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## Credit Where Credit is Due

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# COMMENTS

## CREDIT WHERE CREDIT IS DUE

RICHARD M. DUNN\*

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### I. INTRODUCTION

This is an age of accomplishment in almost every facet of our economic and technological existence in the United States. As our society reaches new economic levels, it becomes apparent that personal consumption expenditures have been a major contributing factor. Increased consumer expenditures are attributable to the addition of credit buying and lending to the economic structure. The institutions granting credit measure their participation in this unprecedented economic boom by the amount by which profit exceeds loss. The increased use of credit buying and the skyrocketing interest charges practically guarantee these institutions a solid share of the profit earned from the "household sector" of the economy.

There is another type of advancement which has recently been emphasized—the social and humanistic advancement of the low income sector of society. In the past, we have sacrificed our humane concern in the search for extensive business profits which highlighted the 1950's and early 1960's. Recently, interest has been focused on abolishing discrimination in places of public accommodation. Discriminatory credit practices, however, have increased with respect to both the low income and the minority consumer.

This article examines the extent of this credit problem, surveys solutions under existing law, and attempts to define power sources for legislative problem solving.

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\* Written while a senior law student at the University of Miami.

## II. THE PROBLEM

A. *A Credit Economy*

The "household sector" of the economy has been termed the largest and most important of all sectors.<sup>1</sup> Total consumer expenditures (for durables, nondurables and services) constitute two-thirds of all final buying in the economy<sup>2</sup> and this consumption level continues to rise each year.<sup>3</sup>

A major factor contributing to the large volume of consumption by the household sector is the gradual development of credit as a substitute for cash transactions.<sup>4</sup> Prior to 1910, credit usage was limited to lower income groups. This pattern began to change when the automobile industry began encouraging installment buying. In the 1920's, use of credit grew rapidly as much of the stigma previously attached to it vanished. Between 1920 and 1960, the installment debt, exclusive of mortgages, rose from one billion to forty-two billion dollars.<sup>5</sup> In the first quarter of 1967 a total of ninety-two billion dollars in credit was outstanding.<sup>6</sup> It is increasingly clear that credit has become an extremely potent factor in our economy.<sup>7</sup> In addition, credit has become a significant spending factor in the lives of consumers. Figures indicate that at the end of 1965, total consumer debt outstanding was 16% of the annual personal income, in contrast to 7% in 1948.<sup>8</sup>

There are two broad categories of consumer credit: installment and non installment. Installment credit includes automobile paper, other consumer goods paper, home repair and modernization loans, and personal loans.<sup>9</sup> Non installment credit, on the other hand, includes single payment loans, charge accounts and service credit.<sup>10</sup> Various institutions are involved in granting consumer credit and holding the consequent obligations. Commercial banks, sales finance companies, credit unions, consumer finance companies, and retail outlets all play a significant part in the growth of the credit economy.<sup>11</sup>

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1. R. HEILBRONER, UNDERSTANDING MACROECONOMICS 60 (1965).

In 1963 it comprised over 47 million families and 11 million independent individuals who collectively gathered in \$464 billions and spent \$375 billions.

*Id.* at 61.

2. *Id.* at 62.

3. *Id.*

4. CONSUMER INSTALLMENT CREDIT, 54 FED. RES. BULL. 457 (June 1968).

5. D. CAPLOVITZ, THE POOR PAY MORE 1, n.1 (1963)

6. STATISTICAL ABSTRACT OF THE UNITED STATES 1967, 465, table 648.

7. G. MOORE & P. KLEIN, THE QUALITY OF CONSUMER INSTALLMENT CREDIT 4 (1967).

8. J. CHAPMAN & R. SHAY, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION 1 (1967). Consumer credit herein is defined as:

all short and intermediate term credit extended through regular business channels to finance the purchase of commodities and services for personal consumption, or to refinance debts incurred for such purposes. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2; STATISTICAL ABSTRACT OF THE UNITED STATES 1967, 465, table 649.

Despite the greater use of credit in sales transactions today, certain prerequisites must ordinarily be met before a consumer may be granted credit. Three main factors are considered in determining the acceptability of a candidate for credit: character, capacity, and capital.<sup>12</sup> The moral responsibility or the *character* of the candidate is determined by closely scrutinizing his reputation in business, his living and spending habits, and his negative tendencies, *e.g.*, alcoholism and gambling. *Capacity* of the consumer is also viewed to determine his ability to earn a livelihood. In this regard, his record of employment, residence, legal status, and prior record of payment are significant. The *capital* of the candidate is important inasmuch as it determines his current ability to repay the loan. Such items as income, capital assets and current obligations must be considered in reaching this determination.<sup>13</sup>

In obtaining this information, credit departments follow several steps. First, the consumer completes an application for a loan by filling in the requested information. Then, a personal interview is conducted to examine certain details and to pinpoint the intended use of the loan. The credit department analyzes the information obtained to determine whether further investigation may be worthwhile.<sup>14</sup> Depending upon the size of the institution, the credit department will either conduct further investigation itself or utilize the services of a credit bureau which will conduct the investigation and issue a report on the application to "complete the picture."<sup>15</sup> Finally, a determination is made as to whether or not the requested credit should be granted, based upon whether the information secured indicates that the applicant meets the standards established by the institution.

### B. *Credit and the Minority Consumer*

The credit standards established by the various loan and retail institutions present little or no problem for the middle income consumers. The low income consumer, however, is most often unable to meet the stringent criterion established<sup>16</sup> and hence is labeled a "poor credit risk."<sup>17</sup>

This leaves an indelible mark on the financial soul of the minority consumer and presents him with a grave buying problem. Senator Mag-

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12. R. ETTINGER & D. GOLIEB, CREDITS AND COLLECTIONS 12, 60 (1962).

13. *Id.* at 60.

14. *Id.* at 72.

15. *Id.* at 96.

16. It appears that two general types of discrimination may be found to exist: That which is based upon the race, color, religion or national origin of the credit applicant (known as minority discrimination) and that which is based upon the low or poor economic standing of the credit applicant (known as low income discrimination). Many times the two are indistinguishably intermixed because of the personalized credit financing approach which has developed in the low-income neighborhoods.

17. CAPLOVITZ, *supra* note 5, at 14. Caplovitz points out that the "poor credit risk" label is the result of low income, negligible savings, job insecurity, and no permanent resident or friends who will vouch for them.

nuson accurately describes the motivational buying factor in pointing out that these less fortunate persons are

constantly surrounded and reminded of all the material benefits of our great society which are enjoyed by everyone else . . . . Like us they are the recipients of the daily advertising messages of the necessities of life which we should buy. . . . The social pressure on them to consume is almost irresistible, not simply because of their actual physical needs for many of these possessions, but also because of their deep psychological needs for self-respect, for dignity, for a feeling of belonging and for approval from their neighbors. . . .<sup>18</sup>

David Caplovitz concurs with the existence of a psychological need for consumption as he points out that many of these persons in the low income bracket have scant hope of improving their low social standing through occupational mobility.<sup>19</sup> Mr. Caplovitz believes that they must then turn to consumption and material possessions to play their part in the American success story.<sup>20</sup> Consumption then is a form of "compensation"<sup>21</sup> for blocked social mobility.

