
ARTICLES

DISCRIMINATION IN AND OUT OF MARRIAGE

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The Supreme Court’s decision in Obergefell v. Hodges marks a tremendous victory for lesbian, gay, bisexual, and transgender people. Some scholars

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suggest, however, that in addressing one form of discrimination, the Court derailed efforts to dismantle another—the privileging of marriage over nonmarriage.

By excavating the forgotten history of marital status advocacy, this Article complicates the progress-and-decline narrative of the law of nonmarriage. Using original archival research, this Article illuminates how the conventional narrative of nonmarriage overstates the progressive nature of its past. Statutes prohibiting marital status discrimination are cited as examples of earlier attempts to unseat marriage from its privileged position. This uncovered history demonstrates that marital status advocacy was a critical step on the road to greater equality. But this work primarily sought to address discrimination within marriage, not discrimination against those living outside of it.

This Article also sheds light on the future of nonmarriage. As a result of earlier marital status activism, discrimination within marriage is much less pronounced today. Many of the statutes and practices that required differential treatment of husbands and wives have been repealed or invalidated. These remarkable successes can be attributed to the multi-dimensional strategy utilized by advocates. This strategy holds much promise for the contemporary struggle to address discrimination against those living outside of marriage.

INTRODUCTION

The Supreme Court’s decision in *Obergefell v. Hodges*¹ marks a tremendous victory for lesbian, gay, bisexual, and transgender (“LGBT”) people. Some scholars suggest, however, that in addressing one form of discrimination, the Court derailed earlier efforts to dismantle another—the privileging of marriage over nonmarriage.² These scholars are rightly concerned about the legal treatment of nonmarital families.³ It remains to be seen, however, whether

¹ 135 S. Ct. 2584, 2604-05 (2015).

² See, e.g., Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 977 (2016) (“In the wake of *Obergefell*, several scholars predicted retrenchment in the gradual embrace of ‘relationship pluralism’ that family law had witnessed in recent decades.”); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1239 (2016) (“In this regard, we might understand *Obergefell* not simply as an effort to nationalize marriage equality, but also as an effort to further entrench marriage’s primacy and foreclose opportunities to establish and protect nonmarital alternatives.”).

³ See, e.g., Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 496 (2014) (urging that “[a]s advocates strive to ensure that marriage is an option for all families, they must also strive to make sure that the children of families who cannot marry, or who choose not to, are still adequately protected under the law”). See generally, e.g., Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805 (2015) [hereinafter Joslin, *Marital Status*] (exploring extent to which statutes prohibiting marital

these accounts of the law's trajectory are complete.⁴ By excavating the forgotten history of marital status advocacy, this Article complicates the conventional progress-and-decline narrative of nonmarriage.

The number of adults living outside of marriage is large and growing.⁵ In 1960, there were fewer than one million unmarried cohabitants.⁶ Today, there are over eighteen million.⁷ The rate of increase of nonmarital cohabitation shows no sign of stopping.⁸ This trend, however, is not consistent across all socioeconomic groups.⁹ Those living outside of marriage are

status discrimination protect nonmarital couples and urging enactment of statutes that do extend that protection); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) [hereinafter Joslin, *Protecting Children*] (arguing that marriage-based parentage rules for children born through assisted reproductive technology harm nonmarital children); Murray, *supra* note 2 (suggesting that Supreme Court's decision in *Obergefell* extending marriage rights to same-sex couples may halt or even reverse advancements in law and policy protecting those living outside of marriage).

⁴ Elsewhere, I offer a more optimistic view of nonmarriage's future. See generally Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) [hereinafter Joslin, *Gay Rights Canon*] (arguing that *Obergefell* may be read to support rather than to foreclose constitutional protection to nonmarriage); Courtney G. Joslin, *Marriage Equality and its Relationship to Family Law*, 129 HARV. L. REV. F. 197 (2016) (arguing, in part, that marriage equality may lead to progressive equality for both nonmarital children and adults).

⁵ DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 3 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [<https://perma.cc/L2SC-RQXL>] (noting that population of unmarried cohabitants grew by forty-one percent between 2000 and 2010).

⁶ Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 7 (2007) (noting that there were "fewer than 500,000 opposite-sex cohabiting couple households in 1960"); Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 88 (2004).

⁷ U.S. CENSUS BUREAU, TABLE AD-3, LIVING ARRANGEMENTS OF ADULTS 18 AND OVER, 1967 TO PRESENT (2016) <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/7K4D-QWVA>] (once at website, click hyperlink to download table); Kaiponanea T. Matsumura, *Regulating Intimate Relationships*, 96 N.C. L. REV. (forthcoming 2018) (manuscript at 2) (on file with author).

⁸ See Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 55 (2015).

⁹ Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171 (2015) ("Marital family law is hardly ideal for the married families it governs, but it wreaks havoc on the nonmarital families it excludes. . . . [T]he fundamental mismatch between marital family law and nonmarital family life undermines relationships in nonmarital families." (footnotes omitted)). To be clear, however, it is sometimes financially beneficial for a couple to remain unmarried. *E.g.*, Erez Aloni,

disproportionately nonwhite and lower income.¹⁰ Marriage, by contrast, has become “a hallmark of privilege.”¹¹ Despite these demographic developments, our system of family law remains stubbornly marriage based.¹² To use the words of Serena Mayeri, “[m]arital supremacy . . . endures.”¹³

The now-conventional narrative suggests that efforts to unseat marriage from its privileged position had been moving on a positive trajectory. To bolster this narrative about the earlier positive arc in nonmarriage law, scholars cite a range of progressive developments during the second half of the twentieth century. These developments include the emergence of new procreative freedom rights;¹⁴ court decisions invalidating laws that discriminated against nonmarital children;¹⁵ no-fault divorce laws that made exiting marriage easier;¹⁶ case law protecting former nonmarital partners’ property rights upon dissolution;¹⁷ and, most relevant to this Article, statutes prohibiting marital status discrimination.¹⁸

Deprivative Recognition, 61 UCLA L. REV. 1276, 1290 (2014); Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 170 (2015) (“[N]onrecognition may be financially beneficial for some families. This would be the case if the combined income of both adults put them over the income threshold for a particular need-based benefit.”).

¹⁰ Joslin, *supra* note 9, at 170 (“People of color, people in lower income brackets, and people with less education are significantly less likely to get married.”).

¹¹ JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19-20 (2014) (“For the majority of Americans who haven’t graduated from college, marriage rates are low, divorce rates are high, and a first child is more likely to be born to parents who are single than to parents who are married.”). See generally Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. 1277 (2015).

¹² E.g., Huntington, *supra* note 9, at 167 (“Family law is based on marriage, but family life increasingly is not.”); see also, e.g., Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 235 (2015) (“The central dividing line in family law is marriage.”).

¹³ Mayeri, *supra* note 11, at 1279 (footnote omitted).

¹⁴ See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“We need not and do not, however, decide [whether a statute limiting access to contraception may be sustained] in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

¹⁵ See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (holding unconstitutional Louisiana workmen’s compensation scheme that discriminated against “illegitimate” children).

¹⁶ Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991) (“In the 1970s, a movement to reform divorce laws swept the United States, leading to the widespread adoption of no-fault grounds for divorce.”).

¹⁷ See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (permitting contract and equitable claims as between unmarried cohabitants). See generally Ann Laquer Estin, Essay, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001) (surveying developments in

According to the conventional narrative, this successful, although admittedly incomplete, movement to dismantle marital supremacy was derailed by the marriage equality efforts.¹⁹ Critics²⁰ argue that by extending protections to same-sex couples, the gay rights decisions deflated the pressure to protect those living outside of marriage.²¹ Moreover, critics continue, the marriage equality movement itself, and the decisions it generated, glorify marriage and denigrate nonmarriage.²²

Other scholars, including Douglas NeJaime²³ and Serena Mayeri,²⁴ push back against this description of nonmarriage's evolution. These scholars present a more nuanced perspective on the role of marriage in earlier reform efforts. It is true that negative attitudes about nonmarital sex and cohabitation moderated during the second half of the twentieth century.²⁵ And legal progress was made. Nonetheless, some of these legal developments—including decisions prohibiting some forms of discrimination against nonmarital

judicial enforcement of agreements and equitable claims between unmarried cohabitants following *Marvin*).

¹⁸ See, e.g., Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 15-17 (2000) (discussing said statutes). See generally Joslin, *Marital Status*, *supra* note 3 (same).

¹⁹ E.g., Katherine Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2701 (2008) (“Advocates on behalf of the cause of same-sex marriage have played a role in reinforcing the benchmark status marriage enjoys. Their arguments have rendered the viability of counterpublics that lie beyond the social field of marriage all the more difficult to imagine.”); Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. FURTHERMORE 79, 82 (2015) (“[T]he *Obergefell* and *Windsor* decisions have reified the privileged position of marriage in our laws. . . [and have] actually set back the movement for equal legal treatment of all regardless of relationship status.”); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 69-70 (2015) (“The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy’s adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.” (footnote omitted)).

²⁰ To be clear, the scholars that I am referring to are critics of marital supremacy; they support the extension of rights to LGBT people.

²¹ See *supra* note 19.

²² Serena Mayeri, *Marriage (In)Equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 126 (2015) (“[C]ritics saw in *Obergefell* . . . an implicit ratification of the legal and social privileges accorded to marital families and withheld from the nonmarried.”).

²³ See generally Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

²⁴ See generally Mayeri, *supra* note 11 (exploring litigation challenging laws that discriminated against illegitimate children and their parents).

²⁵ See, e.g., Joslin, *Marital Status*, *supra* note 3, at 824-25 (discussing polling data regarding public outlook on nonmarital families and cohabitation).

children, as well as the emergence of domestic partnership registries—were less revolutionary than “typically assumed.”²⁶ While these efforts resulted in the extension of some important benefits to those living outside of marriage,²⁷ marriage continued to hold a central and privileged place. As NeJaime argues, “[e]ven if advocates [in these earlier reform movements] wished to destabilize marriage—and certainly some did—they were constrained by a legal, political, and cultural framework that prioritized marriage”²⁸

This Article adds a critical new layer to the study of nonmarriage’s past and future by examining an overlooked piece of the puzzle²⁹—statutes prohibiting marital status discrimination. During the 1970s and 1980s, over twenty states and the federal government enacted statutes prohibiting this form of discrimination in a variety of areas.³⁰ At first glance, these statutes appear to support the conventional narrative that earlier activism sought to unseat marriage from its privileged position. The recovered history of these statutes, however, tells a more complicated account of the relationship between marital status nondiscrimination and marital supremacy.

Many assume that statutes prohibiting marital status discrimination protect nonmarital families.³¹ It turns out, however, that only some of the statutes prohibit this form of discrimination.³² While there is some state-to-state variation, a number of courts and attorneys general concluded that these

²⁶ Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 558 (2015) (“Melissa Murray has persuasively argued that these [nonmarital father cases] were less transformative than typically assumed because in each of these early cases, the Court compares the parent-child relationship—and, more surprisingly, the relationship between the parents—to a marital norm.”).

²⁷ See, e.g., Mayeri, *Marital Supremacy*, *supra* note 11, at 1279-80 (exploring cases challenging laws that “discriminated against ‘illegitimate’ children in areas such as wrongful death recovery, workers’ compensation, child support, inheritance, and government benefits”); NeJaime, *supra* note 23, *passim* (exploring history of efforts to extend rights and protections to nonmarital couples through domestic partnerships).

²⁸ NeJaime, *supra* note 23, at 91.

²⁹ There are only a small handful of contemporary articles exploring statutes prohibiting marital status and none of them explores the historical roots of these statutes.

³⁰ E.g., Porter, *supra* note 18, at 15-16 (“Twenty-one states and the District of Columbia protect against marital status discrimination.”). *But see* Joslin, *Marital Status*, *supra* note 3, at 808-09 (explaining that some of these statutes do not prohibit discrimination against nonmarital couples).

³¹ E.g., Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 500 n.109 (1996) (“Unmarried couples now are protected from discrimination on the basis of their marital status in employment, housing, use of public accommodations, and credit.”).

³² Joslin, *Marital Status*, *supra* note 3, at 808-09 (noting that most of these statutes “prohibit only discrimination based on the *status* of being a single, married, or divorced person”).

statutes prohibiting marital status discrimination only protect individuals who experienced discrimination *because of his or her status* as a single, married, or divorced person.³³ In these jurisdictions, statutes prohibiting marital status discrimination do not prohibit discrimination against a person because the person is living in a nonmarital cohabiting relationship. In other words, in these states, it would be impermissible to refuse to rent to a single woman because she is single, but it would be acceptable to refuse to rent to an unmarried couple because they were unmarried.

Consider *North Dakota Fair Housing Council, Inc. v. Peterson*.³⁴ In *Peterson*, the North Dakota Supreme Court held that a landlord's refusal to rent an apartment to an unmarried couple was not unlawful discrimination based on "status with respect to marriage."³⁵ Instead, the landlord's refusal was based on the couple's "conduct," specifically the conduct of cohabiting while unmarried, which was not discrimination prohibited by the statute.³⁶ Thus, in some states, the scope of protection extended by these statutes is not as broad as many assume.

³³ See, e.g., *Prince George's Cty. v. Greenbelt Homes, Inc.*, 431 A.2d 745, 747-48 (Md. Ct. Spec. App. 1981) (holding that two unmarried individuals seeking to jointly purchase co-op unit did not collectively have marital status and, therefore, were not protected by statute); *Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.*, 415 N.E.2d 950, 953 (N.Y. 1980) ("[E]mployers may no longer decide whether to hire, fire, or promote someone because he or she is single, married, divorced, separated or the like. Had the Legislature desired to enlarge the scope of its proscription to prohibit discrimination based on an individual's marital *relationships*—rather than simply on an individual's marital *status*—surely it would have said so."); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶¶ 47-49, 625 N.W.2d 551, 563 (N.D. 2001) (holding that statutes prohibiting discrimination based on "status with respect to marriage" did not prohibit a landlord from refusing to rent to cohabiting couple); *N.D. Op. Att'y Gen. 90-12, 43, 45* (1990) ("[I]t is my opinion that it is not an unlawful discriminatory practice under N.D.C.C. § 14-02.4-12 to discriminate against two individuals who chose to cohabit together without being married."). *But see, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278 (Alaska 1994) ("Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.").

³⁴ See generally *Peterson*, 2001 ND 81, 625 N.W.2d 551.

³⁵ *Id.* at ¶¶ 47-49, 625 N.W.2d at 563. The current version of the housing nondiscrimination provision is codified at § 14-02.5-02 of the North Dakota Century Code. N.D. CENT. CODE § 14-02.5-02 (2015) (providing that "person may not refuse to sell or rent . . . to an individual because of . . . status with respect to marriage"). When initially enacted, the provision was codified at § 14-02.4-12. N.D. CENT. CODE § 14-02.4-12 (1999).

³⁶ *Peterson*, 2001 ND 81, ¶ 41, 625 N.W.2d at 562 ("Thus, the continuing existence of the [criminal] unlawful cohabitation statute after enactment of [the provision prohibiting housing discrimination because of status with respect to marriage] vitiates 'any argument that the legislature intended "marital status" discrimination to include discrimination on the basis of a couple's unwed cohabitation.'" (quoting *N.D. Op. Att'y Gen. 90-12*, at 44)).

This Article demonstrates that marital status advocates sought to address discrimination, but it was a different form of discrimination than some assume. Today, when one thinks about marital status discrimination, one often focuses on discrimination against nonmarital families. But the history uncovered in this Article illustrates that efforts to prohibit marital status discrimination were part of a campaign that sought primarily to eliminate discrimination *within marriage*.³⁷ Historically, married women experienced the most severe legal disabilities. Under the doctrine of coverture, women lost their separate legal identities upon marriage, as well as many important rights, including the rights to contract and to sue or be sued.³⁸ Statutes prohibiting marital status discrimination—especially those that prohibited discrimination in the context of credit—were a critical part of second-wave feminists’ efforts to eradicate the legal and cultural relics of coverture that continued to hinder the ability of women, especially married and formerly married women, to achieve independence and equality.³⁹

This Article uses the federal Equal Credit Opportunity Act (“ECOA”) as a case study to explore this history.⁴⁰ As originally enacted in 1974, the ECOA prohibited credit discrimination on the bases of sex and marital status.⁴¹ The ECOA sought to address practices that made it difficult for women, particularly married and formerly married women, to obtain credit.⁴² These difficulties were based both on persistent stereotypes about the “appropriate” roles of husbands and wives, as well as laws, including those governing community property, which were premised on and perpetuated these gender-based stereotypes about the distinct roles of husband and wife.

