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The ECOA and Disparate Impact Theory: A Historical Perspective

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THE ECOA AND DISPARATE IMPACT THEORY: A HISTORICAL PERSPECTIVE

Winnie F. Taylor[*]

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INTRODUCTION

The Equal Credit Opportunity Act ("ECOA") is a federal law that prohibits credit discrimination because of sex, marital status, race, age, and other personal attributes.[1] Congress enacted the ECOA in 1974 to eliminate unfair lending practices that inhibit equality in the credit industry due to factors unrelated to an applicant's creditworthiness.[2] Recently, the Consumer Financial

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[1] Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (2012).

[2] Equal Credit Opportunity Act (ECOA), Pub. L. 93-495, 88 Stat. 1521 (1974) (codified as 15 U.S.C. § 1691 (2012)). Section 502 of Pub. L. 93-495 provided that: "The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status,

Protection Bureau[3] ("CFPB" or "Bureau") sued several automobile financiers and alleged ECOA violations in the various complaints.[4] While all of these cases were settled, those settlements became controversial when critics questioned the CFPB's use of an evidentiary standard known as "disparate impact" to support its discrimination claims. Disparate impact discrimination occurs when plaintiffs with protected class status prove that a defendant's facially neutral practices have a disproportionate adverse effect on them.[5] Defendants are liable for causing these negative effects unless they

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as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act [see Short Title note set out under section 1601 of this title] to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status." *Id.* at § 502. "Creditworthiness" pertains to an applicant's ability and willingness to repay a loan. *See* Winnie F. Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFF. L. REV. 73, 73–74 (1980) [hereinafter Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement*].

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(a) (2012)) (establishing the CFPB).

[4] *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices (Sept. 28, 2015) [hereinafter Press Release, Fifth Third Bank, https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-fifth-third-bank-for-auto-lending-discrimination-and-illegal-credit-card-practices/; Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Order Ally to Pay $80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013) [hereinafter Press Release, CFPB and DOJ Order Ally to Pay $80 Million], https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/; Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing (July 14, 2015) [hereinafter Press Release, Honda to Address Discriminatory Auto Loan Pricing], https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/.

[5] *See* Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J. L. & POL'Y 263, 273 n.38 (2009) [hereinafter Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market*].

can provide legitimate business rationales to justify their practices.[6] Absent such justifications, defendants may be found liable for violations of antidiscrimination laws, even if there was no intent to discriminate.[7]

While plaintiffs may use disparate impact theory to prove unintentional discrimination, they may also use another analytical framework called "disparate treatment" to prove intentional discrimination.[8] Because disparate impact theory imposes liability on defendants regardless of whether they intended to discriminate or not, critics are skeptical about its validity. Some believe that plaintiffs may not use disparate impact analysis to prove their claims unless expressly authorized by a statute.[9] Whether such authorization exists is an issue that the United States Supreme Court has addressed several times.[10] In 1971, the Court decided that Title VII of the 1964 Civil Rights Act[11] authorizes disparate impact liability.[12] Later, in 2005, the Court decided that the Age Discrimination in Employment Act ("ADEA") allows plaintiffs who sue under it to use disparate impact theory to prove their claims.[13] More recently in 2015, the Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, held that disparate impact claims are cognizable under the Fair Housing Act

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[6] *See id.*

[7] *See id.*

[8] *See id.* at 273 n. 39.

[9] *See* Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 BUS. LAW. 829, 830–33 (2006) (arguing that Congress did not intend for the disparate impact method of proving discrimination claims to apply in ECOA litigation because neither the ECOA's statutory discrimination proscription nor its legislative history supports a finding that the Act prohibits facially neutral practices that disparately affect protected class members).

[10] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507 (2015); Smith v. City of Jackson, 544 U.S. 228 (2005); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[11] Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. § 2000e (2011)).

[12] *See Griggs*, 401 U.S. at 435–36.

[13] Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified in scattered sections of the U.S.C.); *Smith*, 544 U.S. at 239.

(FHA).[14] This Article explores whether the Court would similarly conclude that ECOA plaintiffs can use impact analysis to prove lending discrimination claims.

Through an analysis of the Court's reasoning in *Inclusive Communities,*[15] this Article argues that from a historical perspective, the decision supports ECOA disparate impact liability. The Court drew its conclusion in *Inclusive Communities* from three sources: the text of the FHA, congressional intent, and public policy. Although the Court's textual analysis does not apply successfully to the ECOA, this Article argues that the statute's legislative underpinnings and policy objectives overcome this deficiency.

The historical perspective this Article presents traces the ECOA from its origin in 1974 when Congress enacted the statute. At that time, lawmakers focused primarily on prohibiting the unfair treatment of women by lenders due to sex and marital status.[16] This Article reconstructs the lending environment that existed for women in the early 1970s and demonstrates why Congress likely intended for the ECOA to remove intentional as well as unintentional barriers that prevented women from obtaining credit equality. Although

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[14] *Inclusive Cmtys.*, 135 S. Ct. at 2525 (holding that "disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose."); *see* Fair Housing Act (FHA), 42 U.S.C. §§ 3604, 3605 (2012).

[15] In 2008, the Inclusive Communities Project, Inc. (ICP), a Dallas housing non-profit, sued the Texas Department of Housing (TDHCA), alleging that TDHCA awarded incentive tax credits for the construction of affordable housing more frequently in minority neighborhoods than in Caucasian neighborhoods, thus perpetuating *de facto* segregation housing patterns in violation of the FHA. In support, ICP relied on the statistical disparity in the allocation of low-income housing tax credits. *Inclusive Cmtys.*, 135 S. Ct. at 2514.

[16] This legislation had its main origin hearings conducted on May 22 and 23, 1972 by the National Commission on Consumer Finance. The hearings were devoted to the subject of discrimination in credit extensions by reason of sex and marital status. *See Hearings on H.R. 14856, A Bill to Prohibit Discrimination on the Basis of Race, Color, Religion, National Origin, Age, Sex, or Marital Status in the Granting of Credit, and H.R. 14908 A Bill to Prohibit Discrimination on the Basis of Sex or Marital Status in the Granting of Credit Before the Subcomm. On Consumer Affairs of the H. Comm. On Banking and Currency*, 93d Cong., 88 (1974) [hereinafter *Hearings*] (statement of Wright Patman, Chairman).

other scholars have mostly argued that the history of the ECOA's amendments reveal congressional endorsement of disparate impact theory,[17] this Article is the first to trace congressional support for impact theory all the way back to the statute's pre-enactment.

To be sure, whether disparate impact theory is a valid methodology that ECOA plaintiffs can utilize to prove their lending discrimination claims is not simply an arcane academic issue. Lawmakers recently weighed in on this question. On April 18, 2018, the U.S. Senate passed a resolution that precludes the CFPB from using impact analysis in future lawsuits it brings against automobile financiers.[18] A few weeks later, on May 8, the House of Representatives passed a companion resolution,[19] and shortly thereafter on May 21, President Donald Trump signed the resolution into law.[20] These actions nullify guidance the CFPB gave to indirect auto financiers on how they can avoid ECOA disparate impact liability.[21] The guidance, which the CFPB presented in a 2013 Bulletin, informed these lenders that the Bureau believed it has the authority to use disparate impact theory to litigate certain ECOA violations.[22] While nullification of the Bulletin undoubtedly reflects the desire of Congress and the President to undercut the CFPB's ability to bring disparate impact claims in indirect auto lending cases, it does not address the broader question of whether the ECOA authorizes disparate impact liability. This Article addresses that question.

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[17] *See* Francesca Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Reading of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 HARV. L. & POL'Y REV. S43, S44–45 (2015).

[18] S.J. Res. 57, 115th Cong. (2018) (enacted).

[19] *Id.*

[20] *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018).

[21] *See* S.J. Res. 57.

[22] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., 2013-02 1 (2013), http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL.] (providing that "[a]n additional consideration for auto lenders covered as creditors under the ECOA is whether and under what circumstances they are liable for pricing disparities on a prohibited basis. When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact.").

This Article is divided into three parts. Part I presents the chronology that led to the 2018 congressional resolutions that curtail the CFPB's use of disparate impact theory in ECOA cases. This part puts the debate over whether impact theory is cognizable under the ECOA in its most contemporary light. This part also shows how congressional leaders have politicized the debate and have thus transformed it into a dispute over the legitimacy of the CFPB itself.[23] Part II examines the ECOA's historical background and its policy considerations. This examination shows that Congress implicitly intended for the ECOA to proscribe disparate impact discrimination when it enacted the statute in 1974.[24] Thus, Congress inextricably linked the ECOA and disparate impact liability from the statute's beginning. Next, Part III analyzes the Supreme Court's decision in *Inclusive Communities*, a case involving the FHA. Although the FHA and ECOA are similar in purpose, there are textual differences between the two statutes. After pointing out these differences, this part articulates an interpretation of *Inclusive Communities* that nevertheless supports impact analysis in ECOA cases. Finally, the Article's concluding section proposes a legislative reform and reflects on the broader implications of disparate impact theory. The proposal urges Congress to amend the ECOA's text to overtly state what the drafters implicitly understood—that the statute authorizes disparate impact. But if Congress fails to amend expeditiously, this Article urges the U.S. Supreme Court, if confronted with this issue, to follow the path of *Inclusive Communities* and find that the ECOA authorizes disparate impact liability based on its rich historical background.

