 8(V).

100 The states include Connecticut, Georgia, New York, and Texas. Telephone interview with S. Campbell, National N.O.W., March 21, 1973.