What were these practices that the ECOA was intended to remedy? At the time, banks often refused to count all or any of a woman’s earned income.⁴³ Even when women were in the paid workforce, lenders relied on the persistent

³⁷ See *infra* Part III.

³⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES, *429-33; Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 (2009) (“Under common law coverture, a wife’s legal identity was almost entirely subsumed, or covered, by her husband’s. Married women could not sue, be sued, make contracts, own property, or keep their own earnings. Husbands had legal custody and control over a married couple’s children.”).

³⁹ See *infra* Part II.

⁴⁰ Equal Credit Opportunity Act, Pub. L. No. 93-495, secs. 501-503, §§ 701-707, 88 Stat. 1500, 1521-25 (1970) (codified as amended at 15 U.S.C. § 1691).

⁴¹ *Id.* at sec. 503, § 701. Two years later, additional bases, including race, color, religion, national origin, and age, were added to the statute. Pub. L. No. 94-239, sec. 2, § 701, 90 Stat. 251, 251 (codified as amended at 15 U.S.C. § 1691).

⁴² E.g., Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 410-11 (1974).

⁴³ See *infra* Part II.

stereotype that women's participation in the workforce was temporary and supplemental.⁴⁴ Working women, banks presumed, would eventually quit their jobs and assume their "proper place" in the home.⁴⁵ Indeed, some lenders considered a married woman's income only if she provided proof she was on birth control.⁴⁶ Utilizing a practice that seems virtually unimaginable today, some lenders agreed to count a wife's income only if she and her husband not only provided proof that they were using birth control, but also affidavits attesting that they would have an abortion if the wife became pregnant.⁴⁷

Relatedly, many banks refused to issue credit cards in the name of a married woman; banks insisted that credit cards needed to be issued in the name of the husband, who was regarded as the financial head of the house.⁴⁸ For example, BankAmericard advised customers that "BankAmericards are [only] issued in the name of the husband."⁴⁹ Like the practices with regard to income counting, these policies were rooted in the stereotype that husbands were the true managers and providers for the family. And in some instances, these stereotypes were still embedded in law. In a number of community property states, including California, the law still gave husbands sole management and control over some or all of the couple's marital property.⁵⁰ Thus, in some states, banks could persuasively argue that their practices were appropriate. If wives had no property over which they had management and control rights, lenders argued, they could not enforce a judgment against them.⁵¹

Thus, these statutes tell a story of progress, and it is a story about marriage. But this story is primarily about achieving equality *within* marriage, not equality for those living outside of it.⁵² The ECOA was part of a larger campaign that sought to dismantle the lingering effects of coverture that

⁴⁴ See *infra* Part II.

⁴⁵ See *infra* Part II.

⁴⁶ See *infra* Part II.

⁴⁷ Letter from Carol Knapp Lowicke to Ami Scupi, Nat'l Org. of Women (Aug. 1, 1972) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 45, Folder 19) [hereinafter Lowicke Letter].

⁴⁸ See *infra* Part II.

⁴⁹ *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency*, 93d Cong. 499 (report of the NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES) [hereinafter *NCCF Report*].

⁵⁰ See *infra* Part III.

⁵¹ See *infra* Part III.

⁵² E.g., Mayeri, *supra* note 11, at 1342 ("Attacking male supremacy within marriage—which loomed large on the agenda of leading feminist legal advocates—posed a fairly radical challenge to American law and social life. Challenging marital supremacy in a political environment where feminists stood accused by ERA opponents of assaulting traditional marriage and family relationships likely seemed impolitic.").

impeded women's—*particularly married women's*—independence.⁵³ By illustrating how marital status advocacy fit into this work on behalf of married and formerly married women, this recovered history offers a more nuanced understanding of marital status advocacy and its relationship to marriage.

This Article makes three novel and critical contributions to this important conversation about nonmarriage's past and future.⁵⁴ First, this Article documents an almost entirely overlooked form of activism—activism to prohibit marital status discrimination. Discrimination on the basis of marital status—albeit a particular form of marital status discrimination—is particularly salient today given the growing race- and class-based marriage gap. Second, this Article offers new and important insights on the ongoing debate about nonmarriage's trajectory. Building on my prior work,⁵⁵ this Article complicates the conventional progress-and-decline narrative of nonmarriage.

Third, this Article closes by drawing upon some lessons that can be gleaned from this forgotten history of marital status advocacy. The marital status advocates of the 1960s and 1970s were successful in removing many of the formal barriers to equality *within* marriage. Many of the statutes and practices that required differential treatment of husbands and wives have been repealed

⁵³ See, e.g., Kenneth L. Karst, "A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency, 35 OHIO ST. L.J. 546, 551-52 (1974) ("[A] central concern of today's women's movement is the problem of dependency."); see also *infra* Part III.

⁵⁴ For a few of the many recent articles devoted to considering this critical and timely issue, see generally, for example, June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, *passim* (2016) (examining and critiquing way law currently regulates nonmarital families and arguing that laws of marriage should not be applied to nonmarital families); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016) (arguing that terminating nonmarital status or converting it into marriage without consent of parties to relationship is unconstitutional); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016) (examining advocacy challenging unequal treatment of nonmarital children and their families); Mayeri, *supra* note 22, at 127 (considering *Obergefell v. Hodges* in relation to "two legacies of second-wave feminist legal advocacy: the largely successful campaign to make civil marriage formally gender-neutral, and the lesser-known, less successful struggle against laws and practices that penalized women who lived their lives outside of marriage"); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 665-66 (2015) (arguing that "impulse to translate coupled intimate relationships into the vernacular of marriage . . . leads to the diminution of legal space for accommodating nonmarriage"); Murray, *supra* note 2 (discussing how *Obergefell v. Hodges* venerated marriage as privileged institution, potentially stunting development of protections for nonmarital couples).

⁵⁵ See generally, e.g., Joslin, *Gay Rights Canon*, *supra* note 4 (arguing that gay rights canon can support rather than foreclose claim of constitutional protections to those living outside of marriage); Joslin, *Marital Status*, *supra* note 3 (arguing for broader protections for nonmarital relationships through context of current civil rights statutes).

or invalidated.⁵⁶ To achieve these successes, advocates utilized what Cary Franklin calls an “interspherical” approach—an approach that targeted discrimination not only in the “public” spaces of the workplace and the marketplace but also in the “private” realm of the home.⁵⁷ This approach to legal change offers important lessons for those engaged in the contemporary struggle to address discrimination against those living outside of marriage.⁵⁸

Part I provides an overview of the evolving demographics and law of nonmarriage. Today growing numbers of American adults live outside of marriage. Family law, however, remains stubbornly marriage-based. To better understand the current law of nonmarriage and how we got here, Part II unearths the history of advocacy to prohibit marital status discrimination. This Part shows how this marital status advocacy focused heavily on challenges faced by married and formerly married women.

Part III places marital status advocacy within the larger women’s rights movement of the 1960s and 1970s. This Part shows how this advocacy was an important step in the struggle to dismantle women’s tangible and symbolic dependency. This Part highlights the multidimensional or “interspherical” nature of this work; activists understood that eradicating discrimination in the “public” sphere of work and the market required reforms to the “private” sphere of the home and the family as well. Women could not be autonomous, financially independent actors in the workplace and the marketplace if they remained dependent housewives. This Article closes by identifying important lessons that can be gleaned from this history.

⁵⁶ *E.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992-93 (N.D. Cal. 2010) (“The marital bargain in California (along with other states) traditionally required that a woman’s legal and economic identity be subsumed by her husband’s upon marriage under the doctrine of coverture; this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals. As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse’s role within a marriage. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals.”).

⁵⁷ Cary Franklin, *Separate Spheres*, 123 *YALE L.J.* 2878, 2889 (2014) (“When the women’s movement began to garner national attention in the mid-1960s, it took aim at this ideology [dividing men and women into public and private spheres, respectively], arguing that in order to achieve true equality between the sexes, the law needed to move beyond the concept of separate spheres and begin to address the interspherical impacts that rendered women second-class citizens across a wide range of social and legal contexts.”).

⁵⁸ Huntington, *supra* note 9, at 239 (arguing that marriage-based family law rules have “a pernicious effect on nonmarital families”).

I. DISCRIMINATION *OUT OF MARRIAGE*A. *Changes in the Family*

Throughout most of our history, very few adults cohabited together outside of marriage.⁵⁹ In 1960, there were fewer than five hundred thousand unmarried heterosexual couples.⁶⁰ Since 1960, however, this number of cohabiting adults in the United States has been on the rise. By 2016, an estimated eighteen million unmarried individuals lived in nonmarital, cohabiting relationships.⁶¹ This quickly growing population is disproportionately lower income, non-white, and non-college educated.⁶² The law, however, has not kept up with these demographic developments. To be sure, many measures that imposed particularly harsh criminal penalties on those living outside of marriage have been removed.⁶³ But in many other realms, including in the area of family law, the law remains stubbornly marriage based.⁶⁴

Historically, marriage was the only legally permissible relationship between adults.⁶⁵ The law criminalized not only sex outside of marriage (fornication), but also living together outside of marriage (cohabitation).⁶⁶ As Cynthia Bowman explains, “In addition to the regulation of morality associated with laws against fornication, the criminal statutes against cohabitation were intended to protect the institution of marriage, as well as the state’s control over entry into it.”⁶⁷

⁵⁹ See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 11 (2010); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 311 (2008) (“In 1958, cohabitation outside of marriage was widely viewed as shameful, and middle-class Americans thus cohabited very rarely.”).

⁶⁰ BOWMAN, *supra* note 59, at 97.

⁶¹ U.S. CENSUS BUREAU, *supra* note 7; Matsumura, *supra* note 7 (manuscript at 2); Sharon Jayson, *Living Together Not Just for the Young, New Data Show*, USA TODAY (Oct. 17, 2012, 9:01 PM), <http://www.usatoday.com/story/news/nation/2012/10/17/older-couples-cohabitation/1630681/> [<https://perma.cc/C2CK-SF85>] (reporting that in 2012, there were 15.3 million unmarried individuals living in nonmarital different-sex relationships).

⁶² Joslin, *Marital Status*, *supra* note 3, at 813.

⁶³ *E.g.*, BOWMAN, *supra* note 59, at 12-20; Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350-56 (2011) (describing developments with regard to nonmarital children).

⁶⁴ Huntington, *supra* note 9, at 170 (“Family law places marriage at the very foundation of legal regulation. Indeed, the most fundamental divide in family law is between married and unmarried couples, and this schism carries over to how the law addresses nonmarital children.”).

⁶⁵ See BOWMAN, *supra* note 59, at 12 (“Although they were not illegal at common law, the early American colonies quickly passed statutes criminalizing adultery and fornication (sexual intercourse between unmarried persons).”).

⁶⁶ *E.g.*, *id.* at 13 (“Virtually every state had criminal sanctions against cohabitation.”).

⁶⁷ *Id.*

Moral disapproval and negative stigma regarding nonmarital relationships were expressed through other laws as well,⁶⁸ including laws that subjected nonmarital children to unfavorable treatment.⁶⁹ At common law, the penalties were particularly harsh; nonmarital children were considered *filius nullius*, literally the children of no one.⁷⁰ Nonmarital children had no right to inherit, or to be supported by either parent.⁷¹ And although the legal treatment of children born outside of marriage was slightly less harsh in this country,⁷² states continued to discriminate against nonmarital children throughout most of our history.⁷³

To be sure, the social and legal treatment of nonmarital families has improved since that time. The advent of the birth control pill in 1960 made premarital sex much less risky.⁷⁴ “With premarital sex came open premarital cohabitation.”⁷⁵ Over time, these changes in behavior lead to greater social acceptance of cohabitation and other nonmarital family forms.⁷⁶

With changes in behavior came changes in the law. In 1972, the Supreme Court declared that women—married and unmarried—have a constitutionally protected right to decide “whether to bear and beget a child.”⁷⁷ This protected

⁶⁸ Garrison, *supra* note 59, at 311 (“[C]ourts viewed nonmarital cohabitation as socially undesirable, and they wanted to discourage such arrangements. . . . In 1958, cohabitation outside of marriage was widely viewed as shameful . . .”).

⁶⁹ Maldonado, *supra* note 63, at 346 (“No one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.” (footnote omitted)).

⁷⁰ *E.g.*, Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 803 (2015).

⁷¹ *See id.*

⁷² *See, e.g.*, HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 11-14 (1971) (noting that, contrary to common law, many states established mechanisms to “legitimate” nonmarital children and that many states treated children born to invalid marriage as legitimate).

⁷³ There were some exceptions to this statement. Arizona and North Dakota are frequently described as having been the first states to eliminate the distinctions between legitimate and illegitimate children. *See, e.g., id.* at 297. To be clear, however, the differential treatment of nonmarital children has not been entirely eliminated. *See generally, e.g.*, Maldonado, *supra* note 63 (exploring ways in which law continues to discriminate against nonmarital children).

⁷⁴ ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 75 (2012).

⁷⁵ Garrison, *supra* note 59, at 313.

⁷⁶ *See, e.g.*, PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 64-65 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [<https://perma.cc/J2J6-NDD9>] (finding much greater acceptance among younger survey respondents).

⁷⁷ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental

liberty interest includes the rights to access contraception⁷⁸ and abortion (within certain, ever increasing limits).⁷⁹ Fornication (when done in a private, noncommercial setting) and cohabitation are no longer subject to criminal sanctions.⁸⁰ Contracts between nonmarital partners are now enforceable in most states.⁸¹ And in one or two states, sufficiently committed nonmarital partners are entitled to automatic property and intestacy protections.⁸² In terms of the children born into these relationships, many (although not all) of the legal disabilities imposed on nonmarital children have been mitigated.⁸³

But while nonmarital relationships are no longer criminal, “marital supremacy . . . endures.”⁸⁴ As the same-sex marriage litigation poignantly illustrates, hundreds of rights are automatically granted to married spouses.⁸⁵ Unmarried cohabitants, by contrast, are denied many of these protections, regardless of the length or strength of their relationships. As I explain elsewhere, “marriage continues to be a prerequisite for many family-based subsidies.”⁸⁶ In contrast, these critical protections typically are not automatically extended to nonmarital couples.⁸⁷ In light of the sheer numbers of people living outside of marriage, as well as the race and class lines that marriage draws, scholars are increasingly calling for a careful review of our current marriage-based system.⁸⁸

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

⁷⁸ *E.g., id.*

⁷⁹ *E.g.,* *Roe v. Wade*, 410 U.S. 113, 164-66 (1973).

⁸⁰ *E.g.,* *Lawrence v. Texas*, 539 U.S. 558, 562-63, 579 (2003) (striking down law that criminalized same-sex sodomy); *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005) (relying on *Lawrence* and holding unconstitutional state fornication law).

⁸¹ Estin, *supra* note 17, at 383 (“[M]ost states’ courts routinely enforce express agreements and recognize various equitable claims between unmarried partners, particularly where they share a business or property.” (footnote omitted)).

⁸² *See, e.g.,* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 393 (3d ed. 2006) (noting that a “few community property states currently follow this approach”).

⁸³ *E.g.,* Maldonado, *supra* note 63, at 347 (arguing that although much of the discrimination against nonmarital children has been eliminated, “nonmarital children continue to suffer legal and social disadvantages as a result of their birth status”).

⁸⁴ Mayeri, *supra* note 11, at 1279 (footnote omitted).

⁸⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.”).

⁸⁶ Joslin, *supra* note 9, at 167.

⁸⁷ *Id.*

⁸⁸ *E.g.,* Joslin, *Marital Status*, *supra* note 3, at 828-29.

This Article builds on my scholarship exploring the legal treatment of the significant and growing group of people living outside of marriage. This Article contributes to that body of work by exploring an obvious, yet almost entirely unexplored body of law—statutes prohibiting discrimination on the basis of marital status.