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[23] *See* Press Release, Fin. Servs. Comm., Hensarling: 'Disparate Impact' Ruling to Have Negative Consequences for All Americans (June 25, 2015), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=399292; *see also* Radio Interview by Steve Inskeep with Republican Rep. Jeb Hensarling (Feb. 24, 2017) ("[W]e've had [the CFPB] ruled totally unaccountable. It is a rogue agency."); Jim Henry, *Some House Republicans Dig In Against the Consumer Financial Protection Bureau And Auto Loan Measures*, FORBES (June 29, 2013), https://www.forbes.com/sites/jimhenry/2013/06/29/some-house-republicans-dig-in-against-the-consumer-financial-protection-bureau-and-auto-loan-measures/#4fd5f40463e3 ("House Republicans are keeping up a fight against the [CFPB].").

[24] *See Hearings*, *supra* note 16, at 136.

I. SENATE JOINT RESOLUTION 57 OF 2018: DEALER MARKUPS, CFPB SETTLEMENTS AND CONGRESSIONAL RESPONSES

A. Dealer Markups

On January 12, 2012, President Barack Obama appointed Richard Cordray to direct the CFPB,[25] the federal agency Congress established to protect the economic interest of consumers after the 2008 financial crisis.[26] Shortly after his appointment, Cordray assembled an Auto Finance Working Group to address concerns regarding what some have described as a dealer markup problem in the auto finance industry.[27]

The markup problem emanates from the interactions among auto dealers, consumers and auto loan financiers.[28] In a typical automobile purchase, an auto dealer arranges for a prospective buyer to obtain financing from a lender. The dealer sends the buyer's contract to several lenders to ascertain whether they will finance the sale. If the lenders decide to purchase the contract from the dealer, they inform the dealer of the interest rate they will charge the customer—the so-called "buy rate."[29] The dealer adds an amount to the buy rate, quotes this amount to the purchaser, and then takes as his compensation all or a portion of the difference between the buy

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[25] Press Release, Office of the Press Secretary, The White House, President Barack Obama, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[26] *See* Henry, *supra* note 23; *see generally* Dodd-Frank Wall Street Reform and Consumer Protective Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.) (establishing the CFPB).

[27] *See* REPUBLICAN STAFF OF THE COMM. ON FIN. SERV., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING 7 (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf.

[28] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22, at 1.

[29] *See* Winnie F. Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 B.U. REV. BANKING & FIN. L. 199, 237–44 (2011) [hereinafter Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*].

rate and the increased amount. Commentators refer to this compensation in various ways, including "dealer markup," "dealer participation rate," and "dealer reserve."[30] Dealers broker numerous financing transactions like these annually. As a result, auto loans are the third-largest source of outstanding household debt in the United States, after mortgages and student loans.[31]

Opponents of dealer markups argue that the practice is dishonest and exploitative. Some say the practice is deceptive because dealers do not voluntarily disclose to consumers that they increase the interest rate on their auto loans above what the lender is willing to charge them.[32] Dealers are quick to point out that no law requires them to disclose their compensation matrix.[33] Others find troubling the unlimited discretion lenders give to dealers to increase the buy rate and thereby determine their compensation.[34] The CFPB is among these critics. The Bureau's core concern is that the discretion lenders give to dealers will incentivize them to disproportionately increase the interest rates of purchasers within the groups the ECOA protects.[35]

The Bureau explained its views to indirect lenders on dealer markups and their potential for creating ECOA disparate impact liability, in a Bulletin the CFPB issued on March 21, 2013. In part, the Bulletin states,

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[30] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22, at 1–2. In some instances, the lender and the dealer split between themselves the difference between the buy rate and the dealer's marked-up rate. *Id.*

[31] BD. OF GOVERNORS OF THE FED. RES. SYS., ECONOMIC RESEARCH & DATA, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015 41 (2016), https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf.

[32] Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*, *supra* note 29, at 237–44.

[33] *See 60 Minutes—The Best Possible Deal*, (CBS television broadcast Apr. 4, 2004) (transcript available at https://www.cbsnews.com/news/the-best-possible-deal-01-04-2004/).

[34] *Id.*

[35] Daniel W. Beebe, *Why Does the CFPB Want to Curb Auto Lenders' Discretion to Charge Higher or Lower Interest Rates?*, DORSEY (Aug. 10, 2015), https://consumerfinancialserviceslaw.us/why-does-the-cfpb-want-to-curb-auto-lenders-discretion-to-charge-higher-or-lower-interest-rates/.

> The supervisory experience of the CFPB confirms that some indirect auto lenders have policies that allow auto dealers to mark up lender-established buy rates that compensate dealers for those markups in the form of reserve (collectively, "markup and compensation policies"). Because of the incentives these policies create, and the discretion they permit, there is a significant risk that they will result in pricing disparities on the basis of race, national origin, and potentially other prohibited bases . . . [36] When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact.[37]

Significantly, even though the dealers are the ones who create the lending disparities, the CFPB cannot sue them for discrimination because a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") exempts them from the Bureau's ECOA enforcement authority.[38]

The Bulletin advised indirect auto lenders that they can limit their risk of ECOA disparate impact liability by "imposing controls on dealer markup and compensation policies . . . or . . . eliminating dealer discretion to markup buy rates and fairly compensating dealers using another mechanism, such as a flat fee per transaction,

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[36] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22, at 2.

[37] *Id.* at 3.

[38] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1029, 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5519). Section 1029(a) of the Dodd-Frank Act states: "Except as permitted in subsection (b), the Bureau may not exercise any rulemaking, supervisory, enforcement, or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. *Id. See also* LARRY KIRSCH & ROBERT N. MAYER, FINANCIAL JUSTICE THE PEOPLE'S CAMPAIGN TO STOP LENDER ABUSE 107–22 (2013) (arguing that the auto dealer lobbyists, especially the National Automobile Dealers Association, spearheaded efforts to carve out the exemption).

that does not result in discrimination."[39] Also, in footnote 5, the Bureau reaffirmed its view that disparate impact liability is cognizable in fair lending cases and that the CFPB may legitimately use this tool when it enforces lender compliance with the ECOA and Regulation B.[40]

In sum, the Bulletin stated that the CFPB would utilize all its regulatory tools, including disparate impact theory, to ensure that the market for auto lending provides fair and nondiscriminatory access to credit for consumers.[41] Moreover, the Bulletin's explicit statement that impact theory is crucial to the Bureau's duty to effectively oversee lending markets sparked litigation and congressional concern about whether the ECOA authorizes disparate impact claims.

B. CFPB Auto Lender Settlements After the March 21, 2013 Bulletin and Congressional Responses

Although the CFPB's March 2013 Bulletin included recommendations for how indirect auto lenders could ensure that they were operating in compliance with fair lending laws, the Bureau nevertheless ended up suing some of them for ECOA disparate impact discrimination. Ally Financial Inc. and Ally Bank ("Ally") were the first of these lenders that the CFPB sued after issuance of the Bulletin.[42] The enforcement action against Ally resulted from a CFPB investigation that began in September 2012.[43] That investigation evaluated Ally's indirect lending program for

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[39] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22, at 4.

[40] *Id.*; Regulation B, 12 C.F.R. § 202.16 (2017). Regulation B is the ECOA's implementing regulation.

[41] CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22, at 5.

[42] *See* Press Release, CFPB and DOJ Order Ally to Pay $80 Million, *supra* note 4.

[43] *Id.*; Consent Order, In the Matter of Ally Financial Inc. and Ally Bank (No. 2013-CFPB-0010, Dec. 19, 2013), http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf [hereinafter Consent Order, In the Matter of Ally].

compliance with the ECOA[44] and concluded that more than 235,000 minority borrowers paid disproportionately higher interest rates for auto loans Ally financed between April 2011 and December 2013.[45] Further, the investigation found that the pricing differences between minority and nonminority consumers resulted from the discretion Ally gave to dealers to markup interest rates[46] and that "Ally failed to implement an effective [indirect lending] compliance program to monitor its loan portfolio for discrimination."[47] On December 20, 2013, the Bureau settled its complaint with Ally and ordered it to pay $18 million in civil penalties and $80 million in damages to compensate the African-American, Hispanic, and Asian and Pacific Islander borrowers Ally's indirect lending policy allegedly harmed.[48]

The Department of Justice (DOJ) partnered with the CFPB to bring the action against Ally[49] and both enforcement agencies issued press releases that announced the Ally settlement. In the CFPB's press release, then-Director Richard Cordray stated that the agency was going to return "$80 million to hard-working consumers who paid more for their cars and trucks based on their race or national origin."[50] A portion of the DOJ's press release that former-Attorney General, Eric Holder, issued stated:

> With this largest-ever settlement in an auto loan discrimination case, we are taking a firm stand

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[44] Consent Order, In the Matter of Ally, *supra* note 43, at 3–4; Press Release, CFPB and DOJ Order Ally to Pay $80 Million, *supra* note 4.