The problem of trying to buy goods in a society that operates on credit was, for the poor, a difficult one. But the American free enterprise system quickly rushed to the rescue by adapting "credit" as it was known in the larger, bureaucratic marketplace to suit the needs of the low income consumer. The system eventually ironed out was simple—the entrepreneurs, *i.e.*, local merchants, sold goods of poor quality to impoverished consumers at a price that was marked up to twice or three times the cost. Added to the already high cost of the goods were equally high interest rates based upon the greater risk of non-collection being assigned by the entrepreneurs.

Today the system is basically unchanged with the exception of the establishment of a "personalized" approach. Typically, the price of an item is not predetermined, rather it is set by the merchant after taking into consideration the type of customer and the estimated risk.<sup>22</sup> Once the "exploiter" has determined that the buyer is worth some credit risk, and the price he will charge for taking that risk, he establishes a series of controls to insure repayment.<sup>23</sup> The fact that the poor are at the mercy of these high priced neighborhood stores and peddlers is demonstrated by Senator Magnuson who states:

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18. W. MAGNUSON & J. COOPER, *THE DARK SIDE OF THE MARKET PLACE* 33 (1968).

19. CAPLOVITZ, *supra* note 5, at 13.

20. *Id.*

21. *Id.*

22. CAPLOVITZ, *supra* note 5, at 16.

23. Formal controls include: liens against wages and property, repossession, discounting paper and credit association ratings. Informal controls include: expected mispayment and consequent high markup and weekly payments to establish a close relationship.

Shopping surveys in Boston, Philadelphia, Chicago and San Francisco reveal the same pattern; the poor are paying exorbitant prices, usually 75 to 100 percent more for goods from stores in low income areas as compared with those in "ethical" stores patronized by the middle class.<sup>24</sup>

The low income consumer, then, with the same wants and needs as his middle income counterpart, but lacking the credit standing, knowledge, and mobility of his counterpart, must turn to an "easy out" with the "friendly neighborhood store." This consumer is virtually forced to pay higher prices and interest rates by the fact of his poverty.

There can be no doubt that most poor consumers use this "E-Z credit" way out. In the Caplovitz survey it was determined that 75-90% of the business of these local merchants was handled on credit.<sup>25</sup> Further, it was shown that 81% of the low income type consumers surveyed used credit as a method of payment in at least some of their purchases.<sup>26</sup> Discrimination, then, is prevalent in the marketplace against the low income consumers as a group.

First, many of the "ethical" or bureaucratic institutions supply forms for an applicant to fill out containing questions in regard to the applicant's "race," "color," "creed" or "national origin." When this information is used as a basis for denial of the loan or credit application, there can be little doubt that discrimination is taking place.<sup>27</sup>

Second, many credit institutions require a personal interview, during the course of which the interviewer casually notes "C" for colored or "B" for black.<sup>28</sup>

Third, many institutions either flatly refuse to extend credit to members of minority groups or they set their standards so high in dealing with the applications of the "poor" for credit, that few, if any, of the low income group can meet the requirements.<sup>29</sup> The maintenance of high credit standards, though to some extent justifiable by the need for adequate assurances of repayment, when based upon very high income levels, or when applied on a sliding scale depending on the credit applicant, has a discriminatory effect upon low income groups.<sup>30</sup>

24. MAGNUSON, *supra* note 18, at 34.

25. CAPLOVITZ, *supra* note 5, at 16.

26. *Id.* at 101.

27. *But see* Mindlin, *The Designation of Race or Color on Forms*, 26 PUB. AD. REV. 110 (1966). The author argues that unless designation of race or color is allowed on forms, there is no means of administratively policing discrimination.

28. This writer interviewed a local bank vice-president who indicated that this practice was prevalent in the industry. April 8, 1969. Also, there is evidence in the concurring opinion of Justice Douglas in *Bell v. Maryland*, 378 U.S. 226, 242 (1964) that whites can secure larger, better loans than Negroes.

29. This writer interviewed several door to door salesmen who indicated that they were never allowed to extend credit to minority groups. Others said that their requirements were more stringent if the "colored" were involved. In Miami, February 26, 1969.

30. The contention could be made that the existence of credit standards, established

The fourth type of discrimination which may be pointed out is in fact a subcategory of discrimination against the "poor" as a group, namely that against non-whites<sup>31</sup> as to price.<sup>32</sup> The personalized approach of local merchants is a natural vehicle for discrimination against non-whites. As Caplovitz points out: "neighborhood merchants do evidently make discriminations along racial lines, the basis for which may lie in exploitation, sales pressure, or distrust."<sup>33</sup> All a merchant needs to do is talk with the buyer to be, size him up, figure the risk factor and then set the price accordingly.<sup>34</sup>

Some discriminatory practices have been isolated. Our governmental structures have whittled away at biases for and against different groups in this society. Similarly, these credit problems must be confronted and solved. If these problems are not confronted, the poor will surely become poorer, regardless of government poverty programs. An existence without credit in this complex society is a bleak one indeed. While this article does not begin to assert the right of each minority societal member to credit at all institutions, it does certainly assert that if other adequate standards can be complied with, then certainly "race, color, religion or national origin" should not be the disqualifying factor. Nor should a relatively low income subject the credit buyer to price and interest discrimination. Additionally, it is submitted that high prices and high credit charges for the low income consumer are discrimination at its worst—in actuality there is no credit at all in these instances.

### III. THE SOLUTIONS UNDER PRESENT LAW

Assuming the existence of any one of the several discriminatory practices described above,<sup>35</sup> and mindful of the seriousness of these practices, the question logically raised under existing law (federal or

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by primarily white concerns, in and of themselves are discriminatory. The reasoning is similar to that used in the employment tests given by large corporations, namely that the questions (or standards) are made to be answered by (or applied to) a basically "white" culture. The point would need substantiation by evidence showing that black families with low incomes by white standards have high incomes by black standards and are responsible credit risks. Recently, it was demonstrated that I.Q. tests were biased in this cultural respect. *Intelligence: Is There A Racial Difference?*, TIME, April 11, 1969, at 59. James F. Crow is herein quoted: "[T]he environmental difference between being black and being white could of itself account for the IQ gap."

31. It is certainly arguable in the discussions which follow under statutes and proposed legislation sections that "race" could be construed to include the poor consumer generally, without regard to color or origin. "Race" can be defined as "A class or kind of individuals with common characteristics, interests, or habits." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 704 (7th ed. 1961).

32. CAPLOVITZ, *supra* note 5, at 91, 104.

33. CAPLOVITZ, *supra* note 5, at 93.

34. A two part series in The Miami Herald pointed out the higher price the non-white pays for all goods and services, e.g., \$825 for a \$348 T.V. set. Elder, *The High Cost of Being Poor*, The Miami Herald, July 19, 1970, at 1, col. 1 and July 20, 1970, at 1, col. 3. For further discussion of discriminatory practices, see 1 CCH Pov. L. REP. §§ 3700-3765.

35. See note 25 and 26 *supra* and accompanying text.

state), is whether the credit institution can be prevented from continuing in its present discriminatory course?