B. *Statutory Protections for Nonmarital Families*

Today, over twenty states and the federal government have statutes prohibiting discrimination on the basis of marital status in a variety of areas of law and life, including housing, employment, and credit.⁸⁹ All of these statutes were passed in the 1970s and 1980s; no state has added statutory protections against marital status discrimination since the 1980s.⁹⁰

The statutes, as they say on their faces, prohibit “marital status” discrimination.⁹¹ Especially when read through a contemporary lens, this language could be read to suggest that they prohibit differential treatment of people because they are in nonmarital rather than marital families. Historical context also might suggest that states intended these statutes to ensure fairer treatment of nonmarital families. The period in which these statutes were passed—the 1970s—saw a burgeoning public conversation about cohabitation.⁹² Articles about cohabitation appeared on the front page of the *New York Times* and in *Newsweek*.⁹³ “In 1972, the psychologist Eleanor Macklin, an assistant professor at Cornell University . . . became the first sex expert to publish a scholarly article on cohabitation.”⁹⁴ The Supreme Court considered and decided a number of cases involving the rights of unmarried persons to access contraception⁹⁵ and abortion services,⁹⁶ as well as the rights of nonmarital children.⁹⁷

Thus, the statutory text and historical context could support the perception that these statutes do and were intended to help unseat marriage from its

⁸⁹ E.g., Porter, *supra* note 18, at 15-16.

⁹⁰ E.g., Joslin, *Marital Status*, *supra* note 3, at 806.

⁹¹ E.g., CAL. GOV'T CODE § 12955(a) (West 2017) (prohibiting housing discrimination on basis of “marital status”).

⁹² See PLECK, *supra* note 74, at 72-74.

⁹³ *Id.* at 72, 74.

⁹⁴ *Id.* at 119.

⁹⁵ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

⁹⁶ Roe v. Wade, 410 U.S. 113, 164-66 (1973).

⁹⁷ E.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (“We hold that Louisiana’s denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment.”). See generally Mayeri, *supra* note 11 (discussing cases challenging rules and practices that disfavored nonmarital families).

privileged position.⁹⁸ This understanding of the statute's effect and purpose is not uncommon. Lynn Kohm, for example, recently wrote: "Generally, state prohibitions against marital status discrimination have played a major role in protecting the rights of unmarried couples."⁹⁹

It turns out, however, the case law is mixed as to whether these statutes prohibiting marital status discrimination protect, as Kohm put it, "the rights of unmarried couples."¹⁰⁰ Courts and attorneys general in a number of states have interpreted these statutes to prohibit only discrimination against individual people because of that person's status as a single, married, divorced, separated, or widowed person.¹⁰¹ In these jurisdictions, the statutes do not prohibit disfavorable treatment of unmarried couples (as compared to married couples) for their "conduct" of living together.¹⁰² To state it in concrete terms, in many of the states that prohibit marital status discrimination, it would be impermissible to refuse to rent an apartment to a particular woman because she is unmarried or divorced, but it would be lawful to refuse to rent to a couple upon learning that the couple is unmarried even though the landlord would have rented to the couple had they been married.

Consider *Hoy v. Mercado*.¹⁰³ In *Hoy*, a New York appellate court held that the landlords did not discriminate on the basis of marital status when they refused to rent an apartment to an unmarried couple.¹⁰⁴ The court concluded that the nondiscrimination prohibition "do[es] not extend to complainants in these circumstances because the denial of housing to a cohabiting couple does not constitute unlawful discrimination on the basis of 'marital status.'"¹⁰⁵ The

⁹⁸ E.g., Younger, *supra* note 31, at 501 (listing statutes prohibiting marital status, along with host of other legal developments, as evidence that "[f]ar from being favored by the law, the married are worse off than the unmarried in some respects").

⁹⁹ Lynne Marie Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 577 (2004); Younger, *supra* note 31, at 500 n.109 ("Unmarried couples now are protected from discrimination on the basis of their marital status in employment, housing, use of public accommodations, and credit."); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1416 (1991) ("[B]y prohibiting marital status discrimination in employment, housing, public accommodations, and credit, state legislators intended to forbid certain businesses from differentiating among individuals on the basis of their choice to be married or unmarried.").

¹⁰⁰ Kohm, *supra* note 99, at 577. For a more detailed analysis of the existing case law, see generally Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017).

¹⁰¹ E.g., Joslin, *Marital Status*, *supra* note 3, at 809.

¹⁰² For a contemporary argument that this conduct/status distinction must be rejected, see Widiss, *supra* note 100, at 2135-50.

¹⁰³ 698 N.Y.S.2d 384, 385 (N.Y. App. Div. 1999).

¹⁰⁴ *Id.* at 385.

¹⁰⁵ *Id.*

court went on to explain: “New York law prohibits landlords from discriminating against individuals (as a class) because they are unmarried, but permits them to discriminate against individuals, married or unmarried, who wish to cohabit with a nonspouse.”¹⁰⁶

To be clear, the high courts in Alaska, California, and Massachusetts have held that their statutes prohibiting marital status discrimination bar discrimination against nonmarital couples, including cohabiting unmarried couples.¹⁰⁷ But “more state supreme courts have ruled the other way.”¹⁰⁸

One could argue, as I have argued elsewhere, that even if this was not true in the past, today, these statutes should be interpreted to prohibit differential and disfavored treatment of those living in nonmarital families.¹⁰⁹ As I stated elsewhere, “[m]any of the earlier decisions narrowly interpreting state marital status discrimination provisions relied heavily if not exclusively on the fact that the state criminalized nonmarital sexual relations and nonmarital cohabitation at the time.”¹¹⁰ Today, to the extent these criminal laws are still on the books, they are unenforceable.¹¹¹ It is now clear that these criminal fornication and cohabitation laws “infringe constitutionally protected conduct.”¹¹²

Moreover, especially when analyzed under the principles of the Supreme Court’s gay rights canon, interpreting these marital status nondiscrimination statutes to permit the disfavored treatment of nonmarital families raises significant constitutional questions.¹¹³ Thus, again to be clear, there are persuasive arguments that these statutes should be interpreted more broadly

¹⁰⁶ *Id.* at 386.

¹⁰⁷ *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 278 (Alaska 1994) (“Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.”); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 914-15 (Cal. 1996) (holding that the Fair Employment and Housing Act’s ban on marital status discrimination prohibited discrimination against cohabiting, nonmarital couples); *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) (holding that housing statute prohibiting marital status discrimination prohibited discrimination against cohabiting, nonmarital couples).

¹⁰⁸ *Widiss*, *supra* note 100, at 2120; *see also* *Joslin, Marital Status*, *supra* note 3, at 809-11.

¹⁰⁹ *E.g.*, *Joslin, Marital Status*, *supra* note 3, at 828-29.

¹¹⁰ *Id.* at 828 (footnote omitted).

¹¹¹ *E.g.*, *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005) (relying on *Lawrence* and holding unconstitutional state criminal ban on fornication).

¹¹² *E.g.*, *Joslin, Marital Status*, *supra* note 3, at 828-29; *Widiss*, *supra* note 100, at 2120 (arguing that these earlier decisions based on status/conduct distinction must be repudiated).

¹¹³ *See* *Joslin, Gay Rights Canon*, *supra* note 4, at 431.

today.¹¹⁴ This Article, however, is not focused on how these statutes should be interpreted and applied today. Instead, this Article explores the historical roots of these statutes.

II. MARITAL STATUS ADVOCACY AND ITS RELATIONSHIP TO MARRIAGE

A. *Nonmarriage, Same-Sex Marriage, and the Arc of Change*

This Part uses the uncovered archival materials of this earlier wave of marital status advocacy to complicate the story of nonmarriage's evolution. As noted above, many contemporary scholars are concerned about the legal treatment of the large and growing number of people living outside of marriage. The now-conventional narrative suggests that the law of nonmarriage had been proceeding along a progressive arc. But the gay rights victories—what I call the “gay rights canon”¹¹⁵—it is said, may have brought this positive trajectory to a grinding halt. In addressing one form of discrimination—discrimination against lesbian and gay people—some contend the gay rights canon exacerbated another form of discrimination—discrimination against those living outside of marriage.¹¹⁶

For example, Melissa Murray argues that in establishing the right of same-sex couples to marry, the Supreme Court's decision in *Obergefell v. Hodges* “promote[d] marriage—and only marriage—as the normative ideal for intimate life.”¹¹⁷ In so doing, she continues, “the *Obergefell* decision goes beyond simply favoring marriage over potential alternatives; it gestures toward the repudiation of the jurisprudence of nonmarriage and its aspirations for nonmarital equality.”¹¹⁸ Melissa Murray is not alone in predicting the demise

¹¹⁴ Even if these statutes were not primarily intended to protect nonmarital couples, that history does not preclude such application today. As the Supreme Court itself explains, particularly in the realm of remedial legislation, “ultimately the provisions of our laws rather than the principal concerns of our legislators” is what governs current interpretation. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Thus, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *Id.* For more discussion of the contemporary meaning and use of these statutes, see generally Joslin, *Marital Status*, *supra* note 3.

¹¹⁵ Joslin, *Gay Rights Canon*, *supra* note 4, at 432.

¹¹⁶ See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 31 (2015) (“Justice Kennedy's denigration of nonmarital families, even if unintentional, is deeply troubling. By reifying the social front of family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser.”); Widiss, *supra* note 26, at 553 (“In recognizing the injury that DOMA wrought by treating same-sex marriages as second-tier marriages, the *Windsor* opinion embraces a traditional understanding of marriage as superior to all other family forms.”).

¹¹⁷ Murray, *supra* note 2, at 1240.

¹¹⁸ *Id.*

of the law of nonmarriage.¹¹⁹ For example, just after the Court's earlier decision in *United States v. Windsor*,¹²⁰ Deborah Widiss wrote that in rectifying inequality against same-sex couples, the Court reaffirmed a different inequality by perpetuating the belief "that marriage is clearly superior to other family forms."¹²¹

Elsewhere, I offer a rereading of the constitutional gay rights decisions that suggests another path forward. In my article *The Gay Rights Canon and the Right to Nonmarriage*, I argue that the gay rights decisions can be read to bolster rather than to repudiate a constitutional right to nonmarriage.¹²² As I explain, "[w]hen read consistently with the principles of the gay rights canon, *Obergefell* supports, rather than forecloses, the claim that the denial of meaningful protection to those living outside of marriage raises a serious constitutional question."¹²³ I suggest that nonmarriage's future arc may not be as bleak as some suggest.¹²⁴

Here, my focus is on an earlier period in nonmarriage's evolution. Specifically, this Article explores the relationship between advocacy to prohibit marital status discrimination and marriage. There is a direct relationship between the two. But it turns out that the relationship is different than many today assume. Today, many scholars and advocates view these marital status nondiscrimination statutes as a means to protect those living outside of marriage. The advocates who worked to pass these statutes, however, were primarily concerned about the treatment of those who were living inside of marriage. Historically, married women faced more legal disabilities than did unmarried women. Under the doctrine of coverture, women lost their separate legal identities upon marriage; married women's identity was "[s]u[s]pended" or "con[s]olidated" into that of their husbands.¹²⁵ As William Blackstone explained: "By marriage, the hu[s]band and wife are one per[s]on in law: that is, the very being or legal existence of the woman is

¹¹⁹ See, e.g., Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015) ("In the process of explaining how vital marriage is to individuals and society, *Obergefell* repeatedly shames those who do not marry."); Infanti, *supra* note 19, at 82 ("[T]he *Obergefell* and *Windsor* decisions have reified the privileged position of marriage in our laws. . . . [*Obergefell*] has actually set back movement for equal treatment of all regardless of relationship status.").

¹²⁰ 133 S. Ct. 2675, 2696 (2013) (invalidating Section 3 of Defense of Marriage Act, which defined marriage for all federal purposes to include only marriage between one man and one woman).

¹²¹ Widiss, *supra* note 26, at 552.

¹²² See generally Joslin, *Gay Rights Canon*, *supra* note 4.

¹²³ *Id.* at 464.

¹²⁴ *Id.* at 475.

¹²⁵ 1 BLACKSTONE, *supra* note 38, at *429-33; Hasday, *supra* note 38, at 1497.

[s]u[s]pended during the marriage, or at lea[s]t is incorporated and con[s]olidated into that of the husband: under who[s]e wing, protection, and cover, she performed every thing”¹²⁶

As beings without independent legal identities, wives were prohibited “from contracting, filing suit, drafting wills, or holding property in their own names.”¹²⁷ Within the home, husbands were the “master[s] of the household.”¹²⁸ A husband had control over all of his wife’s property and he owned any income his wife earned during their marriage.¹²⁹ If the wife earned money through employment, her wages were her husband’s, not her own. Because he owned her wages, the husband (and only the husband) had a legal duty to support his wife.¹³⁰ In sum, “under coverture wives became economically and legally dependent on their husbands.”¹³¹ These legal rules were premised on and reinforced the cultural belief that “women’s appropriate sphere was limited to their family roles as wives and mothers.”¹³² Accordingly, the rules of coverture “kept women exactly where they belonged.”¹³³

Even after married women formally gained the right to contract and to sue and be sued, these deeply-held cultural beliefs about the “proper” roles of husbands and wives continued to shape the life and law of families. For example, even after women gained the right to enter into contracts, the Supreme Court affirmed Illinois’s refusal to admit Myra Bradwell to the Illinois Bar.¹³⁴ In his concurring opinion, Supreme Court Justice Joseph Bradley explained: “[t]he harmony . . . of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”¹³⁵

Statutes prohibiting marital status discrimination—especially those that prohibited discrimination in the context of credit—were an important part of second-wave feminists’ efforts to eradicate coverture’s legal and cultural relics

¹²⁶ 1 BLACKSTONE, *supra* note 38, at *430 (emphasis removed) (footnote omitted).

¹²⁷ Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1994).

¹²⁸ D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 232 (6th ed. 2016).

¹²⁹ Siegel, *supra* note 127, at 2127 (1994); *see also* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 59 (2011).

¹³⁰ HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 156 (2000).

¹³¹ Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 346 (2011) (“[A] woman entered marriage as a dependent, without property or the legal right to earnings through her own labor.”).

¹³² Hasday, *supra* note 38, at 1499.

¹³³ *Id.*

¹³⁴ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873).

¹³⁵ *Id.* at 141 (Bradley, J., concurring).

that continued to hinder the ability of women, especially married and formerly married women, to achieve independence and equality.

B. *The Equal Credit Opportunity Act: A Case Study*

In many jurisdictions, marital status discrimination was first prohibited in the context of credit.¹³⁶ At the federal level, prohibitions against marital status discrimination never made it far past this context. For example, federal law currently does not prohibit marital status discrimination in the areas of employment¹³⁷ or housing.¹³⁸ During the 1960s and 1970s, a range of civil rights advocates came to view access to credit as a critical step to achieving equality for marginalized communities. For example, in the late 1960s, the National Welfare Rights Organization (“NWRO”) spearheaded a campaign intended to ensure credit access for poor people, particularly poor urban blacks.¹³⁹ “The NWRO campaign focused on credit access as a way to bridge

¹³⁶ Articles discussing marital status discrimination typically focus on marital status discrimination in other contexts, such as housing and employment. *See generally* Beattie, *supra* note 99 (exploring cases arising primarily in contexts of employment, housing, and public accommodations); Porter, *supra* note 18, at 15-17.

¹³⁷ Title VII, a federal employment nondiscrimination statute, prohibits discrimination on the bases of race, sex, color, religion, and national origin. 42 U.S.C. § 2000e-2(a) (2012). Attempts to enact a federal ban on discrimination on the basis of “marital status” in the areas of employment and public accommodations have been unsuccessful. *See* H.R. 14752, 93d Cong. (1974) (proposing prohibiting discrimination on bases of sex, sexual orientation, and marital status in employment and public accommodations).