[45] Consent Order, In the Matter of Ally, *supra* note 43, at 5–7; Press Release, CFPB and DOJ Order Ally to Pay $80 Million, *supra* note 4.

[46] Consent Order, In the Matter of Ally, *supra* note 43, at 16, ¶ 24.

[47] Press Release, CFPB and DOJ Order Ally to Pay $80 Million, *supra* note 4.

[48] *Id.*; *see also* Consent Order, In the Matter of Ally, *supra* note 43, at 15–21 (describing the terms of the settlement).

[49] Consent Order, In the Matter of Ally, *supra* note 43, at 1 ("The CFPB and the DOJ engaged in a joint investigation into [Ally's] compliance with the ECOA").

[50] Press Release, Office of Public Affairs, Dep't of Just., Justice Department and Consumer Financial Protection Bureau Reach $98 Million Settlement to Resolve Allegations of Auto Lending Discrimination by Ally (Dec. 20, 2013), https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-98-million-settlementto.

> against discrimination in a critical lending market. By requiring Ally to provide refunds to those who are overcharged because of their race or national origin, this agreement will ensure relief for Americans who are victimized. It will enable the Justice Department and the CFPB to work closely with Ally and others to prevent discriminatory practices in the future. And it will reinforce our determination to respond aggressively to discrimination in America's lending markets-wherever it is found.[51]

Less than a year after Ally's settlement, the CFPB settled a complaint with another indirect lender—American Honda Finance Corporation ("Honda").[52] Two months later, the Bureau announced a settlement with Fifth Third Bank.[53] The CFPB's complaints against these lenders alleged ECOA disparate impact discrimination due to the discretion[54] lenders give to dealers to mark up consumer interest rates.[55] As part of the settlement, Honda agreed to pay $24 million in restitution to affected borrowers and to change its pricing and compensation system to reduce dealer discretion to mark-up interest rates.[56] The consent order also gave Honda the option to

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[51] *Id.*

[52] Press Release, Honda to Address Discriminatory Auto Loan Pricing, *supra* note 4.

[53] Press Release, Fifth Third Bank, *supra* note 4.

[54] The discretion mentioned here refers to the latitude lenders give to auto dealers to mark up the interest rates the bank sets. The banks do not impose limits on the extent to which the dealers may mark up interest rates. Consumer advocates argue that the lack of limits incentivizes dealers to disproportionately increase the interest rates of purchasers within the ECOA protected groups. *See generally supra* Section I.A.

[55] *See* Consent Order, In the Matter of American Honda Finance Corporation (No. 2015-CFPB-0014, July 14, 2015), http://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf; Consent Order, In the Matter of Fifth Third Bank, at 5 (No. 2015-CFPB-0024, Sept 28, 2015), https://files.consumerfinance.gov/f/201509_cfpb_consent-order-fifth-third-bank.pdf.

[56] *See* Press Release, Honda to Address Discriminatory Auto Loan Pricing, *supra* note 4.

move to a non-discretionary dealer compensation program.[57] The Bureau did not assess any penalties because of the agreements Honda made to "directly address the fair lending risk of discretionary compensation systems by . . . reducing or eliminating that discretion altogether."[58]

The Fifth Third Bank settlement resembled Honda's. First, the bank agreed to compensate consumers who the CFPB alleged were harmed by the bank's dealer compensation program.[59] The CFPB would distribute $18 million to African-American and Hispanic borrowers to settle allegations that the bank's indirect lending business damaged these borrowers.[60] Second, the CFPB did not require the bank to pay civil penalties, presumably because the bank agreed to lower caps on dealer discretionary markups.[61]

The Ally, Honda, and Fifth Third Bank settlements were the CFPB's first attempts to prosecute indirect lenders for ECOA disparate impact discrimination. Although the settlements provided compensation to the alleged victims of discrimination and are in that sense a victory for the CFPB's litigation efforts, they foreclosed the opportunity for courts to decide whether the disparate impact analytical framework is appropriate in the CFPB's lending discrimination cases. If the courts confirm that the ECOA permits disparate impact liability, as this Article argues that they should, opposition to the CFPB's authority to use impact theory is likely to decrease substantially.

In the meantime, opposition to the CFPB's use of impact theory in indirect lender settlements persists. Some members of Congress staunchly oppose the settlements. In November 2015, several of these lawmakers sponsored a bill to limit the CFPB's authority to bring enforcement actions against indirect auto lenders.[62] The bill sought "to nullify certain guidance of the Bureau of Consumer Financial Protection and to provide requirements for guidance

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[57] *See* Press Release, Honda to Address Discriminatory Auto Loan Pricing, *supra* note 4, at 10–11.

[58] Press Release, Honda to Address Discriminatory Auto Loan Pricing, *supra* note 4.

[59] Press Release, Fifth Third Bank, *supra* note 4.

[60] *Id.*

[61] *Id.* at ¶ 20.

[62] *See* H.R. Res. 1737, 114th Cong. (2015) (enacted).

issued by the Bureau with respect to auto lending."[63] The House of Representatives passed the bill by a vote of 332 to 96.[64]

After the House passed the bill, the House Congressional Financial Services Committee released a scathing staff report that criticized the CFPB's disparate impact settlement with Ally. The report, *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending* ("Junk Science I"), stated that the CFPB used a "controversial theory of liability known as disparate impact" to support its allegations of discrimination against the bank.[65] Further, the report mocked the results of the CFPB's statistical analysis because the Bureau used a proxy for race to determine racial disparities.[66] Still further, it noted that the Bureau's use of proxies was inappropriate because proxies cannot identify with certainty the race of any consumer the Bureau claimed Ally's practices harmed.[67] Consequently, the report concluded that the racial disparities the impact analysis produced were suspect, and for this reason, the settlement the Bureau secured with Ally was fatally flawed.[68] The report did not discuss the Honda and Fifth Bank settlements.

Although the Bureau denied that the disparities its impact methodology produced were suspect, it acknowledged using a proxy for the race and ethnicity of the consumers in the indirect auto lending cases it settled.[69] The Bureau explained that it relied on the proxies because the ECOA and Regulation B prohibit lenders from obtaining the race and national origin of applicants, which makes actual racial data unavailable.[70] In the absence of such racial data,

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[63] *Id.*

[64] *See H.R. 1737: Reforming CFPB Indirect Auto Financing Guidance Act*, GOVTRACK (Nov. 18, 2015), https://www.govtrack.us/congress/bills/114/hr1737.

[65] REPUBLICAN STAFF OF THE COMM. ON FIN. SERV., *supra* note 27, at 3.

[66] *Id*. at 28–32.

[67] *Id.* at 26–29.

[68] *See id.* at 33, 54.

[69] CONSUMER FIN. PROT. BUREAU, USING PUBLICLY AVAILABLE INFORMATION TO PROXY FOR UNIDENTIFIED RACE AND ETHNICITY 5 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf [hereinafter CONSUMER FIN. PROT. BUREAU, PROXY FOR UNIDENTIFIED RACE].

[70] 15 U.S.C. § 1691(a)(1) (2014); 12 C.F.R. § 1002.6(b)(9) (2018) ("Except as otherwise permitted or required by law, a creditor shall not consider race, color,

the CFPB considered implementing an algorithm that assigns probabilities to whether borrowers are minorities based on their last names and where they live.[71]

The CFPB's explanation for its use of race-proxy algorithms in disparate impact analysis did not satisfy those who claim that the results proxies produce are prone to significant error.[72] A second House Financial Services Committee staff report that was released in January 2016 ("Junk Science II") not only rejected the Bureau's race proxy explanation, but also claimed that "in pursuing its ECOA enforcement agenda, the Bureau has pursued disparate impact cases without justifiable statutory authority."[73] This objection questioned whether the ECOA authorized impact theory in lending discrimination cases and whether the CFPB's use of it was proper.

Despite the questions the Junk Science II report raised about its statistical proxy methodology, the CFPB continued to enforce the settlement it reached with Ally. On January 29, 2016, the Bureau announced that the settlement administrator was distributing checks to consumers for restitution under Ally's agreement.[74] In response, Congressman Jeb Hensarling (R-Texas), Chair of the House Financial Services Committee, urged then-Attorney General, Loretta Lynch, "to immediately suspend distribution of the settlement proceeds."[75] He stated that before distributing the funds,

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religion, national origin, or sex (or an applicant's or other person's decision not to provide the information) in any aspect of a credit transaction.").

[71] *See* CONSUMER FIN. PROT. BUREAU, PROXY FOR UNIDENTIFIED RACE, *supra* note 69, at 6 n.7.

[72] *See* REPUBLICAN STAFF OF THE COMM. ON FIN. SERV., 114TH CONG., UNSAFE AT ANY BUREAUCRACY, PART II: HOW THE BUREAU OF CONSUMER FINANCIAL PROTECTION REMOVED ANTI-FRAUD SAFEGUARDS TO ACHIEVE POLITICAL GOALS 4 (2016), https://financialservices.house.gov/uploadedfiles/cfpb_indirect_auto_part_ii.pdf [hereinafter, REPUBLICAN STAFF OF THE COMM. ON FIN. SERV., UNSAFE AT ANY BUREAUCRACY, PART II].