### A. *Federal Law*

After the Civil War the Congress, by means of legislative enactments, established a policy of eliminating discrimination on account of race or color. Later, by statute, discrimination on account of creed or national origin was added. Constructional limitations, however, have been placed on these statutes by subsequent court decisions. It is these judicially imposed limitations which present a lingering problem in attempting to provide relief for the economically deprived segment of our society.

#### 1. EARLY CIVIL RIGHTS LEGISLATION

Realizing the inequities of the slavery system, which had relegated the Negro to a status something less than human, the abolitionists, both within and without Congress, secured the passage of the thirteenth amendment. This 1865 Act sought to guarantee the freedom of slaves everywhere in the United States and provided as follows:

Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.<sup>36</sup>

Both the opponents and the proponents assumed that the amendment was to be broadly construed to extend beyond mere personal servitude and slavery and that the Negro would be guaranteed certain rights under the Act.<sup>37</sup> The rights considered to be included within the amendment were equality before the law, protection of life and person, and free opportunity to live, work and move about.<sup>38</sup> The language of the amendment was first construed in the *Slaughter House Cases*,<sup>39</sup> wherein the Court interpreted "servitude" as "personal servitude" and determined that servitude had a larger meaning than slavery. Several years later, the Court in *Hodges v. United States*,<sup>40</sup> determined that slavery of Negroes was not the only concern of Congress, but that the thirteenth amendment

36. U.S. CONST. amend. XIII.

37. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324 (1952).

38. J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 142, 143 (1951).

39. 83 U.S. (16 Wall.) 36 (1873). This case involves the contention by various butchers that a Louisiana statute which authorized only one corporation to slaughter cattle in New Orleans had imposed an unconstitutional servitude upon their property. The Court rejected the argument due to their construction of the thirteenth amendment as applying only to personal servitudes.

40. 203 U.S. 1 (1906).



forbids the enslaving of any race or any individual. The courts have consistently interpreted the thirteenth amendment in a strict manner, thus denying the efforts of many persons subjected to harsh discrimination to obtain relief.<sup>41</sup> Consequently the amendment never really assumed the prominence hoped for by proponents and feared by opponents. The thirteenth amendment, however, does operate against acts of individuals whether sanctioned by state legislation or not (unlike the fourteenth amendment which has been construed as requiring state action).<sup>42</sup>

In order to present an argument under the thirteenth amendment, a consumer would have to argue that the action by local merchants in selling low quality merchandise to low income or minority consumers in return for high prices and interest rates, causes the purchaser to be drawn into a condition of forced compulsory service to the seller. Perhaps the court could be persuaded by an explanation of the "controls"<sup>43</sup> retained by the merchant.

The argument, however, would more than likely fail due to the rather strict construction which the thirteenth amendment has received. There is a question as to whether any court would be willing to extend coverage beyond race and color discrimination to religion or national origin. The basic problem is finding the precedent necessary to construe a long term debt commitment as a "servitude."

Almost immediately, it became obvious that the thirteenth amendment was inadequate inasmuch as various Black Codes were enacted by southern states, the effect of which was to render the Negro "socially an outcast, industrially a serf, and legally a separate and oppressed class."<sup>44</sup>

Congress responded by passing the *Civil Rights Act of 1866*.<sup>45</sup> The construction of this Act is interesting in that it is an outright grant of certain rights to all citizens (Negroes, by definition included). The Act is not based upon the commerce power of Congress (as are later acts granting specific rights to the Negro),<sup>46</sup> but rather upon the power of Congress to legislate under section 2 of the thirteenth amendment.<sup>47</sup> This Act was used as the basis of decision in a recent case before the Supreme

41. Typically, denial of admission to public places such as inns and theatres and attempts to segregate public conveyances have been held not to be "servitudes." *Civil Rights Cases*, 109 U.S. 3, 23-25 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

42. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

43. See note 23 *supra*.

44. J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 142, 143 (1951).

45. [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws.

Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

46. *Civil Rights Act of 1964*, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.).

47. Fairman & Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 7 (1949).

Court, *Jones v. Alfred H. Mayer Co.*<sup>48</sup> The case demonstrates the Court's willingness to take cognizance of the ancient Act to obliterate private discrimination. Since public accommodations are not specifically mentioned in the Act, conversion of the Act to provide the relief presently sought would be difficult. Perhaps it could be argued that discriminatory credit practices greatly restrict the minority owner's right to purchase real or personal property. Even still, the "race and color" limitation of the thirteenth amendment presents problems which do not permit application of the Act to all low income consumers.

Again, however, opponents of the Act and some hostile courts did not react favorably toward the new provisions. Supporters of the civil rights of Negroes felt that a new Constitutional amendment was needed. In 1868, the fourteenth amendment was adopted by Congress:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>49</sup>

This amendment, however, is limited to the extent that *state action* has been required by courts in order to enforce its provisions. That is to say, the "state" must be abridging privileges, or denying due process or denying equal protection. For example, the low income plaintiff would seek to establish that the state passed laws which discriminate between two classes; that one group can obtain credit under these laws, while his class cannot, and therefore that he has been denied equal protection of the laws.

It would, concededly, be very difficult for the low income consumer to identify laws which discriminate as to credit practices. However, he could conceivably raise two arguments. First, that the intent of Congress in adopting the fourteenth amendment was not to limit the protection thereunder to acts by the state, but also to include individual acts infringing the rights of all Americans. Testimony taken by the legislative committee indicates that of 125 witnesses appearing before the committee, a vast majority pointed out private invasions of civil liberties as most significant.<sup>50</sup> In light of these hearings, it would seem absurd to conclude that the legislature would deliberately limit the scope of the amendment to state action.<sup>51</sup>

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48. 392 U.S. 409 (1968). A Negro and his wife sought to buy a house in a private development of St. Louis; they were refused on the basis that it was the company's policy not to sell to Negroes. The Civil Rights Act of 1968 insures against discrimination in housing but did not take effect until 1969, so the plaintiffs based their complaint upon the earlier act.

49. U.S. CONST. amend. XIV.

50. L. WARSOFF, *EQUALITY AND THE LAW* 109, 110 (1938).

51. For a discussion of the intent of the legislature, see Gressman, *supra* note 36, at 1329, 1330.

Alternatively, the plaintiff could argue that the current trend of the courts to broadly define "state action" should be likewise applied in the credit area. Actions of state courts or state judicial officials,<sup>52</sup> action by the police to arrest a Negro for trespass at a restaurant segregated under city ordinance,<sup>53</sup> and denial of service to a Negro at a restaurant leased from a state agency,<sup>54</sup> have all been held to be within the meaning of state action. This broad state action doctrine could be applied to the credit area as follows: If a local merchant attempted repossession of goods sold under a contract based on exorbitant prices and interest rates and was refused entrance, any court granting him order to enter and repossess could be held to have acted in a discriminatory manner.