¹³⁸ The federal Fair Housing Act does not prohibit discrimination on the basis of marital status. *See* 42 U.S.C. § 3604(b). It does prohibit discrimination on the basis of “familial status,” but the statute defines that term to mean an adult living with a minor child. *Id.*; *id.* § 3602(k) (“‘Familial status’ means one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.”); *see also* Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 GA. ST. U. L. REV. 619, 628 (2012) (“The term ‘familial status’ is not used as in common parlance but is defined as a household which includes at least one minor child.”). *But cf.* *Hann v. Hous. Auth. of Easton*, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (“I hold today that the practice of categorically excluding unmarried couples from eligibility for low-income housing programs violates [federal Fair Housing Act]. The defendants cannot arbitrarily exclude all applicants who are not related by blood, marriage or adoption from low-income housing. They are required to make individual determinations concerning whether applicants constitute a family unit.”).

¹³⁹ *See* GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICA: CREDIT AND WELFARE 168 (2014).

the seemingly distant worlds of the white middle class and poor urban blacks.”¹⁴⁰

Starting around the early 1970s, feminist activists turned to credit access.¹⁴¹ At the federal level, these efforts of women’s rights advocates led to the passage of the ECOA.¹⁴² As originally enacted in 1974, the ECOA prohibited discrimination in credit on the bases of sex and marital status.¹⁴³ Two years later, other bases, including race, color, and national origin, were added to the statute.¹⁴⁴ Like many of the state statutes prohibiting marital status discrimination, the ECOA has been interpreted to prohibit only discrimination against people because of their *individual* marital status; it does not prohibit discrimination against people because they are living in a nonmarital family.¹⁴⁵

The campaign to enact the ECOA was fueled in part by *Ms. Magazine*’s receipt of thousands of letters from women documenting the discrimination they faced when trying to gain access to credit.¹⁴⁶ The complaints to *Ms. Magazine*, which were later presented to Congress, focused on the treatment of married and formerly married women.¹⁴⁷ After women’s rights advocates brought attention to the issue, the National Commission on Consumer Finance (“NCCF”) undertook to study the issue. Following the release of the Commission’s report in December 1972,¹⁴⁸ Congress held a series of hearings

¹⁴⁰ *Id.* at 173.

¹⁴¹ *Id.* at 179 (“The plight of women in credit markets became the focus of a social and political campaign in 1972.”).

¹⁴² *Id.* at 184.

¹⁴³ Pub. L. No. 93-495, § 701, 88 Stat. 1500, 1521 (codified as amended at 15 U.S.C. § 1691).

¹⁴⁴ Equal Credit Opportunity Act, Pub. L. No. 94-239, sec. 2, 90 Stat. 251, 251 (codified at 15 U.S.C. § 1601).

¹⁴⁵ Anne P. Fortney, *Fair Lending Law Developments*, 55 BUS. LAW. 1309, 1316 (2000) (“The legislative history of the ECOA makes clear that the prohibition against marital status discrimination applied only to the marital *status of an applicant*; Congress did not mean to preclude creditors from considering the marital *relationship between co-applicants*.”).

¹⁴⁶ TRUMBULL, *supra* note 139, at 179 (noting that campaign for ECOA was “stimulated initially by a wave of letters sent in response to an editorial in *Ms. Magazine*, in which the author described her experience applying for an American Express card”).

¹⁴⁷ *See id.* at 180 (“The largest share of complaints concerned the credit plight of married women, who faced a series of discriminatory and degrading lending practices.”).

¹⁴⁸ The December 1972 Report of the Commission summarized the findings as follows:

1. Single women have more trouble obtaining credit than single men. (This appeared to be more characteristic of mortgage credit than of consumer credit.)
2. Creditors generally require a woman upon marriage to reapply for credit, usually in her husband’s name. Similar reapplication is not asked of men when they marry.
3. Creditors are often unwilling to extend credit to a married woman in her own name.
4. Creditors are often unwilling to count the wife’s income when a married couple applies for credit.

to further explore problems related to access to credit for women.¹⁴⁹ “These hearings culminated in a Senate report citing no fewer than thirteen types of credit discrimination based on sex and marital status commonly employed by creditors in their credit evaluations”¹⁵⁰ Of the thirteen problems identified by the Senate Report, ten related specifically to the experiences of married, separated, or divorced women; none concerned the treatment of nonmarital couples.¹⁵¹ Thus, to use the words of Margaret Gates, Co-Director of the Center for Women’s Policy Studies: “It [wa]s the married, or formerly married, women who appear[ed] to be the prime victim of sex discrimination in credit.”¹⁵² Courts interpreting the statute agreed. For example, in *Anderson v.*

5. Women who are divorced or widowed have trouble re-establishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in the husband’s name.

Economic Problems of Women: Hearings Before the J. Econ. Comm., 93d Cong., pt. III, 446 (1973) [hereinafter *Economic Problems of Women, Part III*] (report of Morigene Holcomb, “Equal Legislation in the 93rd Congress, Analysis of the Major Bills”).

¹⁴⁹ Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 659-60.

¹⁵⁰ *Id.*

¹⁵¹ The thirteen identified problems were the following:

- (1) Single women have more trouble than single men in obtaining credit.
- (2) Creditors generally require a woman upon marriage to reapply for credit, usually in her husband’s name.
- (3) Creditors are unwilling to extend credit to a married woman in her own name.
- (4) Creditors are often unwilling to consider the wife’s income when a married couple applies for credit.
- (5) Women who are separated have a particularly difficult time, since the accounts may still be in the husband’s name.
- (6) Creditors arbitrarily refuse to consider alimony and child support as a valid source of income when such source is subject to validation.
- (7) Creditors apply stricter standards to married applicants where the wife rather than husband is the primary supporter for the family.
- (8) Creditors request or use information concerning birth control practices in evaluating a credit application.
- (9) Creditors request or use information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.
- (10) Creditors refuse to issue separate accounts to married persons where each would be creditworthy if unmarried.
- (11) Creditors consider as “dependents” spouses who are employed and not actually dependent on the applicant.
- (12) Creditors use credit scoring systems that apply different values depending on sex or marital status.
- (13) Creditors alter an individual’s credit rating on the basis of the credit rating of the spouse.

Id.

¹⁵² Gates, *supra* note 42, at 410.

United Finance Co.,¹⁵³ the Ninth Circuit explained that the purpose of the ECOA was “to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.”¹⁵⁴

As noted above, historically, under the doctrine of coverture, married women lost a range of important rights upon marriage.¹⁵⁵ By the 1960s, the formal doctrine of coverture had been eliminated; women no longer lost their separate legal identity upon marriage; they maintained the right to contract, and the right to sue and be sued.¹⁵⁶ And, in 1964, Congress prohibited sex discrimination in the workplace.¹⁵⁷ Notwithstanding those legal developments, the long-standing and deeply-held belief that the “paramount destiny and mission of woman [sic] [was] to fulfil [sic] the noble and benign offices of wife and mother,” continued to shape the practice of credit.¹⁵⁸

What were these problems that married and formerly married women faced with regard to credit? In terms of married women, the problems largely fell into three basic categories. First, creditors often refused to allow married women to apply for and receive credit, primarily in the form of credit cards, in their own names. The 1972 NCCF Report included the following example, which it found to be a common problem:

Shortly after my marriage I wrote all the stores where I had charge accounts and requested new credit cards with my new name and address. That’s all that had changed—my name and address. Otherwise, I maintained the same status—the same job, the same salary, and, presumably, the same credit rating. The response of the stores was swift. One store closed my account immediately. All of them sent me application forms to open a new account—forms that asked for my

¹⁵³ 666 F.2d 1274 (9th Cir. 1982).

¹⁵⁴ *Id.* at 1277; *Resolution Trust Corp. v. Townsend Assocs. Ltd. P’ship.*, 840 F. Supp. 1127, 1141 (E.D. Mich. 1993) (stating that ECOA was enacted “to eliminate credit discrimination against married women, who traditionally had been required to obtain their husbands’ joinder to any credit applications”); *Riggs Nat’l Bank of Wash. D.C. v. Linch*, 829 F. Supp. 163, 168 (E.D. Va. 1993) (stating that “[t]he ECOA was implemented to prevent this discriminatory practice of forcing women to have their husbands guarantee any loan they wished to receive”).

¹⁵⁵ See *supra* notes 125-33 and accompanying text.

¹⁵⁶ See *infra* note 280 and accompanying text.

¹⁵⁷ See 42 U.S.C. § 2000e et seq. (2012).

¹⁵⁸ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). For fascinating explorations of the lingering effects of coverture even after the passage of Married Women’s Property Acts, see generally, for example, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) (exploring contemporary legal treatment of marital rape and its connections to coverture); Siegel, *supra* note 127.

husband's name, my husband's bank, my husband's employer. There was no longer any interest in me, my job, my bank, or my ability to pay my own bills.¹⁵⁹

The Report also noted that these problems did not arise simply as the result of the actions of individual bank officials. Instead, it often resulted from official policy. For example, BankAmericard advised customers that their "policy allows card [sic] in the husband's name only."¹⁶⁰ The subsequent report of the Congressional Research Service explained the problem this way: "One of the largest difficulties which [married] women seem to confront is their ability to obtain credit in the name of their choosing."¹⁶¹ This "name problem," the Congressional Report continued, was "reflective of the older common law system whereby a wife was her husband's ward and from him obtained her socio-legal identity."¹⁶² In other words, this common practice of issuing family credit cards only in the name of the husband was rooted in and reinforced the long-standing belief that women were "dreadful decisionmakers" who needed to be protected from their own bad decisions.¹⁶³

The second major hurdle facing married women was the very common policy of excluding or discounting the wife's income, typically in the context of a loan request.¹⁶⁴ That is, many banks and other institutions would not count any or all of the wife's income in assessing the family's credit request.¹⁶⁵ This common practice was based on the presumption that the working wife would eventually become pregnant and, after pregnancy, she would drop out of the labor force.¹⁶⁶ Young working wives were more likely to have their incomes excluded or discounted.¹⁶⁷ A 1971 survey of savings and loan associations by the Federal Home Loan Bank found that "25 percent would not count *any* of

¹⁵⁹ *NCCF Report*, *supra* note 49, at 498.

¹⁶⁰ *Id.* at 499.

¹⁶¹ *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency*, 93d Cong. 660-61 (SYLVIA L. BECKEY, CONG. RESEARCH SERV., WOMEN AND CREDIT: SYNOPSIS OF PROTECTIVE FINDINGS OF STUDY ON AVAILABLE LEGAL REMEDIES AGAINST SEX DISCRIMINATION IN THE GRANTING OF CREDIT AND POSSIBLE STATE STATUTORY ORIGINS OF UNEQUAL TREATMENT BASED PRIMARILY ON THE CREDIT APPLICANT'S SEX OR MARITAL STATUS) [hereinafter WOMEN AND CREDIT].

¹⁶² *Id.* at 661.

¹⁶³ *See id.* (concluding that difficulty women face in obtaining credit in their own name is reflective of coverture system); Hasday, *supra* note 38, at 1499 ("Coverture's advocates also insisted that women were dreadful decisionmakers.").

¹⁶⁴ *See infra* notes 167-74 and accompanying text.

¹⁶⁵ *Economic Problems of Women, Part III*, *supra* note 148, at 547 (statement of Hon. Frankie M. Freeman, Member, U.S. Commission on Civil Rights).

¹⁶⁶ *Id.* at 547-48.

¹⁶⁷ *See id.* at 549.

the income of a wife, age 25, with two school children, who held a full-time secretarial position; that more than 50 percent would limit credit to 50 percent or less of her salary; and that only 22 percent would count it all.”¹⁶⁸ Until the mid-1960s, the Federal Housing Authority would not count any of the wife’s income.¹⁶⁹ And until 1973, the Veterans Administration (“VA”) continued to discount wives’ incomes.¹⁷⁰ The official loan policy of the VA at the time was to grant some consideration to the wife’s income where she had “previously had children and the pattern of employment indicate[d] that she ha[d] been able to work after each addition to the family.”¹⁷¹

Not all jobs were treated the same. As Frankie Freeman, a member of the U.S. Commission on Civil Rights, explained in her statement to Congress, “the type of job the wife [held] [wa]s considered in the loan decision.”¹⁷² A working wife’s income was more likely to be considered (at least in part) if she held what was considered to be a “professional,” as opposed to a “nonprofessional” position.¹⁷³ A report produced by the District of Columbia Commission on the Status of Women, in collaboration with the Women’s Legal Defense Fund, for example, found that of the forty lenders surveyed, “only 27 count[ed] 100% of a woman’s income if she is ‘professional,’ and 13 if she is ‘nonprofessional.’”¹⁷⁴

A third hurdle married working women faced related to the second. Some lenders would only consider the income of a young working wife if she provided evidence that she would not have a child in the near future.¹⁷⁵ This proof was often in the form of a “baby letter.”¹⁷⁶ “The ‘baby letter’ [wa]s a physician’s statement which disclose[d] the birth control method practiced by

¹⁶⁸ NAT’L COUNCIL OF NEGRO WOMEN, U.S. DEP’T OF HOUS. & URBAN DEV., HUD-FO-126, WOMEN & HOUSING: A REPORT ON SEX DISCRIMINATION IN FIVE AMERICAN CITIES 11, 70 (1975) [hereinafter WOMEN & HOUSING] (“[W]omen must now achieve the economic resources to live with or without a man . . .”).

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

¹⁷¹ *Economic Problems of Women, Part III, supra* note 148, at 533 (report of the D.C. COMMISSION ON THE STATUS OF WOMEN, RESIDENTIAL MORTGAGE LENDING PRACTICES OF COMMERCIAL BANKS, SAVINGS AND LOAN ASSOCIATIONS, AND MORTGAGE BANKERS) [hereinafter D.C. COMMISSION REPORT]; Gates, *supra* note 42, at 424 (noting that VA policy “persisted until mid-1973” and that until the revisions in 1973, in order to comply with “VA guidelines lenders were demanding affidavits from wives stating that they were practicing birth control and did not intend to have children”).

¹⁷² *Economic Problems of Women, Part III, supra* note 148, at 549 (statement of Frankie M. Freeman, Member, U.S. Commission on Civil Rights).

¹⁷³ *See, e.g.,* D.C. COMMISSION REPORT, *supra* note 148, at 530.

¹⁷⁴ *Id.*

¹⁷⁵ *Economic Problems of Women, Part III, supra* note 148, at 548 (statement of Frankie M. Freeman, Member, U.S. Commission on Civil Rights).

¹⁷⁶ *See id.*

the couple or state[d] that the couple [wa]s unable to have children.”¹⁷⁷ In some instances, women had to sign affidavits stating that they would have abortions if they became pregnant.¹⁷⁸ Carol Knapp Lowicke wrote a letter to the National Organization for Women (“NOW”) documenting one particularly egregious example.¹⁷⁹ When Lowicke and her husband applied for a loan guarantee from the VA, they were told that the only way both of their full incomes could be considered would be if they submitted the following proof:

1) Two letters from my gynecologist—one stating that I was under his supervision in birth control. The other had to state that due to the condition of my ovaries, it would be difficult for me to get pregnant even without birth control; 2) [M]y husband’s notarized statement that if I should become pregnant, he would agree to an abortion. And if for some reason I had to stop taking the pill, that he would have a vasectomy performed; 3) [M]y notarized statement that if I should become pregnant, that I would agree to have an abortion performed. And if I had to stop taking the pill, that I would agree to my husband’s vasectomy.¹⁸⁰

Another set of the identified challenges concerned formerly married women. First, because women were often unable to maintain credit in their own names during their marriages (because banks often insisted that loans be held in the names of the husbands), wives had little to no established credit history after they divorced.¹⁸¹ As one expert explained, “[a]fter divorce, unless the woman has been adamant about insisting on credit in her own name, and assuming that she has been able to get it, she will not have any credit references to rely on in establishing new credit. [In addition] almost every retailer will cut her off from using her prior joint account, even though most will allow her husband to continue using it, since the account is in his name.”¹⁸²

There were some concerns voiced about younger, never married women, but with regard to this group, the concern was not related to their likelihood of living with a nonmarital male partner.¹⁸³ Instead, the identified challenges faced by single women related to creditors’ assumptions that these women were not likely to have long-term employment *because* they would soon

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 548-49.

¹⁷⁹ Lowicke Letter, *supra* note 47.

¹⁸⁰ *Id.*

¹⁸¹ David Ira Brown, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C. DAVIS L. REV. 61, 64 n.21 (1973) (quoting Symposium of Women and the Law, *Credit: Are Women Treated Differently* (on file with the UC Davis Law Review)).