[73] *Id.* at 19.

[74] *CFPB Distributes Checks for Ally Settlement*, CONSUMER BANKERS ASS'N (Jan. 29, 2016), http://consumerbankers.com/content/cfpb-distributes-checks-ally-settlement.

[75] Press Release, Fin. Serv. Comm., U.S. House of Representatives, Report: Removal of Safeguards Means White Borrowers Receiving Settlement Proceeds Meant for Racial Minorities (Jan. 20, 2016), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=400194.

the CFPB should verify the race of the recipients given that it used a race-proxy to determine the discrimination victims.[76] Further, the Congressman stated that verification was necessary because identifying minority victims by race-proxy results in a group that includes some non-minority consumers who are ineligible to receive compensation,[77] as proxies cannot identify a consumer's race with certainty and thus create a risk of over-inclusion.[78] Consequently, Congressman Hensarling suggested that race verification was necessary to ensure that the compensation funds would be distributed only to minority borrowers and not "invite fraud on a massive scale.[79] To further emphasize his point, Congressman Hensarling quipped that "[s]ending remuneration checks to white borrowers as a means of remedying alleged discrimination against African-American, Hispanic, and Asian borrowers is an unorthodox approach to fair lending enforcement, to say the least."[80]

To ameliorate the potential for fraud, the Junk Science II report suggested that the CFPB use appropriate safeguards when distributing the Ally settlement funds to consumers.[81] Specifically, the report urged CFPB officials to require recipients to confirm their ECOA protected class status and eligibility to receive compensation under penalty of perjury.[82] The CFPB rejected this suggestion and stated that they are "not in a position to question self-identification of race."[83] The Junk Science II report indicated that this response was disingenuous and was actually a cover-up for the Bureau's political motive for distributing the settlement funds without requiring consumers to verify their race.[84] In essence, the report claimed that the Bureau sought to suppress the fact that its impact

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] REPUBLICAN STAFF OF THE COMM. ON FIN. SERV., UNSAFE AT ANY BUREAUCRACY, PART II, *supra* note 72, at 9–15.

[82] *See id.* at 18.

[83] *Id.* (quoting Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015)).

[84] *See generally id.*

analysis incorrectly identified nonminority borrowers as eligible to receive remuneration.[85]

Yet, none of these criticisms and accusations deterred the CFPB from pursuing additional settlements with indirect auto lenders based on allegations of disparate impact discrimination. Accordingly, on February 2, 2016, the Bureau settled its dispute with Toyota Motor Credit Corporation ("Toyota") and resolved charges that the lender's loan program disproportionately harmed African-American, Asian, and Pacific Islander borrowers who paid higher interest rates than Caucasians for auto loans regardless of their creditworthiness.[86] While the consent order required Toyota to pay $21.9 million in restitution to consumers, the CFPB did not impose a penalty.[87] This is most likely due to the fact that the company agreed to reduce dealer discretion to markup interest rates and agreed to consider moving to non-discretionary dealer compensation.[88]

Lawmakers were similarly undeterred in their efforts to limit the CFPB's disparate impact enforcement authority. For example, Senator Jerry Moran (R-Kansas) introduced a bill to halt the CFPB's enforcement actions against indirect auto lenders.[89] Similar to H.R. 1737, the "Reforming CFPB Indirect Auto Financing Guidance Act" condemned the CFPB's disparate impact strategy.[90] Although the Senate Banking, Housing, and Urban Affairs Committee held

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[85] *See generally id.* at 3–4.

[86] Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Reach Resolution With Toyota Mother Credit To Address Loan Pricing Policies With Discriminatory Effects (Feb. 2, 2016) [hereinafter Press Release, CFPB and DOJ Reach Resolution With Toyota], https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-creit-to-address-loan-pricing-policies-with-discriminatory-effects/.

[87] Consent Order, In the Matter of Toyota Motor Credit Corporation (No. 2016-CFPB-0022, Feb. 2, 2016), http://files.consumerfinance.gov/f/201602_cfpb_consent-order-toyota-motor-credit-corporation.pdf.

[88] *Id.*

[89] *See* Reforming CFPB Indirect Auto Financing Guidance Act, S. 2663, 114th Cong. 2d Sess. (2016).

[90] *Id.*

hearings on this bill,[91] the Senate took no further action on it. A few months later, Congressman Hensarling revived his legislative efforts to halt CFPB settlements with indirect auto lenders. In September 2016, he introduced the Financial Choice Act of 2016 ("2016 Choice Act"),[92] which included a provision that would "repeal CFPB's indirect lending guidance."[93] Namely, it sought to repeal the March 2013 Bulletin wherein the CFPB confirmed its authority to bring disparate impact actions against indirect auto lenders.[94] The House of Representatives ultimately did not vote on the 2016 Choice Act, but did end up passing a 2017 version of the Act.[95] This legislation was similar in content to the 2016 proposal in that it was amended to include a provision nullifying the CFPB's indirect lending Bulletin and curbing its authority to bring disparate impact enforcement actions against indirect auto lenders. The Senate did not vote on the 2017 Choice Act, however, in 2018, Congress found another way to overrule the Bulletin. Pursuant to the Congressional Review Act,[96] both houses of Congress passed joint resolutions disapproving the CFPB's Bulletin[97] after the Government Accountability Office concluded that it qualified as a

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[91] *See Reforming CPBF Indirect Auto Financing Act: Hearing on S. 2663 Before the Comm. on Banking, Housing, and Urban Affairs*, 114th Cong. (2016).

[92] Financial Choice Act of 2016, H.R. 5983, 114 Cong. (2016).

[93] *Id.* § 734.

[94] *See* CONSUMER FIN. PROT. BUREAU, CONSUMER FIN. PROT. BUREAU BULL., *supra* note 22.

[95] Financial Choice Act of 2017, H.R. 10, 115th Cong. (2017).

[96] The Congressional Review Act of 1996 permits Congress to expedite or "fast track" procedures to express its disapproval of rules issued by regulatory agencies. This is usually done by the Senate and the House of Representatives each enacting a joint resolution of disapproval. Subtitle E ("Congressional Review") of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, P.L. 104-121, 101 Stat. 847, 868-874 (1996) (codified at 5 U.S.C. §§ 801–808 (2012)).

[97] On April 18, 2018, the U.S. Senate passed S.J. Res. 57 by a vote of 51 to 47, which disapproved of the CFPB's March 2013 Bulletin regarding indirect lender liability and the ECOA. On May 8, the U.S. House of Representatives passed a companion resolution, H.J. Resolution 132, by of vote of 234 to 175. *See* S.J. Res. 57, 115th Cong. (2018); H.R.J. Res. 132, 115th Cong. (2018).

rule subject to legislative evaluation.[98] Congressional disapproval is the functional equivalent of repealing the Bulletin. Thus, when President Trump signed into law Senate Joint Resolution 57 (Resolution 57) on May 21, 2018, the CFPB's statement of its intent to use disparate impact theory in indirect auto lending cases became ineffective and could no longer be regarded as government policy.

It is difficult to separate political motivations from congressional efforts to limit the CFPB's disparate impact enforcement authority.[99] The long-standing Republican opposition to the Bureau since its inception and steadfast Republican efforts to undermine if not eliminate it altogether underscore this difficulty.[100] Although

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[98] In March 2017, Senator Pat Toomey (R-PA) asked the Government Accountability Office to determine whether the CFPB's 2013 Bulletin is a rule subject to congressional review. On December 5, 2017, the GAO issued its finding that the Bulletin qualifies as a rule, even though it is not legally binding. This finding opened the door for Congress to evaluate the Bulletin and decide whether it disapproved of the guidance contained therein. *See* Letter from Thomas H. Armstrong, General Counsel, U.S. Government Accountability Office, to Honorable Patrick J. Toomey, United States Senate (Dec. 5, 2017) (available at https://www.gao.gov/assets/690/688763.pdf).

[99] *See, e.g.*, Adam Levitin, *The Politics of Indirect Auto Lending and the CFPB*, CREDIT SLIPS (Dec. 2, 2015, 1:33 PM), http://www.creditslips.org/creditslips/2015/12/the-politics-of-indirect-auto-lending-and-the-cfpb.html.