In 1875, Congress passed another *Civil Rights Act*, the preamble of which stated:

[W]e recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political.<sup>55</sup>

It is clear that Congress was widening its scope of concern for the civil rights of all men in their day-to-day existence. The Act itself provides that:

[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement. . . . applicable alike to citizens of every race and color. . . .<sup>56</sup>

This Act was based upon the principles of the thirteenth and fourteenth amendments.<sup>57</sup> Clearly the intent was to eliminate the discriminatory acts of individuals which occurred in public places. However, attempts to use this Act as the basis for a suit against a local merchant are hampered by the declaration of "unconstitutionality" by the court in the *Civil Rights Cases*.<sup>58</sup> This decision has never been reversed, but it has been closely scrutinized and its current applicability questioned in recent years.<sup>59</sup>

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52. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

53. *Peterson v. Greenville*, 373 U.S. 244 (1963).

54. *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961).

55. Act of Mar. 1, 1875, ch. 114, §§ 3-5, 18 Stat. 336.

56. *Id.* at 336.

57. Gressman, *supra* note 36, at 1335.

58. 109 U.S. 3 (1883).

59. *United States v. Guest*, 383 U.S. 745 (1966). Specifically at 782-83 of that decision, Justice Brennan stated that the majority of courts today reject the limited interpretation given by the *Civil Rights Cases* to the 1875 Act as it relates to the Fourteenth Amendment.

## 2. RECENT CIVIL RIGHTS LEGISLATION

The next significant civil rights legislation possibly applicable to credit practices is the *1964 Civil Rights Act*.<sup>60</sup> This Act covers many kinds of discrimination, but most significant to this discussion is Title II, "Injunctive Relief Against Discrimination in Places of Public Accommodation."<sup>61</sup> This title attacks discrimination from the dual standpoint of interstate commerce and state action:

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishments as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.<sup>62</sup>

Congress, in passing this Act, utilized the fourteenth amendment when the state has a part in the discrimination and utilized the interstate commerce clause<sup>63</sup> when an individual discriminates against a person for reasons of race, color, religion or national origin, and in so doing affects

60. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of titles 5, 28, & 42 U.S.C.). Other acts passed in the interim are of little consequence in considering credit practices: Civil Rights Act of 1960, Pub. L. 86-449, 74 Stat. 86 (codified in scattered sections of titles 18, 20 & 42 U.S.C.), Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634 (codified in scattered sections of titles 5, 28 & 42 U.S.C.).

61. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of Titles 5, 28, & 42 U.S.C.).

62. *Id.*

63. U.S. CONST. art. 1, § 8, cl. 3.

commerce. The places of public accommodation in which discrimination have been prohibited are specifically defined to include only three types of establishments—lodging, dining and amusement. Under this limited definition, the minority credit consumer can in no way qualify for relief under this section. It is significant to note, however, that as pointed out by John Lindsay in his House majority report, every form of public accommodation whether covered by section 201 or not, is prohibited under section 202 of the 1964 Civil Rights Act from discriminating or segregating if a denial of services is required by state or local law.<sup>64</sup> Therefore, if state action can be shown, the provisions of this Act will apply to credit practices.

On April 11, 1968, Congress confronted the massive housing discrimination problem by passing Title VIII of the *1968 Civil Rights Act* entitled "Fair Housing."<sup>65</sup> Section 805 is of particular interest:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loans or other financial assistance, because of the race, color, religion, or national origin of such person or any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 803 (b).<sup>66</sup>

It is now clearly set out that a low income consumer who wishes to purchase a new house or make improvements on his existing house and who finds discrimination in applying for a loan, may file a complaint with the Secretary of Housing and Urban Development as provided in section 810.<sup>67</sup> Not only is it possible to find affirmative relief in financing housing under this Act, but it is also possible to make the fair conclusion

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64. U.S. CODE CONG. & ADM. NEWS 2495 (1964). Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule or order of a State or any agency or political subdivision thereof.

65. Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (codified in scattered sections of Titles 18, 25, 42 U.S.C.).

66. *Id.* at 102.

67. *Id.* at 104.

that if sufficient evidence as to discrimination in the housing area was found by Congress, then relief for the rest of the credit area suffering a like discrimination could soon be a reality.

Though possibilities of obtaining affirmative relief are found under most of the federal acts cited in this section, there are only a few, clear-cut avenues. Most of the acts require broad statutory construction on the part of the court and reliance on weak arguments at best if relief is to be predicated upon them.

### B. *State Law*

State law offers more concrete remedies for the victim of the "E-Z credit" dealer. It still falls far short of establishing equality in each of the United States, however, because a sizeable number of states have no antidiscrimination laws whatsoever.

#### 1. STATUTORY TYPES

As of 1965, thirty-one states and the District of Columbia had passed statutes providing various remedies for persons subjected to discriminatory treatment in the use of public accommodations.<sup>68</sup> These

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68. Caldwell lists the following state statutes in force in 1965:

ALASKA STAT. §§ 11.60.230-240 (1962);  
 CAL. CIV. CODE §§ 25-1-1 to -2-5 (1953);  
 CONN. GEN. STAT. REV.: 53-35 (1961);  
 DEL. CODE ANN. tit. 6, ch. 45 (1963);  
 IDAHO CODE ANN. §§ 18-7301 to -7303 (1965);  
 ILL. ANN. STAT. ch. 38, §§ 13-1 to -4 (Smith-Hurd, 1961), ch. 43, § 133 (1944);  
 IND. ANN. STAT. §§ 10-901 to -914 (1961);  
 IOWA CODE ANN. §§ 735.1-.5 (1950);  
 KAN. GEN. STAT. ANN. § 21-2424 (Supp. 1962);  
 ME. REV. STAT. ANN. ch. 137, § 50 (1954);  
 MD. ANN. CODE art. 49B § 11 (1964);  
 MASS. ANN. LAWS ch. 140, §§ 5-8 (1957), ch. 272, §§ 9B, 92A (1963);  
 MICH. STAT. ANN. §§ 28.343-344 (1962);  
 MINN. STAT. ANN. § 327.09 (1947);  
 MONT. REV. CODES ANN. § 64-211 (1962);  
 NEB. REV. STAT. §§ 20-101 to -102 (1954);  
 N. H. REV. STAT. ANN. §§ 354-1, -2, -4, and -5 (1963);  
 N. J. STAT. ANN. §§ 10-1-2 to -1-7, 18-25-1 to -25-6 (1963);  
 N. M. STAT. ANN. §§ 49-8-1 to -8-7 (1963);  
 N. Y. CIV. RIGHTS LAW § 4-40 to -41  
     EXECUTIVE LAW § 15-2901,  
     PENAL LAW § 46-513 to -515;  
 N. D. CENT. CODE § 12-22-30 (1963);  
 OHIO REV. CODE ANN. §§ 2901-35-36 (Page 1954);  
 ORE. REV. STAT. §§ 30.670-680 (1963);  
 PA. STAT. ANN. tit. 18, § 4654 (1963);  
 R. I. GEN. LAWS ANN. §§ 11-24-1 to -24-6 (1956);  
 S. D. SESS. LAWS ch. 58 (1963);  
 VT. STAT. ANN. tit. 13, §§ 1451-52 (1958);  
 WASH. REV. CODE §§ 49.60.010-.170, 9.91.010 (1962);  
 WIS. STAT. ANN. § 942.04 (1958);  
 WYO. STAT. ANN. §§ 6-83.1 to -83.2 (1963);  
 D.C. CODE ANN. §§ 47-2901 to -2911 (1951).

Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841, 842 n.4 (1965). See also Annot., 87 A.L.R.2d 120 (1968).

statutes were classified, for purposes of analysis, into four categories by Wallace Caldwell.<sup>69</sup> The first type of statute, with a relatively narrow coverage,<sup>70</sup> is typically very selective and limited in phraseology. They often provide exclusions of one sort or another. The credit buyer is frequently denied any relief under this type of statute. The second type of statute, which has added specific new proscriptions to an older equally specific listing, is typified by the New York statute.<sup>71</sup> Unfortunately, even under this extensive listing, credit transactions are not included. The only hope of the low income consumer under this type of statute is to demonstrate that a loan or credit institution is of the same kind as one specifically listed. If this attempt fails, credit discrimination will remain legally unnoticed in states with this type of statute.

The third type of statute is similar to the second but differs in the inclusion of contemporary categories of public places and is preceded or followed by such language as "to include, but not limited to" or "and any other places, etc."<sup>72</sup> This type of statute, by its own language, leaves open many possibilities of interpretation. For example, the Washington statute<sup>73</sup> sets out a very general definition of the places where discrimination is unlawful. It also contains the "not limited to" language. Usually personal services are among those places listed. Credit could possibly qualify as a place of public accommodations in a state with this type of statute.

The fourth type of statute is written broadly enough to cover all establishments which offer services to the public but does not name specific types of establishments.<sup>74</sup> These statutes are typically designed to cover all instances of discrimination by places offering service to the public. Almost any credit institution can be sued under this broadly phrased type of statute.<sup>75</sup>

69. Caldwell, *supra* note 68, at 843.

70. *E.g.*, District of Columbia, Maryland; *see* note 68 *supra*.

71. New Jersey, New Mexico, New York; *see* note 68 *supra*.

72. Alaska, Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington and Wisconsin; *see* note 68 *supra*.

73. *Wash. Rev. Code* § 9.91.010 (d) (1961). Any place of public resort, accommodation, assemblage or amusement is hereby defined to include, *but not to be limited to*, any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods and merchandise, or for the rendering of personal services . . .

74. *E.g.*, Delaware, Indiana, Massachusetts, New Hampshire, Vermont and Wyoming; *see* note 68 *supra*.

75. An example is California where the statute reads:

All citizens within the jurisdiction of this state, are entitled to the full and equal accommodation, advantage, facilities, privileges or services in all business establishments of every kind whatsoever.

CAL. CIV. CODE § 51 (1959).

## 2. STATUTORY REMEDIES

Caldwell classified the types of remedies available under the four types of statutes into four additional groups. His first group includes civil remedies which provide for the granting of actual damages and exemplary damages to a limited extent.<sup>76</sup> The second type of remedy is the provision of fines or imprisonment as a criminal penalty.<sup>77</sup> A third type of remedy provides for the alternate use of civil or criminal proceedings where instances of discrimination are discovered.<sup>78</sup> Finally, Caldwell notes that an increasing number of states are following the federal practice of establishing an administrative agency for the purposes of education, conciliation, and, as a last resort, provision of legal services.<sup>79</sup>

## 3. INTERPRETATIVE CASES

Difficulties arise in trying to generalize with respect to state court cases because the state statutes differ so greatly. A recent Massachusetts case, however, discusses two of the instances of discrimination pointed out above—namely, application blanks listing race, color, religion or national origin and personal interview notations as to the same. The case of *Local Finance Company of Rockland v. Massachusetts Commission Against Discrimination*,<sup>80</sup> illustrates the broad interpretation given the most general type of statute.<sup>81</sup> That court held that a finance company in the business of making loans was a “place of public accommodation” within the statute.<sup>82</sup> Further, it found that notations by the interviewer in blocks set out on the application form as to whether the applicant is of Negro, White or Spanish ancestry, were definitely discriminatory when used as a basis for disallowing credit applications. The court based its decision on the “broad legislative purpose” in the statute’s adoption and cited persuasive cases in Massachusetts and other jurisdictions which broadly interpreted similar statutes. These cases included allegations of discrimination in rental apartments,<sup>83</sup> dancehalls,<sup>84</sup> a bootblack stand,<sup>85</sup> sale of homes,<sup>86</sup> and a recreation park.<sup>87</sup> In each of these cases the court

76. CAL. CIV. CODE § 51 (1959).

77. These states include the District of Columbia, Idaho, Iowa, Maine, Nebraska, New Hampshire, New Mexico, North Dakota, South Dakota, Vermont and Wyoming.

78. These states include Illinois, Minnesota and Wisconsin.

79. These states include Alaska, Colorado, Connecticut, Delaware, Indiana, Kansas, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Rhode Island, Pennsylvania, and Washington.

80. 355 Mass. 10, 242 N.E.2d 536 (1968).

81. See section (B)(1) at p. 291 *supra*.

82. MASS. GEN. LAW, ch. 272, § 92A, *as amended*, ch. 437 (1953).

83. *Massachusetts Commission Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N.E.2d 595 (1962).

84. *Amos v. Prom, Inc.*, 117 F. Supp. 615 (N.D. Iowa 1954).

85. *Darius v. Apostolos*, 68 Colo. 323, 190 P. 510 (1919).

86. *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 370 P.2d 313 (1962).

87. *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955).



had found the activity to come under the classification of "place of public accommodation"; consequently, each discrimination was held unlawful.

Though judges in state courts are limited by the statutory language of the legislature, a broad interpretation of the statutes can be utilized in order to bring the minority consumer, who is the subject of discrimination, within the range of judicial assistance under the other three statutory types.<sup>88</sup>

Even if judges were willing to utilize the most liberal interpretations, it may still be concluded that in only approximately fifty percent of our states can an aggrieved credit applicant obtain relief against the "exploiters" who seek to shackle him with unreasonable credit payments for life. An analysis of the other fifty percent of the states (those which have passed no antidiscrimination legislation or who have greatly restricted existing legislation) indicates that most of these are southern states. These are the states whose very belligerency prompted the passage of the Civil Rights Act of 1866 and the thirteenth, fourteenth, and fifteenth amendments. The prospects for enactment of workable legislation by these states appear dim. These stubborn states need federal leadership to guarantee the freedom which the Congress granted all minority members after the Civil War.

#### IV. LEGISLATIVE POSSIBILITIES

Given the fact that relatively few remedies may be had under existing law and given the presence of extensive exploitation by local merchants of the minority class of consumers, a mandate for legislative action is present. There are indications that Congress is moving toward credit legislation. The recent *1968 Civil Rights Act* contains provisions which make it illegal to discriminate in denying applications for loans in the financing of housing.<sup>89</sup> Also, the Civil Rights Act of 1964 contains provisions which prohibit discrimination against applicants for employment.<sup>90</sup> If this trend is to be continued, the problem becomes one of how can Congress find the constitutional authority to enact legislation to remedy the discrimination in credit practices. There are several possible sources from which this power may be derived.