¹⁸² *Id.* (alterations in the original) (quoting Symposium of Women and the Law, *Credit: Are Women Treated Differently* (on file with the UC Davis Law Review)).

¹⁸³ See Judy Gray, *Credit for Women in California*, 22 UCLA L. REV. 873, 880 (1975).

marry, have children, and, in turn, leave the paid work force.¹⁸⁴ As one scholar put it at the time: “Much credit discrimination results from the assumption that women are poor credit risks because they do not remain long in the work force; single women will marry, and married women will become pregnant and cease working outside the home.”¹⁸⁵

Second, banks often refused to consider alimony or child support payments as a form of income.¹⁸⁶ At the time, this had a primary and dramatic effect on divorced women, many of whom relied on one or both sources of income post divorce.¹⁸⁷

Opponents of the legislation, which included banks and other lenders, also focused primarily on married women.¹⁸⁸ Opponents did not publicly express any concerns regarding nonmarital couples. One primary concern raised by the banking industry was simply the alleged costs of compliance.¹⁸⁹ And here, the costs were primarily associated with having to redo the accounts of married couples to include the names of both the wife and the husband. For example, after Congress enacted the ECOA, leaders in the banking industry objected to the proposed regulations that required both names to be listed. Kenneth V. Larkin, a senior vice president at Bank of America, asserted that it would cost “\$3 million and ‘300 person years’” to switch their accounting procedures to list both spouses’ names on the accounts.¹⁹⁰

Banking officials’ other concerns related to their ability to enforce a judgment against a wife, especially a nonworking wife,¹⁹¹ and whether allowing married women to maintain separate accounts was consistent with existing state family and property laws.¹⁹² Banking officials pointed out that, at

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 877.

¹⁸⁶ John W. Cairns, Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 973 (1976).

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Ban on Creditor Sexism Opposed*, L.A. TIMES, May 28, 1975, at A1 (stating that Bank of America opposed banning credit discrimination due to cost imposed on company).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., Gates, *supra* note 42, at 429 (noting that under laws that gave only husband management and control over marital property, “creditor might refuse a woman credit because he could not expect to obtain a judgment against the community”).

¹⁹² For more discussion of this issue, see *infra* Part III.

the time, in some states (including California),¹⁹³ state property laws provided that only the husband had management and control over marital property.¹⁹⁴

Today, much of the concern regarding marital status classifications relates to the growing race and class divide between the married and unmarried.¹⁹⁵ Unmarried couples continue to be denied access to hundreds of rights and benefits extended to married couples.¹⁹⁶ And people of color and people in lower income brackets are disproportionately more likely to be in this group of unmarried couples.¹⁹⁷ With regard to the ECOA, some advocates focused on the race and class implications of discriminatory lending practices. But even this part of the conversation focused on the race and class effects of credit discrimination against married or formerly married women. So, for example, a number of experts testified to Congress that the practice of discounting wives' incomes had a disproportionately negative impact on black women.¹⁹⁸ This was true, William L. Taylor, Director for the Center for National Policy Review, explained, "because in minority families the income of the wife often represents a significant contribution to the family's income and standard of living."¹⁹⁹ Bureau of Labor data at the time showed that for women aged twenty-five to thirty-four, "nonwhite wives ha[d] a 59.4% labor force participation rate, as contrasted with 38.0% for white wives."²⁰⁰ Not only were nonwhite wives more likely to be in the paid work force, but their incomes were more likely to constitute a significant portion of their family's total

¹⁹³ California amended its law regarding management and control of marital property in 1975, in conjunction with amendments to its credit nondiscrimination provision. *See, e.g.,* Brown, *supra* note 181, at 68-69.

¹⁹⁴ *See, e.g.,* Gates, *supra* note 42, at 415.

¹⁹⁵ *See, e.g.,* Joslin, *Marital Status*, *supra* note 3, at 813-14 ("There is also a large and growing marriage gap on the bases of race, class, and education level."); *see also* CARBONE & CAHN, *supra* note 11, at 17-20; Huntington, *supra* note 9, at 186-87 ("As compared with their married counterparts, unmarried parents are younger, lower income, less educated, disproportionately nonwhite, and more likely to have children from multiple partners." (footnotes omitted)).

¹⁹⁶ Joslin, *supra* note 9, at 165-68.

¹⁹⁷ *E.g.,* Joslin, *Marital Status*, *supra* note 3, at 813; *see also* CARBONE & CAHN, *supra* note 11, at 17-20; Huntington, *supra* note 9, at 186-87.

¹⁹⁸ *See generally Economic Problems of Women: Hearings Before the J. Econ. Comm., 93d Cong., pt. I, (1973) [hereinafter Economic Problems of Women, Part I].*

¹⁹⁹ *Id.* at 195 (statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University); WOMEN & HOUSING, *supra* note 168, at 71 ("Since a higher proportion of minority families rely on the wife's salary for part of the family's income, the impact of policies discounting the wife's income has been much harsher on the non-white.").

²⁰⁰ *Economic Problems of Women, Part I, supra* note 198, at 195 (statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University).

income.²⁰¹ This disparity was compounded by the practice of granting even less consideration to the incomes of “nonprofessional” wives. “Whereas 2/3 of the responding lenders said they would count 100% of a wife’s income if she were a professional, only 1/3 would fully count the income of a nonprofessional wife.”²⁰² Women of color were more likely than white women to be in so-called “nonprofessional” positions.

A few speakers discussed the impact of credit discrimination on female-headed families. These speakers, however, were typically talking about households in which only one adult—typically the mother—was present. So, for example, Arline Lotman, Executive Director of the Pennsylvania Commission on the Status of Women, noted in her comments that discrimination on the basis of marital status affected “families without both a husband and a wife present in the household.”²⁰³ Lotman went on to note that discrimination targeted against such families disproportionately affected minority women because “53 percent of minority women fall into that category.”²⁰⁴ Even this discussion was in the distinct minority. Very few speakers focused on any form of two-adult families in which the adults were not and never had been married.

²⁰¹ *Economic Problems of Women, Part III, supra* note 148, at 550 (statement of Hon. Frankie M. Freeman, Member of the U.S. Commission on Civil Rights) (“[The practice of discounting the wife’s income] is racially discriminatory in effect because of its impact on the large number of minority families who rely on wives’ incomes.”); Policy on Nondiscrimination in Lending, 38 Fed. Reg. 34,653, 34,653 (1973) (noting that “larger proportion of minority group families rely on the wife’s income to afford housing and other necessities”).

²⁰² *Economic Problems of Women, Part I, supra* note 198, at 196 (statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University).

²⁰³ *Economic Problems of Women, Part III, supra* note 148, at 484 (statement of Arline Lotman, Executive Director, Pennsylvania Commission on the Status of Women); *see also Economic Problems of Women, Part I, supra* note 198, at 129 (statement of Aileen C. Hernandez, Former Member, Equal Employment Opportunity Commission).

²⁰⁴ *Economic Problems of Women, Part III, supra* note 148, at 484 (statement of Arline Lotman, Executive Director, Pennsylvania Commission on the Status of Women); *see Economic Problems of Women, Part I, supra* note 199, at 129 (statement of Aileen Hernandez, Former Member, Equal Employment Opportunity Commission) (“I saw black women turned down for employment because they had children born out of wedlock, while white women were not even asked the question. I saw women, white and nonwhite, terminated for ‘indiscretions’ while men, similarly indiscreet, gained stature in the eyes of their employers.”); Gates, *supra* note 42, at 410 (“As a result, the female-headed household and the family with a working wife are most affected; and disproportionately so affected are black and other minority families.”); *id.* at 410 n.4 (pointing out that “27 percent of women heading households are black”).

Thus, marital status advocacy was about marriage. But these advocates were not attacking marriage or marital supremacy.²⁰⁵ Instead, they primarily sought to address discrimination experienced within marriage.²⁰⁶

III. DISCRIMINATION *IN* MARRIAGE

This Part develops this history further by situating marital status advocacy within the larger women's rights movement of the late 1960s and early 1970s. A critical goal of the mainstream women's rights movement of this time period was to promote economic independence for women.²⁰⁷ Throughout our history, it was married women who faced the most severe hurdles to economic independence. Single women held many (but not all) of the same rights as men.²⁰⁸ Unmarried women "could enter into contracts, sue and be sued, own property, and earn and keep their own income and the rents from their real property."²⁰⁹

Married women stood in sharp contrast to both men and to unmarried women. Under the common law doctrine of coverture, wives were prohibited "from contracting, filing suit, drafting wills, or holding property in their own names."²¹⁰ And, particularly important in this context, husbands controlled the money.²¹¹

A wife's dependence on her husband was also deeply embedded in the culture as well. "[T]he principle of wifely dependence," historian Hendrik Hartog explains, "helped establish the terms of republican male citizenship."²¹²

²⁰⁵ See *supra* Part II; cf. Mayeri, *supra* note 11, at 1342 ("Attacking male supremacy within marriage—which loomed large on the agenda of leading feminist legal advocates—posed a fairly radical challenge to American law and social life. Challenging marital supremacy in a political environment where feminists stood accused by ERA opponents of assaulting traditional marriage and family relationships likely seemed impolitic.").

²⁰⁶ E.g., PLECK, *supra* note 74, at 235-36 ("[A]dvocating cohabitation was a very minor theme in feminist manifestoes and in pressing for an end to marital status discrimination . . .").

²⁰⁷ See, e.g., Karst, *supra* note 53, at 551-52 ("[A] central concern of today's women's movement is the problem of dependency."); Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 268-69 (2013) (noting that six priority issues identified by NOW in 1967 included "the subsidization of child care, the introduction of no-fault divorce, the revision of tax laws to allow deductions for homemaking and child-care services for working women, revision of Social Security laws to expand coverage for widowed and divorced women, and laws prohibiting pregnancy discrimination and guaranteeing family medical leave").

²⁰⁸ HARTOG, *supra* note 130, at 118.

²⁰⁹ Heen, *supra* note 131, at 347.

²¹⁰ Siegel, *supra* note 127, at 2127.

²¹¹ *Id.*

²¹² HARTOG, *supra* note 130, at 110.

By the middle of the nineteenth century, states began to eliminate some of the legal disabilities imposed on wives under coverture.²¹³ Notwithstanding the passage of these so-called “[M]arried [W]omen’s [P]roperty [A]cts,” women’s, especially married women’s, dependency persisted.²¹⁴ “Blackstone’s unities fiction was for the most part replaced by a theory that recognized women’s legal personhood but which assigned her a place before the law different and distinct from that of her husband.”²¹⁵ Husbands were assigned to the public sphere; they were responsible for supporting the family and, generally for serving as the family’s representative with the world through, among other things, voting.²¹⁶ Wives, by contrast, were consigned to the “private” sphere of the home; they were responsible for caring for the home and any children in it.²¹⁷

These beliefs were pervasive. Indeed, these stereotypes about the “appropriate” roles of husbands and wives continued to shape the law for decades after the passage of Married Women’s Property Acts. Thus, even as the legally imposed disabilities on married women with respect to the right to contract and to own property began to fall away, the reality of wives’ dependence on their husbands persisted. Ensuring equal access to credit was a critical piece of the work to achieve equality and independence for women.

Marital status advocacy is a good example of multi-dimensional, or to use Cary Franklin’s term “interspherical,” advocacy.²¹⁸ One dimension of this work involved addressing discrimination against women in the “public” sphere of the workplace and the marketplace.²¹⁹ These public sphere efforts included prohibiting discrimination that directly impeded the ability to married women to obtain good employment at equal pay. Thus, at the federal level, advocates successfully lobbied Congress to enact the Equal Pay Act in 1963, which required equal pay for equal work without regard to sex.²²⁰ The next year,

²¹³ Siegel, *supra* note 127, at 2135.

²¹⁴ *Id.* at 2127.

²¹⁵ Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 153 (1992).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Franklin, *supra* note 57, at 2883 (arguing “that concern about interspherical impacts motivated some of the key [sex discrimination] statutes and legal decisions of the 1960s and early 1970s”).

²¹⁹ See, e.g., Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1328 (2012) (“But in fact, the legislative debate over Title VII’s sex provision emphasized the most distinctive feature of sex discrimination, in 1964 and throughout American history: namely, that it was understood as a means of enforcing conventional sex and family roles.”).

²²⁰ Equal Pay Act of 1963, Pub. L. No. 88-38, §3, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)(1)).

Congress passed the Civil Rights Act of 1964, which, among other things, prohibited employment discrimination on the basis of sex.²²¹ Title VII opened up job opportunities to women that previously had been closed to them.²²²

Advocates understood that prohibiting discrimination against women in the public realm—the workplace and the marketplace—was important but insufficient alone. Women would not have full and equal opportunity in the public sphere so long as stereotypes and family law rules that enforced these stereotypes about their “true homemaker status” persisted.²²³ Change, therefore, also required reform of the rules governing marriage. Take *Reed v. Reed*.²²⁴ The case concerned the appointment of an administrator for a deceased child’s estate.²²⁵ After the child died, the child’s mother (who was separated from the child’s father at the time), filed a petition to be named as the administrator of her child’s estate.²²⁶ The father later filed a competing petition.²²⁷ Idaho law at the time provided that, as between members within a designed class of relatives entitled to be named as an administrator of the estate, “males must be preferred to females.”²²⁸ This statute, like many other statutes still in existence at the time, reinforced the notion of husbands as the true managers of the family. In *Reed*, the Court began to chip away at this deeply-held belief by holding the statute unconstitutional.²²⁹

These successes advanced the cause for all women—married and unmarried. That said, like *Reed*, most of the cases litigated by Ruth Bader Ginsburg and the ACLU’s Women’s Rights Project (“WRP”) involved married or formerly married people.²³⁰ Moreover, as was true in the *Reed* litigation, Ginsburg and

²²¹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(a)).

²²² See, e.g., *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (5th Cir. 1969) (holding that employer’s refusal to hire women as switchmen was impermissible sex discrimination).

²²³ E.g., Mayeri, *supra* note 54, at 2324 (“Second-wave feminist legal advocates set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.”).

²²⁴ 404 U.S. 71 (1971).

²²⁵ *Id.* at 71-72.

²²⁶ *Id.*

²²⁷ *Id.* at 72.

²²⁸ *Id.* at 73 (quoting IDAHO CODE § 15-314 (1932) (repealed July 1, 1972)).

²²⁹ *Id.* at 76.

²³⁰ Mayeri, *supra* note 54, at 2325. See generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (reexamining “the foundational sex-based equal protection cases of the 1970s”).

her colleagues did not seek to eliminate marriage; they sought to reform it into a more equal institution.²³¹

Again, marital status advocacy is a useful example of this type of interspherical work. In order to buy homes; to purchase what they needed for themselves and their families; to get loans to open small businesses; and generally to be seen as autonomous, equal beings, banks and other lenders needed to be prohibited from discriminating.²³² But, advocates understood that equal credit access for women could not be fully realized unless changes were also made to rules governing the “private” realm of marriage and the family.

A. *Women and Dependency*

1. Second-Wave Feminism

The wake of World War II saw increasing public interest and discussion about women’s role and place in society.²³³ By the 1960s, activists began a more concerted and organized push to address the legal rights and claims of women.²³⁴ On December 14, 1961, President John F. Kennedy “issued an

²³¹ Mayeri, *supra* note 54, at 2325 (“Many feminist legal advocates saw marriage as a primary vehicle for the perpetuation of sex and gender rules that confined women to a stifling domesticity and deprived them of political and economic power.”).

²³² Gates, *supra* note 42, at 410 (“The availability of credit to women [was] vital to the upgrading of their economic status because it determine[d] their access to education, homeownership, entrepreneurship, and investment, as well as their ability to provide for the more immediate needs of their families.” (citation omitted)); *see also Economic Problems of Women, Part I, supra* note 199, at 153 (statement of Hon. Herbert S. Denenberg, Comm’r of Insurance, State of Pennsylvania) (“Denial of equal access to insurance, at fair rates, affects the economic status of all women. It touches employment discrimination, opportunities to hold a job, ability to maintain a family in the face of personal catastrophe, and economic security.”).