[100] Republicans have consistently opposed the CFPB since its creation in 2011. They have introduced numerous bills to restructure or eliminate the agency. Most recently, Senator Ted Cruz (R. Texas) introduced a bill on February 14, 2017 to eliminate the CFPB. *See* Tobie Stanger, *Why the Consumer Financial Protection Bureau is in Danger* (Mar. 13, 2017), https://www.consumerreports.org/consumer-financial-protection-bureau/why-consumer-financial-protection-bureau-is-in-danger/ ("Sen. Ted Cruz recently introduced the Repeal CFPB Act, which would scrap the bureau entirely."); Mark Schoeff Jr., *Why Financial Advisers Hate Elizabeth Warren*, INVESTMENTNEWS (Sept. 4, 2016), http://www.investmentnews.com/article/20160904/FREE/160909989/why-financial-advisers-hate-elizabeth-warren ("[I]n the U.S. Senate, Elizabeth Warren has become one of the most polarizing figures in Congress and among the legislators most hated by members of the financial services industry."). *See also Timeline: The Republicans' Abysmal Record on the CFPB*, U.S. HOUSE COMM. ON FIN. SERVICES DEMOCRATS, https://democrats-financialservices.house.gov/uploadedfiles/republican_record_on_the_cfpb_final.pdf (last visited Apr. 4, 2018) (providing a timeline of the comprehensive struggle between the Republicans and the CFPB); David Lazarus, *Republicans Cook Up Plan to Cripple Consumer*

some Republican members of Congress have stated that they opposed the Bulletin because they saw it as an attempt by the CFPB to circumvent the Dodd-Frank exemption[101] and give the Bureau regulatory power over auto dealers,[102] Resolution 57 disapproving the Bulletin may actually reflect congressional intent to weaken the CFPB instead of legitimate concern about whether the Bureau is carefully considering how to approach the problem of disparate impact in indirect auto lending. For instance, during congressional hearings on Resolution 57, Congresswoman Ann Wagner (R-MO), who supported the resolution, argued that "this guidance has become a symbol for everything that is wrong with the CFPB."[103]

In sum, the history of Senate Joint Resolution 57 shows that legal and political dynamics are shaping the dispute over the validity of disparate impact theory in lending discrimination cases.[104] However, these toxic dynamics are secondary to the larger issue of whether the ECOA authorizes disparate impact claims. The authorization issue is paramount because whether the CFPB correctly used proxies in its disparate impact analyses will be a moot question if the ECOA does not authorize these claims at all. Nevertheless, the political and legal dynamics are significant in that they foreshadow a fierce upcoming legal battle over the scope of the ECOA's discrimination prohibition. It is important to emphasize that Resolution 57 that precludes the CFPB from using impact theory in indirect auto finance, does not resolve the overarching question of whether the ECOA permits disparate impact claims. *Inclusive Communities* provides insight on how courts will likely decide this question. As the Supreme Court emphasized in that case,

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Agency, L.A. TIMES (June 14, 2016), http://www.latimes.com/business/lazarus/la-fi-lazarus-dodd-frank-20160614-snap-story.html.

[101] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1029, 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5519).

[102] *See, e.g.*, 164 CONG. REC. 74, H3,815–23 (Tuesday, May 8, 2018) (statements of Sen. Hensarling).

[103] 164 CONG. REC. 74, H3,815–23 (Tuesday, May 8, 2018) (statements of Sen. Wagner).

[104] *See supra* Introduction.

congressional intent is the linchpin that determines validity.[105] As such, it is important to examine whether Congress intended for consumers to be able to use impact analysis to prove their ECOA claims.

II. DISPARATE IMPACT LIABILITY: THE ECOA AND *INCLUSIVE COMMUNITIES*

A. Background

Ever since Congress enacted the Fair Housing Act ("FHA") and the ECOA as part of a series of civil rights legislation in the 1960s and 1970s, courts have consistently recognized that both statutes prohibit disparate treatment and disparate impact discrimination.[106] Despite, or possibly because of, this consensus, the Supreme Court for many years had declined to interpret both statutes. The Court broke its silence at the end of its 2014 term when it decided *Inclusive Communities*, holding that disparate impact claims are indeed permissible under the FHA.[107] The Court found support for its holding in the statute's text, legislative history, and historical purposes.[108] Although the FHA and ECOA have similar backgrounds and purposes, their statutory construction diverges just enough that the Court's textual analysis in *Inclusive Communities* does not support recognizing ECOA disparate impact liability.[109] However, the historical background of the ECOA and the policy considerations undergirding it[110] provide compelling reasons for concluding that Congress intended for ECOA plaintiffs to be able to bring disparate impact claims.

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[105] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

[106] Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 23, 56–59 (2008).

[107] *Inclusive Cmtys.*, 135 S. Ct. at 2525.

[108] *Id.*

[109] *See infra* Section III.C.

[110] *See infra* Section III.B–C.

After presenting an overview of the ECOA, the next section reconstructs the lending environment for women that preceded the statute's enactment and shows its historical significance to interpretation of this fair lending legislation. This history reveals that Congress intended for the ECOA to combat disparate treatment and disparate impact discrimination. The Supreme Court's reasoning in *Inclusive Communities*, which is also discussed in the next section, highlights the importance of historical information to the determination of whether a statute includes disparate impact liability. When the *Inclusive Communities* line of reasoning is applied to the ECOA, what emerges are strong arguments for favoring such liability in fair lending cases.

B. The Equal Credit Opportunity Act

1. The Text

The ECOA is codified in Sections 1691-1691(f) of Title 15 of the United States Code.[111] Relevant here is Section 1691, which sets forth the scope of the prohibition on credit discrimination. Section (a) provides the ECOA's operative language, which makes it

> [u]nlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter.[112]

Subsections (b) and (c) provide exceptions to this general prohibition. For example, Subsection (b) allows inquiries into: (1) marital status "for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;" (2) age or the applicant's status as a public-benefits recipient "for purpose of

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[111] Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(a)–(e) (2012).

[112] *Id.* § 1691(a).

determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness;" (3) age if "the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant;" and (4) gender and minority status for the purpose of small-business loan data collection.[113] Subsection (b) further allows creditors to discriminate against applicants based on their age as long as the creditors do not discriminate against elderly applicants and their motivation is "empirically derived" and "statistically sound."[114] Subsection (c) specifies that the ECOA does not prohibit creditors from participating in certain affirmative action programs.[115]

2. Legislative History

In the early 1970s, several members of Congress expressed interest in fair lending legislation that would forge a new era of widespread equality and opportunity in the way lenders dispensed consumer credit.[116] In 1974, Congresswoman Leonor Sullivan (D-Missouri), a member of the House Banking and Currency Committee, introduced a bill that was a major step in that direction.[117] The bill, which ultimately failed to get out of committee, would have protected consumers against discrimination on the basis of sex, marital status, race, color, national origin, age,

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[113] *Id.* § 1691(b).

[114] *Id.* § 1691(b)(3).

[115] *See id.* § 1691(c). The ECOA does not specify that this section is referring to affirmative action programs, but the legislative history makes it clear that this is the purpose. *See* H.R. Rep. No. 94-873, at 8 (1976) (Conf. Rep.) (explaining amended bill would exempt all affirmative action credit programs as opposed to just loan programs).

[116] For example, Congresswoman Marie Claiborne Boggs ("Lindy Boggs") D-La., who became a member of Congress in 1972, noted in her memoir that when the Congressional Banking Committee met to mark up an early ECOA bill that would protect against discrimination because of race, color, national origin, age, and religion, she added "sex and marital status" to the prohibited categories. She also states that the other committee members unanimously approved her additions to the bill. *See* LINDY BOGGS & KATHERINE HATCH, WASHINGTON THROUGH A PURPLE VEIL: MEMOIRS OF A SOUTHERN WOMAN 277–78 (1994).

[117] *See* Equal Credit Opportunity Act of 1974, H.R. 14856, 93d Cong. (1974).

and religion.[118] Congresswoman Bella Abzug, (D-New York) introduced much narrower bills that focused primarily on women.[119] Her bills would have prohibited discriminatory lending practices on the basis of sex and marital status.[120] Congress opted for the narrower version and passed the Equal Credit Opportunity Act as part of the Depository Institutions Amendments Act of 1974.[121] Congresswoman Sullivan had pushed for a stand-alone ECOA bill that she believed would have protected more consumers than the legislation actually enacted. After Congress passed the statute, she commented that "the discrimination provision is not as strong as we would have gotten if this had been handled as a separate bill . . . [i]t's a start, but it's not as far as it should have gone."[122]

Despite the ECOA's perceived shortcomings, some members of the Congress that enacted the legislation praised it as a boon for women. For instance, Congresswoman Bella Abzug described it as "very gratifying . . . and a victory for the women's movement."[123] Echoing these sentiments, Senator William E. Brock 3d, (R-Tennessee), said,

> Women are a most integral part of our economic society today . . . Many of them are heads of households, working mothers, or career women who deserve the right to have equal opportunity to obtain credit . . . This measure helps to provide that

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[118] *Id.*; *see* Enid Nemy, *Congress Passes Bill Banning Bias Against Women on Credit*, N.Y. TIMES (Oct. 11, 1974), http://www.nytimes.com/1974/10/11/archives/congress-passes-bill-banning-bias-against-women-on-credit-women.html.

[119] *See* H.R. 248, 3210, 8163, 9110, 9111, 9112, 9265, 10109, 10142, 10737, 93d. Cong. (1974).

[120] *See id*.

[121] Federal Deposit Insurance Increase Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 12 U.S.C. § 1811 (2011)). This legislation included such titles as Fair Credit Billing Act, Truth-in-Lending, as well as the ECOA, which is Title V of the Depository Institutions Amendment Act. *Id.*

[122] Nemy, *supra* note 118.