##### A. *The Interstate Commerce Clause*

The commerce clause is set out in article I, section 8, clause 3: "The Congress shall have power . . . To regulate commerce with foreign Nations, and among the several states. . . ."<sup>91</sup> The case of *Gibbons v.*

88. See note 73 *supra* and accompanying text.

89. Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (codified in scattered sections of Titles 18, 25, 42 U.S.C.).

90. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253 (codified in scattered sections of Titles 5, 28, 42 U.S.C.).

91. U.S. CONST. art. 1, § 8, cl. 3.

*Ogden*,<sup>92</sup> was one of the first cases to interpret the meaning of "commerce." "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ."<sup>93</sup> Speaking further of the scope of this commerce power, Chief Justice Marshall pointed out:

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.<sup>94</sup>

The case of *Heart of Atlanta Motel, Inc. v. United States*,<sup>95</sup> defined the scope of the power of Congress under the commerce clause:

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more states than one" and has a real and substantial relation to national interest.<sup>96</sup>

Justice Clark, in further clarification of this interstate commerce power, stated:

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.<sup>97</sup>

With this broad interpretation of the commerce power, certainly local activities can conceivably be encompassed by Congress in legislative enactments when these activities "affect commerce." Congress has taken this step in passing the Civil Rights Act of 1964.<sup>98</sup> The provisions of Title II,<sup>99</sup> which seeks to eliminate discrimination in places of public accommodation, and Title VII,<sup>100</sup> which attempts to prevent discrimination in employment, are particularly on point. Both of these provisions establish a broad definition of what activities "affect commerce" and therefore fall within the scope of the Act. In fact, the Accommodations Act specifies that a restaurant can "affect commerce" even if it does not serve inter-

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92. 22 U.S. (9 Wheat.) 1 (1824).

93. *Id.* at 83.

94. *Id.* at 86.

95. 379 U.S. 241 (1964).

96. *Id.* at 255.

97. *Id.* at 258.

98. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of Titles 5, 28, 42 U.S.C.).

99. *Id.* at 243.

100. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253 (codified in scattered sections of Titles 5, 28, 42 U.S.C.).

state travelers, as long as a substantial portion of the food which it serves has moved in commerce.<sup>101</sup>

Therefore, it appears that Congress has sought to prevent discrimination in housing,<sup>102</sup> in employment,<sup>103</sup> and in private accommodations<sup>104</sup> in one comprehensive act. There is strong support for an extension of the interstate commerce power of Congress into the personal service area, which is receiving an increasing portion of consumer business. Credit practices could properly be policed within these "service" provisions, where an extension of federal influence is necessary.

The legislative history of the 1964 Act indicates the dissatisfaction of some with the slow-moving state legislation. The Congressional committee pointed out:

[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious.<sup>105</sup>

The committee believed that federal legislation would provide national leadership by dealing with the most troublesome problems. The purpose was to create an atmosphere conducive to voluntary or local resolution of other forms of discrimination. It is certainly true that the status of credit in our economy has greatly increased since the 1963 consideration of this legislation.<sup>106</sup> It is also true that certain states, approximately twenty in number and mostly Southern, have failed to follow the federal lead in passing legislation to curb discrimination.<sup>107</sup> It would seem that federal leadership could again be asserted via the interstate commerce clause of the Constitution by amending public accommodations to include a broader scope of services, namely credit. One congressman expressed the additional majority view by pointing out that "In title II, the bill reported by the full committee is deficient in that it guarantees equal access to only some public accommodations, as if racial equality were somehow divisible."<sup>108</sup> He went on to point out that the subcommittee bill provided for coverage of all places of public accommodations and was therefore more closely attuned to the needs of society.<sup>109</sup>

If Congress used the interstate commerce clause as the basis of prevention of discrimination in the credit area, a question would arise as to whether the evidence would be sufficient to sustain this means as

101. *Id.* at 243.

102. Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (codified in scattered sections of Titles 18, 25, 42 U.S.C.).

103. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253 (codified in scattered sections of Titles 5, 28, 42 U.S.C.).

104. *Id.* at 243.

105. U.S. CODE CONG. & ADM. NEWS 2393 (1964).

106. STATISTICAL ABSTRACT OF THE UNITED STATES 1967, 465.

107. *E.g.*, Alabama, Georgia, Mississippi, North Carolina and South Carolina.

108. U.S. CODE CONG. & ADM. NEWS 210 (1964). Statement by the Honorable Robert Kastmier.

109. *Id.*

"reasonable."<sup>110</sup> There would be little trouble in showing that retail firms were involved in interstate commerce because they buy at least some goods from out of state manufacturers. To the extent then that discrimination against potential buyers exists, interstate commerce is restricted. The participation of banks and loan companies in interstate commerce would be a question of fact for investigation by Congressional committees. Certainly, the transfer of money must be as integral a part of interstate commerce as the shipment of goods.

Assuming that the need and the reasonableness of the means could be clearly demonstrated at a determinative hearing, there are strong policy reasons to suggest the interstate commerce clause would not be the best route for anti-discrimination legislation. It is clear from the outset that the commerce power is very broad;<sup>111</sup> and that Congress may exercise this power to whatever extent it determines necessary. But legislative history indicates that in passing the 1964 Civil Rights Act, Congress exercised significant restraint in limiting the public accommodations section to a few narrow areas in the interest of national policy. Senator Magnuson, Chairman of the Senate Commerce Committee, explained the basis of the legislation:

[T]he commerce power is broad and plenary; and of course the committee did not have any problem as to the authority of Congress to implement its power under the commerce clause. The committee's real problem was to determine how far it wished to go within this authority, as a matter of national policy . . . .

[I]t appears the problem is not one of power but one of policy, . . .<sup>112</sup>

Apparently, a great burden is placed upon those who would seek to expand the commerce power in the discriminatory credit area, inasmuch as broadening national policy would be necessary. Additionally, the Attorney General, speaking before the House Judiciary Committee, discussed the limits set out in confining the area of governmental concern:

[T]he principle upon which title II stands is a moral one and all forms of racial discrimination are equally objectionable. One can argue legitimately from this moral principle to the inclusion of all forms of business enterprise within the reach of the Constitution. The administrative proposal did not attempt to extend Federal law so far . . . we were reluctant to extend Federal power beyond those areas where it was clearly needed to meet existing problems.<sup>113</sup>

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110. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

111. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

112. 110 Cong. Rec. 7402, 7403 (1964).

113. *House Hearings on Miscellaneous Proposals Regarding Civil Rights of Persons Within the Jurisdiction of the U.S. before Subcommittee No. 5 of the House Committee on the Judiciary*, 88 Cong., 1st Sess. 2655-56 (1963).

Further, there seems to be little connection between the protection of human rights and a constitutional provision designed to establish a unified national economy.<sup>114</sup> The use of the commerce power in antidiscrimination legislation could result in an absurd overextension of that power.

Nevertheless, if sufficient evidence of an existing problem could be gathered and if Congress could be convinced to ease its restrictive policy in extending the commerce clause power, this avenue of approach may provide a firm possibility for future legislation should other possibilities fail.