²³³ MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 60 (1986) (“The late 1940s and the 1950s saw increasing public discussion of women’s appropriate place in view of the fact that so many women worked outside the home.”); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2125 (2002) (“Women’s politics of recognition picked up speed after World War II, and the renewed interest showed up immediately in constitutional cases such as *Goesaert v. Cleary*. Women who had proved themselves fully equal to men during the war were often unwilling to re-assume their subordinate status after the war.”).

²³⁴ Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 499 (1996) (“With the civil rights movement in the African-American community during the 1960s came a ‘renewed struggle’ for women’s equality.”); *see also* BERRY, *supra* note 233, at 60 (“The 1960s brought a revival of the women’s rights movement and more insistence on changed social and legal rights and responsibilities.”).

executive order creating the President's Commission on the Status of Women"²³⁵ The Commission's mandate was to consider and recommend ways to end "prejudices and outmoded customs [that] act as barriers to the full realization of women's basic rights."²³⁶ Eleanor Roosevelt chaired the Commission.²³⁷ The twenty-six member commission was comprised of national leaders, including cabinet members and members of Congress, as well as women's rights activists.²³⁸ Despite the ambitious stated goals of the Commission, some argued that Kennedy issued the executive order primarily to "appease" women's rights activists.²³⁹ Indeed, some believed Kennedy constituted the group "to quiet the struggle for the Equal Rights Amendment ["(ERA)"]."²⁴⁰

In terms of tangible results, the legacy of the Commission was "mixed."²⁴¹ For the most part, the Commission did not push radical reforms.²⁴² For example, the Commission opposed the ERA.²⁴³ As one of the Commission's

²³⁵ FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, at 35 (1991); *see also* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2048 (2000).

²³⁶ Exec. No. Order 10,980, 3 C.F.R. § 500 (1959-1963).

²³⁷ Kay, *supra* note 235, at 2048.

²³⁸ Mary Becker, Essay, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 218 (1998).

²³⁹ McFarland, *supra* note 234, at 500 n.36 ("Kennedy's establishment of the CSW was partially an effort to appease women voters who felt that Kennedy failed to fulfill his promise of promoting the equality of women."); *see also* NANCY E. MCGLEN & KAREN O'CONNOR, *WOMEN'S RIGHTS: THE STRUGGLE FOR EQUALITY IN THE NINETEENTH AND TWENTIETH CENTURIES* 169 (1983) (likewise suggesting that Kennedy created Commission to appease women who had supported his candidacy but became disappointed with his lack of commitment to women's rights after his election).

²⁴⁰ McFarland, *supra* note 234, at 500 n.36; *see also* Becker, *supra* note 238, at 218 ("Although the purpose of the PCSW was 'to undermine' the ERA, [Esther] Peterson realized it was important to include at least one supporter of the ERA, and that one person was Marguerite Rawalt.").

²⁴¹ "As an advocate for the emancipation of women, the Commission had a somewhat mixed record" Kay, *supra* note 235, at 2048.

²⁴² It is important to note, however, that some of the recommendations likely seemed radical to some. For example, the Report recommended "that marriage should be considered an economic partnership and that any property acquired during the marriage should belong to both spouses." DAVIS, *supra* note 235, at 37.

²⁴³ Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875 (1971) ("Thus the President's Commission on the Status of Women argued in 1963 that 'the principle of equality [could] become firmly established in constitutional doctrine' through use of the Fourteenth and Fifth Amendments,

members, Esther Peterson, said: “[the Committee] made few avant-garde recommendations; we did not propose to restructure society. Rather, we strove to fit new opportunities into women’s lives *as they were*.”²⁴⁴

Nonetheless, the Commission helped enact several important pieces of legislation. In 1963, the Commission issued a report entitled *American Women: The Report of the President’s Commission on the Status of Women*.²⁴⁵ Due in part to its recommendations, the Equal Pay Act was enacted that same year.²⁴⁶ Title VII, including its prohibition against sex discrimination, was enacted the following year.²⁴⁷

In addition to moving forward some concrete legislative developments, the Commission shone a public and high-level spotlight to the issue of women’s rights.²⁴⁸ The Commission also brought together a number of women who would soon become leaders in the women’s rights movement.²⁴⁹ Several members of the Commission, including Catherine East, Mary Eastwood, Pauli Murray, and Marguerite Rawalt, later helped form NOW.²⁵⁰

and concluded that ‘a constitutional amendment need not now be sought.’” (alterations in the original)).

²⁴⁴ DAVIS, *supra* note 235, at 36-37.

²⁴⁵ See generally COMM’N ON THE STATUS OF WOMEN, *AMERICAN WOMAN: THE REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN* (1963), <https://www.dol.gov/wb/American%20Women%20Report.pdf> [<https://perma.cc/U28M-CD96>].

²⁴⁶ Ellen Marrus & Laura Oren, *Feminist Jurisprudence and Child-Centered Jurisprudence: Historical Origins and Current Developments*, 46 HOUS. L. REV. 671, 680 (2009) (“The Equal Pay Act was a modest product of the recommendations of the U.S. Commission on the Status of Women, appointed by President Kennedy and led by Eleanor Roosevelt.”); see also Ruth B. Cowan, *Women’s Rights Through Litigation: An Examination of the American Civil Liberties Union Women’s Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373, 376 (1976) (“Two years later [in 1963], the year the Commission issued its report, Congress passed the Equal Pay Act.”).

²⁴⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17). For a discussion of the inclusion of sex in Title VII, see generally Franklin, *supra* note 230.

²⁴⁸ See DAVIS, *supra* note 235, at 47-48 (“Surprisingly, both the establishment of the Kennedy Commission and the passage of Title VII happened before the second wave got under way. They were, in fact, part of what made it possible. Together, they legitimated sex discrimination as an issue.”).

²⁴⁹ Jennifer Woodward, *Making Rights Work: Legal Mobilization at the Agency Level*, 49 LAW & SOC’Y REV. 691, 707 (2015) (“The founders of NOW were either members of the President’s Commission on the Status of Women or friends of the members.” (citation omitted)).

²⁵⁰ DAVIS, *supra* note 235, at 37 (“The experience of working for the Commission opened the eyes of several women who later became leaders of the revitalized women’s movement, including Catherine East, a young attorney named Mary Eastwood, and Pauli Murray, the civil rights lawyer. Years later, Murray described the experience as ‘intensive

Indeed, NOW was formed in 1966, just three years after the Commission issued its report.²⁵¹ The “spark”²⁵² that led to NOW’s formation was the EEOC’s refusal “to make sex discrimination a priority in its enforcement of [Title VII].”²⁵³ “When officials ignored their complaints at a 1966 conference on women’s status, [Pauli] Murray, Betty Friedan, and other feminists stormed out in protest and founded the [NOW].”²⁵⁴ “By the end of 1970, activities for the promotion of women’s equality constituted a major social movement with a substantial organized component.”²⁵⁵ In addition to NOW, other organizations emerged during this period, including the Women’s Equality Action League (“WEAL”), the National Women’s Political Caucus, and the ACLU’s WRP.²⁵⁶

One of the core goals of NOW and other mainstream women’s rights organizations was to challenge women’s dependency on men.²⁵⁷ Advocates were concerned both about actual, tangible economic dependence, as well as intangible symbols of women’s dependence.²⁵⁸ Addressing both forms—the tangible and the symbolic—was important. As Dr. Jean Lipman-Blumen, Director of the Women’s Research Staff of the National Institute of Education, stated in her testimony, “The socialization of women as dependent, vicarious

consciousness-raising.’ Afterward, all three women became part of an informal network of feminists brought together because of the Commission.”); *see also President’s Commission on the Status of Women*, SCHLESINGER LIBR. ON THE HIST. OF WOMEN IN AM. http://guides.library.harvard.edu/schlesinger_presidents_commission_on_the_status_of_women [<https://perma.cc/V668-3DCQ>] (last visited Oct. 20, 2017).

²⁵¹ Kay, *supra* note 235, at 2049-50 (“[As a result,] on June 29, 1966, a small group of women, convinced that Title VII would never be enforced to benefit women unless an advocacy group for women equivalent to the National Association for the Advancement of Colored People existed, founded the [NOW].”).

²⁵² Eskridge, *supra* note 233, at 2130 (“As [Betty] Friedan later recalled, ‘it only took a few of us to get together to ignite the spark’ that grassroots feminist consciousness raising had already created, ‘and it spread like a nuclear chain reaction.’”); Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women’s Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315, 318-19 (2007).

²⁵³ Eskridge, *supra* note 233, at 2129-30.

²⁵⁴ *Id.*

²⁵⁵ Cowan, *supra* note 246, at 376.

²⁵⁶ *Id.* For a history of the Women’s Rights Project, see *id.* at 376-83.

²⁵⁷ *See, e.g., WOMEN & HOUSING*, *supra* note 168, at 11 (“[W]omen must now achieve the economic resources to live with or without a man”); June K. Inuzaka, *Women of Color and Public Policy: A Case Study of the Women’s Business Ownership Act*, 43 STAN. L. REV. 1215, 1222 (1991) (“WEAL’s primary focus was on economic equity issues for women.”).

²⁵⁸ Karst, *supra* note 258, at 551-52 (“[A] central concern of today’s women’s movement is the problem of dependency. The point finds expression in the economic and political terms, but the most destructive dependency of all is psychological, the dependency that limits a woman’s sense of who she is and what she can do.”).

people makes both men and women believe that females cannot deal with adult financial responsibilities.”²⁵⁹

While most feminist advocates “did not assume the superiority of marital families,”²⁶⁰ challenging dependency within the marital relationship was a priority for the women’s rights movement.²⁶¹ Addressing gender inequality in marriage—which was the dominant family form at the time—was seen as a critical means of addressing gender inequality more broadly.²⁶² Thus, feminist advocates “set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.”²⁶³ NOW’s original 1966 statement of purpose, for example, focused on challenging the stereotypical roles of husband as breadwinner and wife as carer of the home. The 1966 purpose statement declared: “We believe that a true partnership between the sexes demands a different concept of marriage, an equitable sharing of the responsibilities of home and children and of the economic burdens of their support.”²⁶⁴

There certainly were some feminist organizations during the 1960s and 1970s that directly challenged marriage. These groups believed that the institution of marriage was so “permeated” with male supremacy there would be no way for women to achieve equality in a marriage.²⁶⁵ So, for example, some radical feminists took the position “that marriage must be destroyed.”²⁶⁶ Extending recognition and protection to nonmarital, different-sex couples was not always the goal, even among these more radical activists. One such group—The Feminists—however, did not encourage individuals to enter into nonmarital, cohabiting relationships.²⁶⁷ Instead, they recommended “raising children communally.”²⁶⁸ Other activists at the time sought to protect the rights of women to raise children without men.²⁶⁹ To be sure, these anti-marriage

²⁵⁹ WOMEN & HOUSING, *supra* note 168, at 15.

²⁶⁰ *E.g.*, Mayeri, *supra* note 54, at 2379-80.

²⁶¹ *Id.* at 2324 (“Second-wave feminist legal advocates set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.”).

²⁶² *Id.* at 2391 (“A sex-neutral approach to parenting within marriage seemed clearly to advance feminist aspirations for an egalitarian division of labor at home, a prerequisite for freedom and equal opportunity in the public sphere.”).

²⁶³ *Id.* at 2324.

²⁶⁴ JANE J. MANSBRIDGE, WHY WE LOST THE ERA 99 (1986) (quoting JUDITH HOLE & ELLEN LEVINE, REBIRTH OF FEMINISM 85 (1971)).

²⁶⁵ *Id.* at 101.

²⁶⁶ DAVIS, *supra* note 235, at 90.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See, e.g.*, Patricia Tenoso & Aleta Wallach, 19 UCLA L. REV. 845, 851 (1972).

activists participated not only in the more radical groups of the time; some of them started in NOW and other mainstream groups.²⁷⁰

Again, some individual activists at the time sought to dismantle marital supremacy. In contrast, the mainstream organizations lacked consensus about whether and how to attack discrimination against nonmarital families. In the context of nonmarital families, many feminists recognized the reality that women bore the brunt of the obligations.²⁷¹ And while feminists were interested in distributing those responsibilities, many simultaneously wanted to protect the autonomy of those unmarried women and mothers.²⁷² Thus, “[w]here [unmarried] mothers’ and fathers’ interests coincided, feminists could wholeheartedly attack the legal privileging of marriage. [But w]hen fathers’ rights threatened mothers’ freedom, marital primacy [was invoked to] shield[] unmarried women from the downside of sex neutrality.”²⁷³ Moreover, there was a sense that a campaign to dismantle marital supremacy was unlikely to succeed.²⁷⁴ Ruth Bader Ginsburg subscribed to this position, explaining: “Another [issue] that I didn’t think we should attack—at least not yet—was the distinction between married couples and individuals who are not married. Because that distinction runs throughout law to such a tremendous extent, the Court was just not ready to take it on.”²⁷⁵ Thus, for these and other reasons, the mainstream women’s rights organizations at the time did not prioritize dismantling marital supremacy.

²⁷⁰ For example, NOW adopted a proposal, agreeing that sex should not be the state’s interest and that “[m]arriage’ should become a social institution, i.e. persons of the same or opposite sex agreeing to live together” Eliza Paschall, *Marriage, Sex, and Economics*, 2-3 (Aug. 23, 1971) (unpublished proposal adopted by NOW) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, MC725, Box 21, Folder 17). Another activist resigned from her position as NOW’s New York City chapter President “because she disagree[d] with NOW’s basic polic[ies] regarding marriage and organization structure. . . . She [said] she [wa]s opposed to both” Letter from Dolores Alexander to Members of NOW 1968 Nominating Committee and Members of the NOW Board of Directors (Nov. 19, 1968) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 1, Folder 50).

²⁷¹ See, e.g., Mayeri, *supra* note 54, at 2303 (“[N]onmarital children traditionally were the mothers’ responsibility by default.”).

²⁷² *Id.* at 2392.

²⁷³ *Id.*

²⁷⁴ See, e.g., Cowan, *supra* note 246, at 392-93.

²⁷⁵ *Id.* at 393.

2. Public Sphere Reforms

Initially workplace issues were front and center.²⁷⁶ Feminist activists recognized that women could not be financially independent if they could not obtain well-paid jobs.²⁷⁷ Accordingly, mainstream women's rights advocates continued to pressure the Equal Employment Opportunity Commission ("EEOC") to enforce Title VII's sex discrimination prohibition and to challenge what were viewed as unfavorable positions about Title VII's sex discrimination protection that the EEOC had taken.²⁷⁸ For example, activists protested the EEOC's initial position that Title VII permitted sex-specific want ads,²⁷⁹ and they urged the EEOC to conclude that firing female stewardesses when they married violated Title VII.²⁸⁰ In addition to working on Title VII implementation, advocates also successfully urged the enactment of an Executive Order prohibiting sex discrimination by federal contractors.²⁸¹

These employment-related cases were also thought to be more winnable ones. The ACLU's WRP, for example, "had a preference for litigating employment related issues. This inclination resulted partly because they involved matters of vital concern to women but also, and more importantly, because they appealed to the principle of equal pay for equal work, the most widely accepted of the women's rights goals."²⁸²

3. Private Sphere Reforms

Feminist advocacy was not limited to public spaces of the office and the marketplace.²⁸³ Women's rights activists understood that equality in these

²⁷⁶ DAVIS, *supra* note 235, at 49 ("In the beginning, NOW focused mostly on sex discrimination in the work place.").

²⁷⁷ See, e.g., Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1017-18 nn.79-80 (2015).

²⁷⁸ *Id.* at 1014.

²⁷⁹ *Id.* at 1028-29 ("Despite acting quickly to prohibit racially segregated advertisements in August 1965, the EEOC did not similarly outlaw sex-segregated ads, but instead convened a task force composed mostly of advertisers and business interests that unsurprisingly concluded that sex-segregated ads did not violate Title VII. . . . [T]he EEOC issued a guideline permitting sex-segregated advertising so long as newspapers published a disclaimer stating that the segregated advertising was not meant to be discriminatory, but rather simply reflected the fact that 'some jobs were of more interest to one sex than another.'").

²⁸⁰ Franklin, *supra* note 219, at 1380 n.233 (noting that "NOW actively supported the stewardesses' campaign to eradicate age and marital termination policies from the start").