[123] Congresswoman Abzug also wanted the legislation to have unlimited class action damages which she saw as a stronger deterrent to violators of the act. *Id.*

> opportunity. If they are qualified for credit, they should be able to obtain it.[124]

Soon after Congress passed the original ECOA, it resumed its effort to pass broader fair lending protections along the lines that Congresswoman Lenore Sullivan initially suggested.[125] The result of these efforts was the Equal Credit Opportunity Act Amendments of 1976 ("1976 Amendments"). This legislation extended the ECOA's protection against discrimination to include the applicant's race, color, age, religion, national origin, status as a public benefit recipient, or victim of creditor retaliation for suing under the Consumer Credit Protection Act.[126] Importantly, a House of Representatives report that pertains to the proposed ECOA amendments mentioned a proposal "that would provide that no consumer could successfully seek punitive damages unless the creditor 'willfully' violates the law."[127] As part of her objection to this proposal, Congresswoman Abzug stated,

> Where credit criteria, though discriminatory, are on their face legitimate, it would become nearly impossible to demonstrate an intent to discriminate. This would mean that plaintiffs who rely on the effects test would be limited to the recovery of actual damages.[128]

Furthermore, Congresswoman Abzug noted that the proposal, "in disallowing any civil penalties, except in the rare case of proven willful discrimination, would be a full retreat from effective private enforcement."[129] Congresswoman Sullivan agreed, and noted that "the present law" does not contain the word "willfully."[130]

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[124] *Id.*

[125] *See* Equal Credit Opportunity Act Amendments of 1976, H.R. 6516, 94th Cong. (1976) (enacted); Equal Credit Opportunity Act of 1974, H.R. 14856, 93d Cong. (1974).

[126] Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251 (codified at 15 U.S.C. § 1691). The amendments also added several exceptions to the general provisions. *Id.*

[127] Legislative History of the Equal Credit Opportunity Amendments of 1976 Pub. L. 94-239, 1, 18 (1976).

[128] H.R. 6516, 94th Cong., at 16746.

[129] *Id.*

[130] *Id.*

Apparently, the arguments of Congresswomen Abzug and Sullivan prevailed because the enacted amendments did not include a requirement that ECOA plaintiffs must show that lenders intentionally violated the statue to recover punitive damages. The implication is that lawmakers tacitly understood that disparate impact claims were included in the ECOA when they initially enacted the statute and that they intended for victims to recover punitive damages for intentional as well as unintended violations.

Although the 1976 Amendments were the last major substantive changes, Congress has amended the ECOA several more times in the years since.[131] None of these amendments touched on disparate impact liability. Notably, Congressman William McCollum (R-Florida) introduced a bill in 1995 and another one in 1997 to amend the ECOA. These bills would have restricted ECOA liability to intentional discrimination.[132] Congress opted not to take any action regarding these proposals. The failure of lawmakers to act suggests that there may not have been enough votes to pass this legislation. Perhaps a majority believed that the most effective way to obtain equality in credit markets is to outlaw intentional and unintentional lending discrimination. Limiting ECOA claims to disparate treatment liability would not be consistent with this objective.

The ECOA's enactment in the 1970's undoubtedly provided a gateway for women to gain better access to credit. But this required the removal of many barriers that impeded credit equality. Some of these barriers resulted from lender policies and practices that caused disparate treatment discrimination while others resulted in disparate impact discrimination. Although both intentional and unintentional conduct created these barriers, the roadblocks that led to

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[131] *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protective Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.) (granting newly created Consumer Financial Protection Bureau regulatory authority under the ECOA); Economic Growth and Regulatory Paperwork Act of 1996, Pub. L. 104-208, § 2301, 110 Stat. 3009 (1996) (adding incentives for self-testing and self-correction); Federal Deposit Insurance Corporation Improvements Act of 1991, Pub. L. 102-242, §§ 212, 223, 105 Stat. 2236 (1991) (changing enforcement regime).

[132] *See* Equal Credit Opportunity Act Amendments of 1995, H.R. 1699, 104th Cong. (1995); Equal Credit Opportunity Act Amendments of 1997, H.R. 229, 105th Cong. (1997); Regulation B, 62 Fed. Reg. 66,411, 66, 414 (Dec. 18, 1997).

unintentional discrimination were not always transparent. Reconstruction and assessment of the pre-ECOA lending environment will enhance our understanding of the link between some of the barriers women faced obtaining credit and the role disparate impact theory arguably played in their removal.

3. Pre-ECOA Lending Environment for Women

The congressional hearings that preceded the ECOA's enactment highlighted the economic status of women as well as the problems women faced obtaining credit.[133] Since disparate impact theory allows plaintiffs to challenge unintended discrimination,[134] it is helpful to visualize the lending environment for women that pre-dated the ECOA's enactment and focus on some of the barriers that disproportionately affected women.

Before 1974, the credit industry held many assumptions about women that undermined their ability to obtain credit. For instance, lenders were reluctant to extend individual credit to single, working women because they widely assumed that these women would soon marry and leave the workforce.[135] In addition, lenders assumed that married women would have children and stay home to raise them. Therefore, they could not be relied on as wage earners for the repayment of their loans.[136] Further, lenders deemed women who were divorced, separated, or widowed as uncreditworthy, due to the fact that any credit established during the duration of a marriage was likely to be in the husband's name.[137] "Congressional testimony and

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[133] *See Hearings*, *supra* note 16, at 132.

[134] *See* Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market*, *supra* note 5, at 273.

[135] 142 AM. JUR. 3D PROOF OF FACTS § 2 (2014). *See also* NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES, 151, 152–53 (1972) [hereinafter NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT] (describing methods of discrimination against women in consumer credit).

[136] *Hearings*, *supra* note 16, at 132 (statement of Rep. Flemming, Chairman, U.S. Comm'n on Civil Rights, and Comm'r, Admin. on Aging, Dep't of Health, Educ. and Welfare).

[137] *See* Jeffrey M. Bucher, Member Bd. of Governors of the Fed. Reserve Sys., The Expanding Role of the Federal Reserve in Consumer Credit, Remarks Before the California Bankers Association, Consumer Lending Outlook Conference 3 (May 1, 1975).

media coverage also suggested that lenders often required that single, divorced, or widowed women provide a male relative as a co-signer for a mortgage loan" because they assumed that these women were incapable of successfully managing their financial affairs.[138] Furthermore, lenders, at that time, often discounted the wages of working women when underwriting a loan, even when these women were their family's primary breadwinners.[139]

These attitudes and assumptions about women produced discriminatory effects that the ECOA arguably proscribes. Below is a discussion of five examples of facially neutral policies and practices that were common before Congress enacted the ECOA. They correspond to questions lenders typically asked on credit applications before 1974. A credit application before 1974 probably looked like this:

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[138] *Hearings*, *supra* note 16, at 266–67 (citing U.S. Comm'n on Civil Rights, *Mortgage Money: Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Connecticut*, Clearinghouse Publication No. 48 (June 1974)) ("the female is inherently unstable and incapable of conducting her own affairs."). *See also* DUBRAVKA RITTER, DO WE STILL NEED THE EQUAL CREDIT OPPORTUNITY ACT? 1–2 (2012), https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2012/d-2012-equal-credit-opportunity-act.pdf?la=en (providing an overview of how lenders viewed women as being unprepared to handle their finances).

[139] *See* Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*, *supra* note 29, at 257 n.236 (citing Helen F. Ladd, *Evidence On Discrimination in Mortgage Lending*, 12 J. ECON. PERSP. 42, 59 (1998) (documenting that the earnings of women were often discounted by 50 percent or more by a large number of lenders)).

Credit Application

(Open end, unsecured credit: individual account)

Section A—Information regarding the applicant

Full Name: ________________________ **Date of Birth:** ___/___/___ **Age:** ____

Courtesy Title: [ ] Married [ ] Single [ ] Divorced [ ] Separated [ ] Widowed

Present Address: ________________________________ **Years there:** ________
City: _____________________ **State:** _____________ **Zip Code:**__________

Previous Address: _______________________________ **Years there:** ________
City: _____________________ **State:** _____________ **Zip Code:**__________

Social Security Number: _____________________

Telephone: _______________ **Is the telephone listed in your name?** [ ] Yes [ ] No

Present Employer: ______________ **Years there:** ___ **Telephone:** __________
Part-time: [ ] Yes [ ] No **Net Salary: $**_________ **Per:** ______________
Employer's Address: ____

Previous Employer: ______________ **Years there:** ___
Previous Employer's Address: ____________________________________

Other Income (e.g., commission, bonus, etc.): $______ **Source:** ______________

Do you receive alimony, child support, or separate maintenance payments? [ ] Yes [ ] No
Number and Ages of Children: ____________________________________

Section B—List Outstanding Debts and Other obligations. (Include charge accounts, installment contracts, credit cards, rent, mortgages, child support or other payments, etc.) Use separate sheet if necessary. Include the name of creditor, type of debt or account; the name in which the account is carried, and monthly payments.