The most recent Congressional enactments dealing with consumer credit have, in fact, been bottomed on the interstate commerce power. The recent Truth in Lending Law<sup>115</sup> and the regulations promulgated pursuant to this act, commonly called regulation "Z,"<sup>116</sup> control computation of finance charges and require disclosure of annual interest rates. Additionally the regulations affect open end credit plans<sup>117</sup> and real estate credit in those instances when the credit is advanced to an individual and not for business purposes unless the business is agriculture.<sup>118</sup>

Title VI of the recent credit disclosure bill<sup>119</sup> provides additional requirements for the keeping and disclosure of records by organizations dealing in consumer credit information. Again, the power source is related to commerce.

Finally, Title II of the Consumer Credit Protection Act,<sup>120</sup> also passed under the commerce power, has recently been upheld by the United States Supreme Court as applied to "extortionate credit transactions." In a case involving a "loan shark," the Court held the Congressional findings of a connection between extortionate credit transactions and organized crime; and a second connection between organized crime and interstate commerce were sufficient to support federal regulation of this otherwise intrastate activity.<sup>121</sup> The Court, per Mr. Justice Douglas, concluded that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce."<sup>122</sup> When the rationale of *Perez v. United States* is taken in the light of the previous decisions in *Heart of Atlanta Motel v. United States*, and *Katzenbach v. Mc Clung*, it seems clear that if Congress can legislate regarding interest rates and

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114. Cf. Spector, *The Fourteenth Amendment Power and Private Discrimination: U.S. v. Guest*, 14 U.C.L.A. L. Rev. 553 (1967).

115. 15 U.S.C. § 1601 *et seq.* (Supp. 1971).

116. 12 C.F.R. §§ 226.2-226.8 (1969).

117. 12 C.F.R. § 226.7 (1969); *and see* *Ratner v. Chemical Bank New York Trust Co.*, 309 F. Supp. 983 (S.D.N.Y. 1970).

118. 12 C.F.R. § 226.8 and 226.9 (1969).

119. U.S. CODE CONG. & ADM. NEWS 1316 (1970); codified in scattered sections of 15 U.S.C. (Supp. 1971).

120. 18 U.S.C. ch. 42 (Supp. 1968).

121. *Perez v. United States*, 91 S. Ct. 1357 (1971).

122. *Id.* at 1361.

their disclosure because of an effect on commerce, Congress can reach out to cover the discrimination area of credit transactions.

### B. *The Thirteenth Amendment*

The history of the thirteenth amendment does not readily lend itself to an interpretation of "involuntary servitude" or "slavery" as inclusive of the exploitation of a consumer in his credit dealings. The thirteenth amendment to the Constitution abolishes not only "slavery" as it existed at the time of the amendment's passage, but also involuntary servitude. The thirteenth amendment was self-executing as applied to existing conditions, but it also grants to Congress the power to enforce its provisions by appropriate legislation.<sup>123</sup> It is this second section of the thirteenth amendment which Congress can and should utilize. The thirteenth amendment is specifically adapted to prevent servitudes established by individuals—there is clearly no "state action" requirement as under the fourteenth amendment. The *Civil Rights Cases*<sup>124</sup> interpreted the thirteenth amendment as follows:

By its own unaided force and effect it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.<sup>125</sup>

It is arguable that this amendment should be applied in the instance of credit discrimination because the Congress has the power by appropriate legislation to abolish personal servitudes. Justice Harlan, dissenting in the *Civil Rights Cases*,<sup>126</sup> pointed out that the

[c]onstitutional provisions adopted in the interests of liberty, and for the purpose of securing through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. . . .<sup>127</sup>

This original intent of Congress, then, was to use national legislation to prevent "involuntary servitudes" as the definition of the word changed.

123. U.S. CONST. amend. XIII, § 2: "Congress shall have the power to enforce this article by appropriate legislation." Congress has passed the Peonage Acts, 14 Stat. 546 (1867), pursuant to this authority.

124. 109 U.S. 3 (1883).

125. *Id.* at 20.

126. 109 U.S. 3 (1883).

127. *Id.* at 26.

The United States Supreme Court, in the recent case of *Jones v. Alfred H. Mayer Co.*,<sup>128</sup> seems to have breathed new life into section two of the thirteenth amendment by holding that Congress did have the power under this section to enact a statute to eradicate conditions that prevented Negroes from buying and renting property because of their race or color. The Court in discussing section two stated:

"By its own unaided force and effect," the thirteenth amendment "abolished slavery, and established universal freedom." Civil Rights Cases, 109 U.S. 3, 20, 3 S. Ct. 18, 28. Whether or not the amendment *itself* did any more than that—A question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"<sup>129</sup>

Later Justice Stewart summed up the question of the authority of Congress under section two:

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.<sup>130</sup>

The *Jones* decision provides Congress with a clear definition of its authority. Congress has the requisite power to define what are "badges and incidents of slavery." The credit discrimination problem with regard to its minority group aspects may qualify for remedial action by way of affirmative legislation under section two of the thirteenth amendment. If sufficient empirical data could be garnered, Congress might be convinced to use the thirteenth amendment as a vehicle to end discrimination in many other areas besides credit. Perhaps Congress will now discontinue the fictions related to the use of the interstate commerce clause in matters of discrimination. There are problems inherent in this interpretation. The thirteenth amendment has been limited to race and color, which would exclude poor whites from legislative relief. Congress would also have to alter its definitions of "personal servitude" and "slavery." Nevertheless,

128. 392 U.S. 409 (1968).

129. *Id.* at 439. Senator Trumbull is quoted by the Court in describing the broad range of Congress under the thirteenth amendment during a discussion of the 1866 Civil Rights Act:

I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what the appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.

392 U.S. 409, 440 (1968), quoting from CONG. GLOBE, 39th Cong., 1st Sess., 322 (1865).  
130. *Id.* at 440.

equipped with the holding in *Jones*, Congress can fashion relief for minority consumers who are being discriminated against in credit dealings because of their race or color.

### C. *The Fourteenth Amendment*

In a search for a valid Congressional power source, the fourteenth amendment provides a possible answer to the credit discrimination problem.

Section five of the fourteenth amendment has a provision for legislation to be enacted: "The Congress shall have the power to enforce by appropriate legislation, the provisions of the article."<sup>131</sup> This clause has not been frequently used due to the requirement that Congress could only enact legislation to counteract discriminatory state laws. In other words, section five had the same limitation as section one of the fourteenth amendment: it was operative only against the state and not against private individuals. This point is emphasized in the *Civil Rights Cases*<sup>132</sup> wherein it is pointed out that:

[T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of citizens, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce. . . .<sup>133</sup>

Recently, however, several trends are discernible which will have a definite effect upon the section five enabling provision of the fourteenth amendment. First, there is increasing doubt as to the use of the commerce clause as a basis for preventing discrimination. In the case of *Edwards v. United States*,<sup>134</sup> Justice Douglas, in a concurring opinion, pointed out that the rights of persons occupy a more protected position in our constitutional system than the movement of cattle, steel and coal.<sup>135</sup> The 1964 case, *Heart of Atlanta Motel, Inc. v. United States*,<sup>136</sup> recognizes that "Congress based the Act [1964 Civil Rights Act] on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate commerce under Art. 1, 8, cl. 3, of the Constitution."<sup>137</sup> Again Justice Douglas concurred and restated his reluctance to rely on the commerce clause to solve discrimination problems.<sup>138</sup> The real reason for dissatisfaction with the commerce clause is that there should certainly be a more firm basis upon which to rest legislative protection of human

131. U.S. CONST. amend. XIV, § 5.

132. 109 U.S. 3 (1883).