²⁸¹ Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-1970) (Oct. 13, 1967); Schultz, *supra* note 277, at 1038 ("One of NOW's first successes was convincing President Johnson to amend the Executive Order in 1967 to add sex discrimination.").

²⁸² Cowan, *supra* note 246, at 392.

²⁸³ Franklin, *supra* note 57, at 2891.

public spaces could not be achieved without altering rules governing the “private” sphere of the family.²⁸⁴ Some scholars suggest that women’s rights advocates were not core players in the pivotal and numerous family law reforms going on at the time.²⁸⁵ Among other developments, California became the first state to adopt no-fault divorce in 1969.²⁸⁶ Other states quickly followed.²⁸⁷ Many states reformed their property division rules during this time as well.²⁸⁸

These scholars argue that the ERA preoccupied women’s rights advocates of the 1960s and 1970s and, as a result, they did not attend to family law developments at the time. For example, numerous scholars contend that feminist advocates did not play a leading role in the divorce reform revolution.²⁸⁹ Milton Regan wrote in 1992 that “[d]ivorce reforms in general, and changes in property distribution in particular, by and large simply were not the product of feminist efforts to impose a vision of equality.”²⁹⁰

In recent years, however, others have pushed back on, or at least complicated, this narrative. For example, as Cary Franklin demonstrates, feminist advocates did not confine themselves to employment, or education; their advocacy also recognized and sought to achieve “structural changes in the sphere of the family, because without such changes, women would continue to lack practical access to opportunities widely available to men.”²⁹¹ Feminists

²⁸⁴ *Id.*

²⁸⁵ *E.g.*, Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that “women’s rights movement was not significantly involved with early divorce reforms”).

²⁸⁶ Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 1 (1987).

²⁸⁷ *Id.* at 2 (noting that “no-fault divorce [was] available in all fifty states” by 1987).

²⁸⁸ *Id.* at 7-12.

²⁸⁹ Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 293 (1987) (“[T]he achievement of legal equality between women and men was not a central goal of the divorce reform effort in California.”); Isabel Marcus, *Locked in and Locked out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 435-36 (1988) (noting that feminists were mostly concerned with issues other than divorce reform during period of greatest legal change); Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1464 (1992) (arguing that feminists were “conspicuous[ly]” absent from debate on divorce reform); Rhode & Minow, *supra* note 285, at 195 (stating that “women’s rights movement was not significantly involved with early divorce reforms,” primarily because “implications of such reforms were not yet apparent”).

²⁹⁰ Regan, *supra* note 289, at 1465, 1457 (“[Fineman’s] argument that feminists were a powerful influence on the shape of divorce reform, for instance, is belied by evidence that in most states feminists had little involvement in the passage of divorce legislation.”).

²⁹¹ Franklin, *supra* note 57, at 2890.

understood that unless these family law rules were addressed, “sex-role enforcement that associated men with the marketplace and women with the home” would persist.²⁹² Thus, as Mary Zeigler shows, feminists did play a role in reshaping the rules governing alimony and the distribution of property upon divorce.²⁹³

ERA advocacy of the time also reflected this understanding of the interspherical nature of discrimination against women. In the highly influential *Yale Law Journal* article about the ERA and its possible effects, the authors noted that despite coverture’s partial demise, the law still “tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women.”²⁹⁴ The authors continued: “In many respects, such as name and domicile, the law continues overtly to subordinate a woman’s identity to her husband’s.”²⁹⁵ Accordingly, “[m]uch of the national discussion about women’s status has focused on marriage and divorce laws, and rightly so, because the issues involved are important to people personally, and because women’s domestic role has traditionally been considered their primary one.”²⁹⁶

Given this understanding, it is not surprising that many of the cases brought by (and usually won by) Ruth Bader Ginsburg and the ACLU’s WRP challenged family law rules that were based on stereotyped assumptions about the distinct roles of husbands and wives.²⁹⁷ The law, Ginsburg explained,

awarded husbands the exclusive right to control family assets and to determine the family’s domicile; expected wives to adopt their husbands’ names upon marriage; and permitted girls to marry at a younger age than boys, thereby according the latter “more time to prepare for bigger, better and more useful pursuits.”²⁹⁸

Take *Orr v. Orr*.²⁹⁹ This seminal constitutional sex discrimination case challenged an Alabama statute that allowed courts to require husbands but not wives to pay alimony upon divorce.³⁰⁰ Ginsburg and her colleagues at the ACLU filed an amicus brief arguing that the statute was unconstitutional.³⁰¹

²⁹² Franklin, *supra* note 230, at 124.

²⁹³ Zeigler, *supra* note 207, at 267. For earlier work highlighting this connection, see generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

²⁹⁴ Brown et al., *supra* note 243, at 937.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Franklin, *supra* note 57, at 2892-93.

²⁹⁸ *Id.* at 2892.

²⁹⁹ 440 U.S. 268, 271 (1979).

³⁰⁰ *Id.*

³⁰¹ See generally Brief for the American Civil Liberties Union as Amicus Curiae Supporting Appellant, *Orr v. Orr*, 440 U.S. 268 (1979) (No. 77-119), 1978 WL 206698.

The Court, in an opinion by Justice Brennan, agreed.³⁰² This was just one of many cases the WRP litigated that “questioned the traditional assumptions about appropriate family sex roles, i.e., the assumptions that women belonged at home as wives, homemakers and mothers and men belonged outside the home as chief wage earners.”³⁰³

B. *Credit and Dependency*

1. Public Sphere Reforms

Eradicating credit discrimination was an important step in the struggle to achieve independence for women. Credit discrimination impeded women’s ability to be financially independent.³⁰⁴ Most directly, lack of equal credit access inhibited women’s ability to financially support themselves. As NOW leader Cynthia Harrison wrote in 1972: “a woman’s ability to obtain credit independent of her husband is essential to permitting her to achieve true economic self-sufficiency.”³⁰⁵ Credit discrimination also “[did] violence to her self-esteem, her confidence in dealing with economics on an equal footing with men.”³⁰⁶

As described above, women faced a variety of forms of discrimination with regard to credit access. Some banks refused to issue credit in the name of a married woman.³⁰⁷ Because married women often could not get credit in their own names during marriage, upon divorce, they often had difficulty obtaining credit because they had no or little credit history in their own names.³⁰⁸ Women—both married and unmarried—often had their incomes discounted when seeking mortgages and loans to start small businesses.³⁰⁹

Most obviously and most directly, credit discrimination inhibited women’s ability to be financially independent.

In a credit-oriented society, the most important single aspect of a wife’s financial rights during marriage is the ability to obtain credit. Through the use of credit, she may effectively enforce her husband’s duty to support—which is otherwise totally unenforceable—by purchasing needed items

³⁰² *Orr*, 440 U.S. at 271.

³⁰³ Cowan, *supra* note 246, at 392, 394 (“*Frontiero*, *Wiesenfeld* and the subsequent Social Security cases attacked the legal stereotype line pervasive in the law that the woman is the homemaker and the man is the breadwinner.”).

³⁰⁴ See WOMEN & HOUSING, *supra* note 168, at 12-14.

³⁰⁵ Letter from Cynthia Harrison, Coordinator, Task Force on Credit, Nat’l Org. for Women (Nov. 18, 1972) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, 83-M238, Carton 2, Folder 25).

³⁰⁶ WOMEN & HOUSING, *supra* note 168, at 12.

³⁰⁷ See *supra* Part II.

³⁰⁸ See *supra* Part II.

³⁰⁹ See *supra* Part II.

and deferring payment for them, or obtaining unsecured loans to make such purchases.³¹⁰

These discriminatory credit practices were also rooted in and perpetuated stereotypes about women's dependency—stereotypes that were a core target for women's rights advocates.³¹¹ Lenders often discounted the incomes of women—both married and unmarried—based on the stereotyped assumption that women were only temporary, secondary workers.³¹² For example a female associate professor at the Massachusetts Institute of Technology who had given birth to two children during the decade that she had already served as a professor was told that “she need[ed] her husband's signature to get a loan from the university's federally chartered credit union, because she ‘might get pregnant and leave.’”³¹³

Moreover, even when they had paid jobs in the workplace, many married women were often unable to obtain credit in their own names.³¹⁴ Instead, it was not uncommon for banks to require the account to be taken out by the husband.³¹⁵ This happened to Jorie Leuloff Friedmann, who at the time was a Chicago newscaster.³¹⁶ When she got married, Friedman wrote to the companies with which she had charge accounts and asked for new cards with her new name and address.³¹⁷ Despite the fact that Friedman “ha[d] supported herself for nine years” on her own salary, the companies either closed the accounts altogether, or required her to reapply for credit using only her husband's information.³¹⁸ “There was no longer any interest in me, my job, my bank or my ability to pay my own bills. Marriage,” Friedman explained, “had made me a nonperson.”³¹⁹ Another woman exclaimed that that although she

³¹⁰ Anne K. Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights*, 3 PEPP. L. REV. 26, 29 (1976).

³¹¹ WOMEN & HOUSING, *supra* note 168, at 10-26.

³¹² *Economic Problems of Women, Part I*, *supra* note 198, at 205 (statement of Jane R. Chapman and Margaret J. Gates, Co-directors, Ctr. for Women Policy Studies) (“Credit extenders often voice doubt over the permanence of women's employment.”); *id.* at 174 (statement of Barbara Shack, Assistant Director, N.Y. Civil Liberties Union) (“Another prevailing attitude is that women are only temporary members of the workforce, dependent on a male primary wage earner, burdened with home responsibilities . . .”).

³¹³ Claudia Levy, *Women Still Treated Like Economic Minors*, L.A. TIMES, Dec. 29, 1974, at E2.

³¹⁴ *Economic Problems of Women, Part I*, *supra* note 198, at 204 (statement of Jane R. Chapman and Margaret J. Gates, Co-Directors, Ctr. for Women Policy Studies).

³¹⁵ *See id.* at 204.

³¹⁶ Marlene Cimons, *Women Charge Credit Bias at Hearings*, L.A. TIMES, May 26, 1972, at F1.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

made \$12,000 a year and her husband was an unemployed student, when she sought a car loan, “[m]ost [banks] insisted on having her husband’s signature.”³²⁰

Prohibiting discrimination by banks and lenders in the public marketplace was critical to achieving tangible economic independence and security for women. It was also important in intangible ways. These credit practices perpetuated a pernicious stereotype about women. “[The] prevailing attitude [wa]s that women [we]re only temporary members of the work force, dependent on a male primary wage earner, burdened with home responsibilities”³²¹ The refusal of credit card companies to issue cards in the names of married women also perpetuated the long-ago rejected notion that married women did not have separate legal identities. Many feminists considered the custom of women taking their husband’s names upon marriage a poignant relic of coverture.³²² Accordingly, during the late 1960s and 1970s, increasing numbers of women began retaining their maiden names after marriage.³²³ This action was viewed as a powerful rejection of the long-standing principle that wives merged into their husbands upon marriage.³²⁴

The passage of Married Women’s Property Acts (“MWPAs”) in the nineteenth and twentieth centuries removed many of the legal disabilities associated with coverture.³²⁵ Despite these legal developments, however, most married women continued, and indeed continue today, to take their husbands’ names.³²⁶ With a few notable exceptions,³²⁷ this custom continued largely

³²⁰ Lynn Lilliston, *Pushing for a Federal Equal Credit Law*, L.A. TIMES, Oct. 19, 1973, at D1.

³²¹ *Economic Problems of Women, Part I*, *supra* note 198, at 169 (statement of Barbara Shack, Assistant Director, N.Y. Civil Liberties Union).

³²² See Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 911 (2010) (“Debates over women’s surnames have historically borne on state recognition of women’s equality insofar as the state has denied women’s equality by mandating the adoption of one’s husband’s last name.”).

³²³ *See id.*

³²⁴ *Id.* at 948.

³²⁵ Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398, 1410-11 (1983); Reva B. Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082-83 (1994); Siegel, *supra* note 127, at 2127.

³²⁶ See Patricia J. Gorence, *Women’s Name Rights*, 59 MARQ. L. REV. 876, 883 (1976) (noting that “unity of person” under coverture “undoubtedly encouraged the custom of a woman’s assuming her husband’s surname after marriage”). To be clear, even in the 1970s, that “there was no legal requirement under the common law for a married woman to adopt her husband’s name.” Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Married Women’s Surnames*, 5 CONN. L. REV. 598, 602 (1973). Despite the lack of a legal requirement to do so, most married women took their husbands’ names. Gorence, *supra*, at 876.

unchallenged until the late 1960s and early 1970s when women's activists began to direct more attention to the issue.³²⁸ A number of women sued, challenging the refusal to allow them to use their maiden names during marriage or after separation or divorce.³²⁹

As Roslyn Goodman Dunn wrote at the time, "a name is a symbol of status. For many women, a requirement to use their husbands' names is a shackle which symbolizes ownership and dependence."³³⁰ Years earlier, Lucy Stone expressed a similar perspective. "My name," she wrote, "is the symbol of my identity which must not be lost."³³¹ As contemporary legal theorist Suzanne Kim explains: "The law and practice of marital name change[—that women take their husband's names—]symbolized for many [at the time] the subordinate status of women in marriage."³³² Organizations were formed to advocate on this issue. For example, in 1973 the Center for a Woman's Own Name was formed.³³³ National women's rights organizations participated in

³²⁷ "Lucy Stone is credited with being the first woman to retain her maiden name after marriage." Omi [Morgenstern Leissner], *The Problem that Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 353 (1998). "My name," Stone explained, "is the symbol of my identity which must not be lost." UNA STANNARD, MRS MAN 192 (1977).

³²⁸ Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 772 (2007) ("This legal regime largely continued until the 1970s, when a series of cases established the right of women to continue to bear their birthnames after marriage."); Kim, *supra* note 322, at 950-51 ("By the 1960s and early 1970s, 'many women began consciously seeking ways to retain their maiden names.' Indeed, social scientists have documented dramatic increases in name retention after the 1960s." (footnotes omitted)).

³²⁹ See, e.g., Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 4-9 (1998) (surveying case law); Gorence, *supra* note 326, *passim* (describing and analyzing cases); see also, e.g., *Stuart v. Bd. of Supervisors of Elections for Howard Cty.*, 295 A.2d 223, 227 (Md. 1972); *Dunn v. Palermo*, 522 S.W.2d 679, 688-89 (Tenn. 1975); *Kruzel v. Podell*, 226 N.W.2d 458, 463-66 (Wis. 1975).

³³⁰ Roslyn Goodman Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 U. MICH. J.L. REF. 63, 66 (1974). Ellen Goodman expressed a similar sentiment in a column she wrote in 1974. Goodman stated:

I guarantee you that the first generation of women who grow up without scribbling "Mrs. Paul Newman" all over their notebooks "just to see what it looks like" is going to think we [the feminists who fought against mandatory name change for women] were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.

Emens, *supra* note 328, at 767 (quoting Ellen Goodman, *The Name of the Game*, BOS. GLOBE, Sept. 24, 1974, at 30).

³³¹ STANNARD, *supra* note 327, at 192.

³³² Kim, *supra* note 322, at 945.

³³³ *Id.* at 952.

some of the legal cases. For example, in one case, *Kruzel v. Podell*,³³⁴ the ACLU's WRP and NOW jointly filed an amicus brief.³³⁵

ERA advocates also grappled with the issue of married women's names. The seminal 1971 *Yale Law Journal* article on the potential effects of the ERA, argued:

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name.³³⁶

Credit was one of the legal regimes in which married women's names was especially prominent. One of the most common problems that women identified in their testimony to Congress and in their letters to women's rights organizations was the inability to obtain credit cards in their own names.³³⁷ As letter after letter indicated, banks regularly refused to issue credit cards to married women in their own names. One letter provided to Congress, for example, brought attention to the woman's difficulty in "trying to obtain credit in [her] own name."³³⁸ "As a married woman," she continued, "credit [wa]s invariably issued in [her] husband's name."³³⁹ This was true despite the fact that her own salary was "sufficient to meet" the standards of the credit card company.³⁴⁰ Many other women reported similar experiences.³⁴¹

Advocacy to prohibit these discriminatory credit practices of banks and lenders was part and parcel of the larger movement to promote the principle that women—including married women—were independent and autonomous beings. Not only did these common name practices in the credit industry reinforce the principle that women merged into their husbands upon marriage, but it also perpetuated the deeply-held belief that husbands were the breadwinners and decisionmakers for the family.