Have you ever filed for bankruptcy? [ ] Yes [ ] No **If yes, when and where?** _________

Applicant's Signature:__________________ **Date:** ____________________

The five examples of facially neutral policies and practices fall into the following categories: telephone listings, credit history, child-rearing, part-time income and support payments, and name changes. Each category illustrates why Congress likely intended to allow ECOA disparate impact claims.

a. Telephone Listing

Although creditors in the early 1970s normally requested applicants to provide a telephone number for contact information,

many required the number to be listed in the telephone book in the applicant's name.[140] This requirement disproportionally impacted married women because the social custom and norm at the time "dictate[d] that a married couple have their telephone listed in one name, almost always the husband's."[141] One author described the practice in this manner:

> Until 1977 telephone company policy had been to use only the first name of the individual who had taken out the account. In a married couple, this was usually the husband. An additional listing on a separate line has always been available, telephone officials said, but at an additional fee.[142]

Importantly, lenders who used credit scoring systems to evaluate credit applicants assigned values to certain criteria they deemed indicative of creditworthiness.[143] To receive credit, borrowers had to obtain a score above a predetermined cutoff.[144] For borrowers, every positive value was significant in helping them to reach the score that allowed receipt of credit. Thus, lenders who assigned positive values to the existence of a telephone listing in the applicant's name, utilized a policy that was discriminatory in operation for married women.

b. Childrearing

Before Congress enacted the ECOA, lenders typically asked applicants for their age as well as the number and ages of their children.[145] The acquisition of this information often opened the

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[140] Anne J. Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 BUS. LAW 1641, 1652 (1976).

[141] *Id.*

[142] Andree Brooks, *Women In The Phone Book*, N.Y. TIMES (Mar. 7, 1983), https://www.nytimes.com/1983/03/07/style/women-in-the-phone-book.html.

[143] *See* Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement*, *supra* note 2, at 89–90.

[144] *Id.* at 113.

[145] *See Hearings*, *supra* note 16, at 256 (citing U.S. Comm'n on Civil Rights, *Mortgage Money: Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Connecticut*, Clearinghouse Publication No. 48 (June 1974)) ("[T]he number and ages of children living at home are also considered.

door to assumptions about the applicant's childrearing or childbearing plans.[146] For instance, some creditors made lending decisions based on aggregate statistics that indicated whether applicants in certain age categories would likely bear or rear children and for that reason receive diminished or interrupted income when they left the labor market.[147] As such, women disproportionately bore the brunt of such predictions and were often denied credit due to potentially unreliable income based on the likelihood of pregnancy during their "childbearing years."[148] To ameliorate the harshness of this policy, some lenders discounted the income of women who fell into certain age brackets instead of totally disregarding it.[149] Because there was no statistical data that showed that men of certain ages were likely to leave the workforce and have income interruptions when they became fathers, creditworthiness determinations connected to childrearing policies have adversely affected only women.[150]

c. Support Payments and Part-time Income

To determine if an applicant has the ability and willingness to repay debt, lenders evaluate an applicant's financial status. Historically, lenders considered not only the continuity of an

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Lenders assume that families with young children will have additional children and discount the working wife's income accordingly.").

[146] *See* Geary, *supra* note 140, at 1650.

[147] *See* NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT, *supra* note 128, at 151, 152–53 (1972); *see also Geary*, *supra* note 140, at 1650 ("[discounting income] is based on one or more assumptions lenders make about women . . . that women are less stable members of the work force, that all married women will have children, and that women who do have children will leave their jobs to care for them.").

[148] *See Hearings*, *supra* note 16, at 256 (citing U.S. Comm'n on Civil Rights, *Mortgage Money: Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Connecticut*, Clearinghouse Publication No. 48 (June 1974)).

[149] *See* Geary, *supra* note 140, at 1650.

[150] Aggregate statistics existed on the likelihood that women of certain ages would become pregnant and thus have income interruptions based on pregnancy leaves and leaves to rear children. *See* Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement*, *supra* note 2.

applicant's income, but also the amount and source.[151] Before Congress passed the ECOA, lenders typically asked if an applicant received alimony, child support, or separate maintenance payments.[152] Although men and women are legally entitled to receive such supportive income, women overwhelmingly receive it more often than men.[153] The problem is not the improper acquisition of information; instead, it is the fact that lenders linked this information to policies that had discriminatory effects on women.

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[151] *See Hearings*, *supra* note 16, at 242–43 (citing U.S. Comm'n on Civil Rights, *Mortgage Money*, *supra* note 145); *Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Connecticut*, Clearinghouse Publication No. 48 (June 1974)) (noting that some lenders failed to accept income from overtime pay and second jobs on a consistent basis and that this had a discriminatory effect on minority housekeepers who often relied on these sources of income). The Federal Home Loan Bank Board in December 1973 released guidelines that said, "Automatically discounting . . . income from bonuses, overtime, or part time employment will cause some applicants to be denied financing . . . Since statistics show that minority group members and low and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing." Nondiscrimination in Lending, 38 Fed. Reg. 34,653 (Dec. 17, 1973).

[152] *See* sample 1970s credit application form, *supra* Section II.B.3. *See also* Hearings, *supra* note 16, at 272 (citing U.S. Commission on Civil Rights, *Mortgage Money: Who Gets It: A Case Study in Mortgage Lending Discrimination in Hartford, Connecticut,* Clearinghouse Publication No. 48 (June 1974)) ("Lenders generally will not rely on support payments . . . even if there is a long history of reliable payments . . . The divorced woman also has considerable difficulty in obtaining a mortgage, both because of the alleged probability of an unstable economic situation and because of her social position. Her financial circumstances are often complex: she may rely on alimony, child support, or an independent income alone, or any combination of these sources . . . The divorced woman who has a substantial work history and a separate source of income will be treated as any other single woman. Differential treatment occurs when alimony or child support payments are listed as contributing and fundamental sources of income . . . Lenders generally will not rely on support payments which are not court ordered even if there is a long history of reliable payments.").

[153] According to a 2015 U.S. Census report, of the nearly 600,000 people in the U.S. who receive post-divorce spousal payments, just 15% were men. In the same year, fathers represented nearly 85% of child support providers. *See* U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 2 (2015), https://www2.census.gov/programs-surveys/demo/tables/families/2015/chldsu15.pdf.

For instance, some lenders disregarded or discounted alimony, child support or separate maintenance payments as sufficient income for credit purposes, regardless of amount and regularity with which support payments had been received.[154] This income source was categorically considered unreliable.[155] And yet, for some women, support payments were their only income. Consequently, a lender's policy of wholesale rejection of support payments as "unstable" or "unreliable" income resulted in these women being denied equal access to credit solely because of this income source.[156] The blanket refusal to consider support payments without analyzing the extent to which receipt of it created a credit risk, disproportionately burdened women.

Women encountered similar access to credit problems due to lender policies and practices regarding income derived from part-time employment. In the early 1970s, women were the majority of the part-time workforce.[157] And, like support payments, lenders partially or wholly discounted part-time income because they considered it as "unstable" or "unreliable" regardless of credible evidence showing otherwise.[158] While the practice of automatically discounting or disregarding part-time income had a disproportionately heavy impact on women,[159] it affected minority

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[154] *See, e.g.*, *Hearings*, *supra* note 16, at 371 (statement of Margaret J. Gates, Codirector, Center for Women Policy Studies) (citing Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV., No. 3 (1974)) ("Typically, the divorced woman has relied upon her husband's credit during her marriage; when she applies for her own charge accounts or a loan she is, as they say in the credit business, a "new face." If she is not fully employed and relies in part upon alimony or child support to meet the creditor's income requirements, she will probably be refused. Such payments by husbands are considered unreliable even though in an individual case they may have been made regularly over a long period of time.").

[155] *See* Geary, *supra* note 140, at 1651.

[156] *Hearings*, *supra* note 16, at 371 (citing Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 417 (1974)).

[157] Regulation B, 40 Fed. Reg. 49,298, 49,301 (Oct. 22, 1975).

[158] *See Hearings*, *supra* note 16, at 132. (Statement of Arthur S. Fleming, Chairman, U.S. Commission on Civil Rights).

[159] *See* Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*, *supra* note 29, at 257–58 n. 236.

women in particular.[160] As one commenter noted during the ECOA hearings, the impact of denying credit to persons who are not gainfully employed on a full-time basis was "doubled for minority women who were penalized because of sex and then again because of race or national origin."[161] In support of this observation, Arthur S. Flemming, a member of the U.S. Commission on Civil Rights, introduced data at the ECOA hearings that showed that "[i]n 1972, of all married women with a husband present, 40.5 percent of white women and 51.9 percent of black women worked."[162] Since most of these women worked part-time, when financial institutions discounted part-time income, the statistics showed that a greater proportion of minority women were harmed than other women because their families relied more often on part-time income.[163]

d. Credit History

Before the ECOA, lenders had credit history practices that negatively impacted women. For instance, although an applicant's ability to show a separate, positive history of debt repayment was a prerequisite for obtaining credit, many married women could not satisfy this criterion because the credit records of married

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[160] In response to the congressional concerns regarding the disproportionate impact that the discounting of part-time income had on minorities and women, the Federal Reserve Board incorporated a provision in Regulation B that prohibits lenders from discounting income solely because it is earned from part-time employment. Further explaining the importance of this provision, the Federal Reserve Board noted that because the majority of the part-time workforce is female, a practice of automatically discounting all part-time income has a disproportionately heavy impact on one sex. *See* Regulation B, 40 Fed. Reg. 49,298, 49,300 (Oct. 1975) (to be codified at 12 C.F.R. 202); *see also*, Regulation B, 44 Fed. Reg. 23, 865, 23,865–23,866 (Apr. 23, 1979) (to be codified at 12 C.F.R. pt. 202).