133. *Id.* at 13.

134. 314 U.S. 160 (1941).

135. *Id.* at 177.

136. 379 U.S. 241 (1964).

137. *Id.* at 249.

138. *Id.* at 279.



rights than a constitutional power source which was intended to establish a unified national economy.

Second, the Warren Court, and more specifically Justice Brennan, has held that Congress can pass legislation under section five of the fourteenth amendment to prevent discrimination by private individuals as well as state action in order to protect fourteenth amendment rights.<sup>139</sup> In the case of *United States v. Guest*,<sup>140</sup> Guest and a fellow defendant were charged with conspiring to deprive Negroes of the enjoyment of their constitutional rights in violation of 18 U.S.C. § 241 (1964). The defendants moved to dismiss the indictment on the basis that it failed to state an offense. The lower court dismissed the indictment. The Supreme Court reversed the judgment below. Justice Stewart held in Part II of the opinion of the court, that state action was necessary under the statute. However, he believed that sufficient state action existed to invoke the equal protection clause. Most significantly, though, six members of the Court<sup>141</sup> determined that section five was intended for more than corrective legislation after the court had found the actions of a particular state violative of the fourteenth amendment. Justice Brennan stated:

[T]here can be no doubt that the specific language of section five empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment Rights.<sup>142</sup>

Under this interpretation of section five, there is no reason why legislation could not be passed under the positive grant of power to Congress. This section could then become a more meaningful and vital element of the Constitution—there is really little for the legislature to do under the old interpretation, inasmuch as once the court declared the state action invalid, there was no need for legislation.

Later in 1966, in the case of *Katzenbach v. Morgan*,<sup>143</sup> Justice Brennan followed the prior decisions, saying that:

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. . . .<sup>144</sup>

The Court has given Congress any authority which may have been stripped from it in the past.

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139. See Spector, *The Fourteenth Amendment Congressional Power and Private Discrimination: U.S. v. Guest*, 14 U.C.L.A. L. REV. 553 (1967) and Rose, *An Appropriate Constitutional Provision for Dealing with the Problems of Discrimination*, 18 W. RES. L. REV. 964 (1967).

140. 383 U.S. 745 (1966).

141. Those members were Justices Brennan, Warren, Douglas, Fortas, Clark and Black.

142. *United States v. Guest*, 383 U.S. 745, 782 (1966).

143. 384 U.S. 641 (1966).

144. *Id.* at 650.

Section five now authorizes Congress to make laws that it believes are necessary to protect a right created and arising under the fourteenth amendment. Consequently, Congress can decide whether punishment of private conspiracies interfering with such a right are necessary for its full protection.

A threshold problem in the credit area is the location of a right guaranteed by the fourteenth amendment upon which legislation can be based. Perhaps denial of equal protection will afford the basis for Congressional action. Alternatively, it might be pointed out that since § 202 of the 1964 Civil Rights Act<sup>145</sup> was passed prior to *Guest* and includes a state action requirement, it might be amended to exclude such requirement. That section provides:

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.<sup>146</sup>

The elimination of the state action requirement would enable Congress to reach the private individuals who are denying credit based upon race, color, religion or national origin or who are invalidly discriminating as to price and finance charges.

Congress has enacted legislation under section five of the fourteenth amendment since the *Guest* decision. The majority committee report on the 1968 Civil Rights Act states that:

H.R. 2516 (1968 Civil Rights Act) is such a statute (as indicated in *Guest*) and would—as six Justices said was constitutionally possible—cover racially motivated acts of violence which do not involve participation or connivance of public officials.<sup>147</sup>

The continuing force of the state action language of the *Guest* opinions, and consequently the validity of H.R. 2516, is open to question. In 1970, after undergoing significant personnel changes, the Court handed down a decision which would appear to reinstate the state action requirement of the pre-*Guest* cases. In *Adickes v. S.H. Kress & Co.*,<sup>148</sup> Mr. Justice Harlan, speaking for himself and four other Justices, restated the language of *Shelley v. Kramer*<sup>149</sup> to the effect that: “action inhibited by the first section of the fourteenth Amendment is only such action as may be fairly said to be that of the states. . . .” The principle which appeared

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145. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of Titles 5, 28, 42 U.S.C.).

146. *Id.* at 244.

147. U.S. CODE CONG. & ADM. NEWS 1840 (1968).

148. 398 U.S. 144 (1970).

149. 334 U.S. 1 (1947).

to govern the *Adickes* case was the requirement of state action. In assessing that requirement, Mr. Justice Harlan set forth the following criteria:

For state purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the state that has commanded the result by its law. Without deciding whether less substantial involvement of a state might satisfy the state action requirement of the Fourteenth Amendment, we conclude that the petitioner would have shown an abridgement of her Equal Protection right, if she proves that Kress refused her service because of a state enforced custom of segregating the races in public restaurants.<sup>150</sup>

Justices Black and Brennan concurred in the result.

On the basis of the language in *Adickes*, it may be safely predicted that the approach of the Burger Court to the state action requirement of the fourteenth amendment will be more restrictive than the approach of the Warren Court.

## V. CONCLUSION

Society is moving slowly toward resolution of the credit discrimination problem. Under existing federal legislation there is but faint hope of a consumer recovering against credit dealers with the exception of recovery based upon the financing provisions of the new housing act. Some states have enacted provisions to prevent discrimination in places of public accommodation. Other states refuse to legislate against discrimination, impliedly condoning its use in daily practices. Since most states demonstrate an apathetic attitude toward anti-discrimination laws, new federal legislation is needed to provide a remedy for the low income consumer. The enactment of such remedial measures requires selection by Congress of a valid power source. The utilization by Congress of the interstate commerce clause to prevent credit discrimination requires the creation of a fiction in the law which seemingly distorts the real purpose of the commerce clause. The thirteenth amendment could be used as an effective power source; however, the application of the thirteenth amendment has been traditionally limited to situations involving discrimination based on "race or color." The most logical power source appears to be section 5 of the fourteenth amendment, as interpreted by *United States v. Guest*. Even in light of the limitations imposed upon the *Guest* decision by the *Adickes* case, it is the opinion of this author that the *Guest* view is the better view and that it should prevail. By following the *Guest* rationale Congress would be clearly providing appropriate legislation to secure the privileges and immunities of all citizens and to insure due process and equal protection. More importantly, the court would, within constitutional

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150. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970).

bounds, be preventing discrimination by the individual merchant—a person heretofore unaffected in his credit practices by discrimination legislation.

Whether the interstate commerce clause will be replaced as a federal power source will largely be determined by the interpretation placed on the state action requirement of the fourteenth amendment by the Burger Court. Irrespective of which power source is chosen, the need for federal leadership in solving the often neglected problem of credit discrimination is evident. Through such leadership, the Congress can hopefully produce an unprecedented sociological boon to match our high level of economic and technological competence.