³³⁴ 226 N.W.2d 458, 463-66 (Wis. 1975).

³³⁵ Gorence, *supra* note 326, at 893.

³³⁶ Brown, et al., *supra* note 243, at 940.

³³⁷ See, e.g., *Economic Problems of Women, Part III*, *supra* note 148, at 564 (Letter from Laurinda W. Porter to Stanford Parris, Representative, U.S. House of Representatives (July 26, 1973)).

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ See, e.g., *Availability of Credit to Women: Hearing Before Nat'l Comm'n on Consumer Fin.* 150 (1972) (testimony by Bella Abzug, Representative, House of Representatives) (on file with the National Archives) [hereinafter *NCCF Hearings*].

2. Private Sphere Reform

Credit advocacy, therefore, was part and parcel of feminists' focus on women's dependency—symbolic and tangible. These efforts included the enactment of laws regulating conduct in the “public” realm of banking and credit. But advocates recognized that equality for women could not be achieved solely by focusing on reforms in the workplace and the marketplace. Equality for women also required addressing sex discrimination within the “private” sphere of the family, especially the marital family. As Cary Franklin explains, “NOW's key claim was that gender equity in spheres such as education and employment depended on structural changes in the sphere of the family, because without such changes, women would continue to lack practical access to opportunities widely available to men.”³⁴²

Like other campaigns of the time, equality for women in the credit context could not be achieved without simultaneous work to dismantle sex-based rules governing the marital family. The problem was particularly acute in community property states.³⁴³ Community property states are often characterized as more protective for wives by ensuring that wives, including wives with no earned income, have a claim to a share in the success of the community.³⁴⁴ This is so because under the community property system, all spouses have “present, undivided, one-half interest[s]” in the community property during the marriage.³⁴⁵ Until the late 1960s, however, husbands in all of the community property states had sole management and control rights over community property.³⁴⁶ “Thus, in some of the community property states [at that time] a working wife may be put in the position of a woman before passage of the [MWPA]: she may lose control of her own earnings to her husband.”³⁴⁷

Indeed, prior to “1972, no community property state allowed wives to manage community personal property equally with their husbands, although some did allow them to manage their own wages.”³⁴⁸ And in all but one of the

³⁴² Franklin, *supra* note 57, at 2890.

³⁴³ The eight community property states at the time were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Id.* at 946.

³⁴⁴ *Id.* (noting that community property system “is sometimes championed by advocates of women's rights because it gives a housewife who earns no independent income a legal share in the family property”); *see also* WEISBERG & APPLETON, *supra* note 128, at 231 (noting that “[u]nlike the commonlaw system, community property recognizes the contributions, for example, of the homemaker spouse”).

³⁴⁵ WEISBERG & APPLETON, *supra* note 128, at 231.

³⁴⁶ Brown et al., *supra* note 243, at 946-47.

³⁴⁷ *Id.* at 947.

³⁴⁸ Bingaman, *supra* note 310, at 28. By 1972, California, Idaho, Nevada, Texas, and Washington all permitted wives to manage their own wages, at least if uncommingled. *See id.* at 28 n.8.

community property states at that time,³⁴⁹ “the husband ha[d] power of management and control over the community property; and in some states he [could] assign, encumber or convey the property without his wife’s consent.”³⁵⁰ For example, prior to January 1, 1975,³⁵¹

a husband in California had absolute control of the community personal property (other than the wife’s uncommingled earnings and personal injury damage awards), with gratuitous transfers requiring the wife’s written consent. The husband likewise had management and control over the community real property, subject to the wife’s written consent to transfers or encumbrances for periods exceeding 1 year.³⁵²

“The wife, who lacked powers of management and control over the community property, could not contract for the community except as an agent of the husband.”³⁵³ Many banks argued—persuasively in some states, including California—that these community property rules justified the denial of equal credit access to married women.³⁵⁴ In states where married women did not have the right to manage and control community property, including their own earnings,³⁵⁵ banks would be without a remedy if the wife defaulted on an account issued in her name alone.

³⁴⁹ The one exception was Texas. Brown et al., *supra* note 243, at 946-47. Washington amended its statute in 1972 to give wives the right to manage and control the community property. Barbara Ann Kulzer, *Property and the Family: Spousal Protection*, 4 RUTGERS-CAMDEN L.J. 195, 231 (1973) (citing WASH. REV. CODE ANN. § 26.16.030 (1961), as amended (Supp. 1972)).

³⁵⁰ Brown et al., *supra* note 243, at 946-47.

³⁵¹ In 1974, effective January 1, 1975, California amended its community property laws to give wives the right to manage and control community property. Alan Pedlar, *The Implications of the New Community Property Laws for Creditors’ Remedies and Bankruptcy*, 63 CALIF. L. REV. 1610, 1616, 1621 (1975).

³⁵² *Id.* at 1616.

³⁵³ *Id.* at 1617.

³⁵⁴ “[Banking officials] argue that they must know whether a person is married in order to comply with certain state laws and to protect their interest in collateral to which a spouse may have a right.” Gates, *supra* note 42, at 428 (citing *Fair Credit Reporting Act and Other Titles of the Consumer Credit Protection Act: Hearing Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 93d Cong., 381-88 (1973) (statement of John Dillon, Executive Vice President of National Bank Americard (also representing Interbank)) (unpublished transcript on file with author); see also TASK FORCE ON FAMILY LAW AND POLICY, REPORT TO THE CITIZENS’ ADVISORY COUNCIL ON THE STATUS OF WOMEN 147 (1968) (“[In community property states,] [t]he income of a working wife as well as that of the husband becomes part of the community property and, under the traditional community property system is managed by the husband, with the wife having no say in how her income is to be spent.”).

³⁵⁵ See *supra* notes 347-54 and accompanying text.

To address this concern, advocacy to prohibit credit discrimination on the basis of marital status often proceeded hand-in-hand with advocacy to amend state rules regarding the management and control of community property. This multi-prong strategy was followed, for example, in California. As noted above, married women in California did not have equal rights to manage and control community property until 1975. In 1972, the California Legislature held a series of hearings to discuss this and other issues related to the community property rules.³⁵⁶ A number of legislative enactments resulted from these hearings.³⁵⁷ Critically, one provision, effective January 1, 1975, “extended to wives the same power to manage community property that their husbands had enjoyed.”³⁵⁸ Another provision prohibited credit discrimination against married women.³⁵⁹

To be sure, not all of the credit discrimination women experienced resulted from unfair community property laws. In 1967, Texas became the first community property state to enact legislation giving wives the right to manage and control community property.³⁶⁰ Despite this change to the family law rules, some banks in Texas continued to deny equal credit to married women.³⁶¹

And, indeed, it was this experience in Texas that fueled much of the work on credit reform.³⁶² In 1971, several years after Texas amended its laws to give

³⁵⁶ See generally CAL. J. INTERIM COMM. ON JUDICIARY, HEARINGS ON COMMUNITY PROPERTY (Sept. 25-26, 1972; Oct. 10, 1972; Oct. 20, 1972).

³⁵⁷ Kay, *supra* note 289, at 303.

³⁵⁸ *Id.* (citing Act of October 1, 1973, ch. 987, 1973 Cal. Stat. 1897, amended by Act of September 23, 1974, ch. 1206, 1974 Cal. Stat. 2609). Subsequently, Act of September 23, 1986, ch. 1091, 1986 Cal. Stat. 1091 further amended Section 5125.

³⁵⁹ Kay, *supra* note 289, at 303 (citing Act of October 1, 1973, ch. 999, § 1, 1973 Cal. Stat. 1987). This statute initially only protected married women from credit discrimination. See *id.* The statute was later amended to prohibit credit discrimination against any woman (or man) on the basis of marital status. ch. 163, 722 Cal. Stat. 727.

³⁶⁰ Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, LAW & CONTEMP. PROBS., Spring 1973, at 71, 73 (“[I]n 1967 Texas was the first community property jurisdiction in the United States to eliminate gender discrimination from the laws of community management. . . .”); see also Brown et al., *supra* note 243, at 947-48.

³⁶¹ See Letter from Marsha King, Women’s Equity Action League, to Betty, Women’s Equity Action League (Sept. 22, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) [hereinafter King Letter I].

³⁶² See, e.g., Letter from Bert Harley, Secretary, Nat’l Capital Chapter of Women’s Equity Action League, to unknown (Oct. 12, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 10, Folder 39) [hereinafter Harley Letter] (stating that chapter was thinking of starting national banking investigation and inviting interested activists to contact Marge Gates); see also Agenda for Nov. 8 Meeting of National Capital Chapter of Women’s Equity Action League (on file

wives the right to manage and control community property, women's rights advocates in Texas turned their focus to banks and credit unions.³⁶³ Initially, advocates investigated *employment practices* at banks.³⁶⁴ Sex discrimination in employment, they argued, violated the recent executive order banning sex discrimination in entities that received federal financial assistance,³⁶⁵ as was the case at federal credit unions.³⁶⁶ Advocates then quickly shifted their focus to credit,³⁶⁷ with a particular focus on their extension of credit to *married women*.

As advocates in Texas noted at the time, what they found was that even though married women had an equal right to manage and control the community property in Texas, they nonetheless continued to be denied equal access to credit. It appeared that old habits—and stereotypes—were hard to break. The situation was aptly described by a WEAL activist: “You see, in Texas women have only been able to contract for themselves for about three years, and our department stores and banks are simply not used to having women arrange their own credit.”³⁶⁸

Thus, in Texas, the family law reforms preceded public sphere efforts to achieve credit equality. In other jurisdictions, the reforms proceeded in the opposite order. But in any event, the experiences demonstrate that changes in

with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 10, Folder 56) (noting that member would outline Texas Chapter's banking investigation and tell others how they can set up their own Task Force); Letter from Paula Latimer, Chairperson, Comm. on Credit and Money, Women's Equity Action League, to Women's Equity Action League President or Convenor (Jan. 10, 1973) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 12, Folder 42) (suggesting that banking investigations began in Texas).

³⁶³ Letter from Marsha King, Women's Equity Action League, to Betty, Women's Equity Action League (Aug. 4, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) [hereinafter King Letter II].

³⁶⁴ See Harley Letter, *supra* note 362.

³⁶⁵ Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-1970) (Oct. 13, 1967).

³⁶⁶ Letter from Marsha King, Women's Equity Action League, to James W. Keay, Republic Nat'l Bank of Dall. (Sept. 7, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) (asserting that they were discriminating against female employees in violation of executive order).

³⁶⁷ King Letter I, *supra* note 361 (“We are now working on a project of finding out which banks will give women equal credit with men.”); see Letter from Marsha King, Women's Equity Action League, to Betty Women's Equity Action League (Sept. 25, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) (stating that latest investigation is “better . . . than the other, because it affects so many more people”).

³⁶⁸ King Letter I, *supra* note 361 (“We are now working on a project of finding out which banks will give women equal credit with men.”).

both spheres were necessary ingredients in the struggle for equality. As Cary Franklin has explained: “NOW’s key claim was that gender equity in spheres such as education and employment depended on structural changes in the sphere of the family, because without such changes, women would continue to lack practical access to opportunities widely available to men.”³⁶⁹

CONCLUSION

By recovering the history of marital status advocacy of the 1960s and 1970s, this Article complicates the understanding of nonmarriage’s trajectory. This account reveals that advocacy to prohibit marital status discrimination is a story of progressive advancement, and it is a story about marriage. But this story is primarily about achieving equality *in* marriage, not equality for those outside of it. To be sure, statutes prohibiting marital status discrimination extend important protections to those living outside of marriage. These statutes ensure that single women cannot be denied credit solely because they are single.³⁷⁰ The ECOA was not, however, intended to be a direct assault on marital supremacy. By uncovering this movement, this Article deepens our understanding of nonmarriage’s past.

This story also sheds new light on the future of nonmarriage. It has been suggested that recent gay rights victories brought a halt to earlier efforts to unseat marriage from its privileged position.³⁷¹ Elsewhere, I challenge this prediction from a constitutional law perspective.³⁷² I argue that the gay rights canon can be read to support, rather than to foreclose a constitutional right to nonmarriage.³⁷³ The history explored in this Article offers another set of tools for those seeking to forge a progressive path forward. Advocacy to prohibit discrimination in the workplace and the marketplace is critical, of course. Those living in nonmarital families need to be protected not only from discrimination against them based on their status as a “single” person. They also need to be protected from employment and housing discrimination because they are living in nonmarital families.³⁷⁴ Being in a nonmarital relationship is not relevant to a person’s ability to do a job, and it should not be a permissible basis for refusing to rent to someone.³⁷⁵

³⁶⁹ Franklin, *supra* note 57, at 2890.

³⁷⁰ 15 U.S.C. § 1691 (2012).

³⁷¹ See, e.g., Huntington, *supra* note 116, at 23 (arguing that *Obergefell* “reifies marriage as a key element in the social front of family, further marginalizing nonmarital families”); Powell, *supra* note 19, at 69-70 (“The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy’s adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.” (footnote omitted)).

³⁷² See generally Joslin, *Gay Rights Canon*, *supra* note 4.

³⁷³ *Id.* at 432-33.

³⁷⁴ Joslin, *Marital Status*, *supra* note 3, at 823-28.

³⁷⁵ *Id.* at 829-30.

This type of public sphere advocacy is critical, but it must be accompanied by other reforms as well. Advocates for nonmarital families must also work to reform the rules governing families. That is, advocates must challenge the many family law rules that continue to privilege the marital family over the nonmarital family. These rules that privilege marriage are ubiquitous. They range from tax rules, to social security rules, to parentage, to the military.³⁷⁶ As Clare Huntington so eloquently illustrates, not only are our family law rules stubbornly marriage based, but when they are applied to nonmarital families, these rules often inflict harm.³⁷⁷ This, of course, is contrary to what family law rules are supposed to do; family law rules are supposed to support families and provide them with stability and protection.³⁷⁸ Change is necessary. These families make up a large and growing share of our population, and they are just as in need of stability and support as marital ones.

The challenges are great, but advocates are not treading on entirely new ground. Feminist advocates of the past waged a successful battle to reform the law of marriage. Today, the law of marriage is dramatically different than it was in the past. Historically, wives' identities merged into that of their husbands.³⁷⁹ They had no right to contract, no right to sue or be sued. And even a century after many of these legal disabilities were formally eliminated, many family law rules still forced husbands and wives into different gender-based roles. Through the 1960s, in some states, only husbands were responsible for alimony.³⁸⁰ A regime in which husbands and wives are legally permitted to play equal roles seemed unimaginable to many, even fifty years ago. But due to the efforts of these advocates, that is indeed the law of marriage today.³⁸¹

³⁷⁶ See, e.g., Aloni, *supra* note 9, *passim* (exploring benefits and burdens of being in recognized marriage).

³⁷⁷ Huntington, *supra* note 9, at 239 (arguing that marriage-based family law rules “have a pernicious effect on nonmarital families”).

³⁷⁸ See, e.g., Joslin, *supra* note 9, at 165.

³⁷⁹ 1 WILLIAM BLACKSTONE, *supra* note 38, at *430.

³⁸⁰ See, e.g., *Orr v. Orr*, 440 U.S. 268, 271 (1979) (holding unconstitutional Alabama law that provided that husbands, but not wives could be required to pay alimony upon divorce).

³⁸¹ Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 723 (2012) (“The groundbreaking sex discrimination cases of the 1970s required legislatures to strip away virtually all of the sex-based classifications within marriage law other than the basic requirement that marriage must be between a man and a woman.” (footnote omitted)). To be sure, however, many forces continue to channel husbands and wives into different roles. E.g., *id.* at 729 (arguing that “prevalence and persistence of gendered divisions of responsibilities is due both to social norms and to substantive provisions of marriage and related benefits law that continue to encourage specialization”).

Likewise, achieving a regime in which marriage is not privileged over nonmarriage may seem like an impossible quest. But the important legacy unearthed in this Article suggests that such radical reforms are possible, and this history lays a path forward.