[161] *Hearings*, *supra* note 16, at 132.

[162] *Id.*

[163] Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance*, *supra* note 29, at 257–58. *See also* COMM'N ON CIVIL RIGHTS, MORTGAGE MONEY: WHO GETS IT? A CASE STUDY IN MORTGAGE LENDING IN HARTFORD, CONNECTICUT 21 (1974) ("For minority families the [part-time worker] penalty may be doubly severe because . . . sex discrimination, coupled with discrimination on the basis of race . . . effectively places minority women and their families in double jeopardy.").

individuals were kept in only one name, usually that of the husband.[164] Should a marriage later be dissolved, either by separation, divorce, or death, the woman would discover that she had no prior credit history. Moreover, she often encountered significant difficulty in establishing credit under her own name.[165] When creditors disqualified these women for lack of a credit report, they disproportionately deprived them of equal credit opportunity.

e. Name Changes

Before the ECOA, many lenders had loan policies regarding a borrower's name change. These lenders customarily asked credit applicants to list the names in which their previous and current debt obligations are held.[166] This information can show whether an applicant's name has changed over time. Professor Neil O. Littlefield has noted the profound effect some of these policies had on women. To illustrate the point, he posits the case of

> [a] single woman who has been gainfully employed for a number of years and has established credit with a number of enterprises. She decides to get married. She informs her creditors of her change of name and address. The reaction of her creditors in such a situation has often been predictable, illogical and demeaning. Some of them instantly cancel the account, perhaps with an offer to have her husband apply for an account which he will be willing to let her use. Others inform her that the account can be continued only if her husband provides data on his economic life and if he assumes joint liability by adding his own name to the

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[164] *See* Bucher, *supra* note 137.

[165] *Id.*

[166] Before the ECOA was enacted, once married, a woman's accounts were usually discontinued and she would have to reapply in her husband's name. After the ECOA, where she undergoes a change in name or marital status, the lender is prohibited from requiring that she reapply and from changing the terms or terminating the account. *See* Gail R. Reizenstein, *A Fresh Look at the Equal Credit Opportunity Act*, 14 AKRON L. REV. 215, 225–27 (1980).

> account. It goes without saying that similar treatment is not accorded the male upon his marriage.[167]

Instead of characterizing this case as one that involves difference in treatment based on a change in marital status, it may also be viewed as a classic case of disparate impact discrimination. For instance, suppose the lender argues that the accounts of all applicants, whether male or female, are terminated once it receives information regarding a name change. Here, the argument is that there is no difference in treatment based on a change in marital status because a person's name may change for reasons unassociated with marriage.[168] If a court accepts the argument that there is no disparate treatment discrimination if the lender treats alike all who change their name for whatever reason, a single woman whose account is terminated when her name changes upon marriage may still have a disparate impact claim. She can argue that because women routinely change their names when they marry and men rarely, if ever, do so, the policy almost exclusively provides a basis for lenders to terminate the credit of certain women. Analyzed in this manner, the negative impact on women becomes clear and the lender may be liable for discrimination if unable to sufficiently justify the policy. The fact that name change and change in marital status are here intertwined illuminates the complexity that is sometimes involved when resolving lending discrimination cases under the ECOA.[169]

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[167] Neil O. Littlefield, *Sex-Based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575, 575–76 (1973).

[168] For example, people may change their names to avoid stalkers or harassing persons. Also, under the federal immigration-and-nationality law, aliens may adopt new names when they apply for naturalization, allowing them the opportunity to adopt more Americanized names and integrate into mainstream society. Furthermore, under the state laws and common law, a person can adopt any name desired for any reason—e.g., reflecting one's true identity or disliking the old name—provided that the new name is not intended to mislead or does not include violence. *See generally Why You Might Want to Change Your Name*, DEED POLL OFFICE, https://deedpolloffice.com/change-name/why-change-your-name (last visited Apr. 4, 2018) (listing a variety of reasons why people choose to change their name).

[169] A similar issue arose in *Miller v. American Express*. Miller v. American Express, 688 F.2d 1235 (9th Cir. 1982). In that case, Mrs. Miller claimed that American Express discriminated against her because of her marital status when it cancelled her supplementary credit card after her husband's death. When he died,

4. History of Regulation B

The ECOA originally granted the Board of Governors of the Federal Reserve ("Fed") the authority to promulgate the ECOA's implementing regulation.[170] One year after the statute's enactment, the Fed published Regulation B.[171] From the beginning, the Fed interpreted the statute to authorize disparate impact claims.[172] Indeed, several Regulation B provisions challenge lender policies and practices that disproportionately harmed women before Congress passed the ECOA.[173] For example, under Regulation B Section 202.6(b)(5), creditors "may consider the amount and probable continuance of any income," but must treat alimony, child support, and separate maintenance payments as a sufficient income source.[174] This means that creditors can no longer discount or

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her status changed from married to widowed. However, American Express argued that its neutral policy of terminating all supplementary cards upon the death of the basic cardholder was not discriminatory in motive or effect. Stated differently, Amex claimed that its uniform policy of cancelling all supplementary cards, whether the holders were widow, widower, sibling, or child, was neither disparate treatment nor disparate impact discrimination. Although the majority held that Amex engaged in disparate treatment discrimination, a vigorous dissent challenged that holding, with one dissenting judge opining that the better way to decide the case would have been under the disparate impact analytical framework. This judge noted that Mrs. Miller could have challenged Amex's practice "on the ground that, though neutral on its face and as applied, it has a disproportionate impact on women whose marital status changes as a result of the death of the basic cardholder." *Id.* at 1242 n. 3.

[170] 12 C.F.R. § 202.1 (2011)

[171] Regulation B, 40 Fed. Reg. 49,298 (Oct. 22, 1975) (to be codified at 12 C.F.R. pt. 202).

[172] *See, e.g.*, *id.* at § 49,301 (discussing the disparate impact on sex, resulting from the practice of automatically discounting all part-time income and the disparate impact on women resulting from the name change requirement). *See also* Equal Credit Opportunity, 40 Fed. Reg. 29,870, 29,873–74 (July 20,1976) (to be codified at 12 C.F.R. pt. 202) (explaining that "the words 'or rearing' have been added . . . in recognition of the fact that inquiries regarding the rearing of children may constitute an indirect inquiry into plans or intentions regarding childbearing."); *Id.* § 202.6(a) (discussing the effect test under the amended ECOA).

[173] 12 C.F.R. § 202.6 (b)(5) (2018).

[174] *Id.*

disregard this income source. In an effort to eliminate any lingering effects of historical lender bias against support income, Regulation B further states that:

> A creditor shall not inquire whether income stated in an application is derived from alimony, child support, or separate maintenance payments unless the creditor discloses to the applicant that such income need not be revealed if the applicant does not want the creditor to consider it in determining the applicant's creditworthiness.[175]

Thus, the provision allows women to decide for themselves if they want to inform lenders that they are support payment recipients or want them to consider this income when they apply for credit. For those who choose to rely on this income, Regulation B further requires creditors to "consider such payments as income to the extent that they are likely to be consistently made."[176] In other words, lenders are to treat support income like other legitimate income sources.

The Fed also included provisions in Regulation B that informed lenders on how to evaluate credit histories without disproportionately impacting women. Section 202.6(b)(6) is illustrative.[177] It requires creditors who evaluate credit reports to evaluate the history of accounts "designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable."[178] Additionally, it requires creditors to consider "any information the applicant may present that tends to indicate the credit history . . . does not accurately reflect the applicant's creditworthiness."[179] As a result, not only does the regulation allow married, divorced, and separated women to automatically have their own individual credit reports, they are also permitted to disconnect themselves from a spouse's negative credit report that does not accurately reflect their credit behavior. Furthermore, with respect to credit histories of married applicants

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[175] *Id.* § 202.5 (d)(2).

[176] *Id.* § 202a.6 (b)(5).

[177] *Id.* § 202.6 (b)(6)

[178] *Id.* § 202.6 (b)(6)(i).

[179] *Id.* § 202.6 (b)(6)(ii).

established after Regulation B's effective date, the regulation requires creditors to designate "[a]ny new account to reflect the participation of both spouses if the applicant's spouse is permitted to use or for which both are contractually liable."[180] By removing the adverse effects of lender policies pertaining to credit histories, Section 202.6(6) removed a major obstacle that previously hindered credit availability for women.

Another provision that the Fed included when it first drafted Regulation B pertains to telephone listings. Section 202.6(b)(4) expressly prohibits creditors from considering "whether there is a telephone listing in the name of an applicant for consumer credit."[181] However, this provision does not bar lenders from considering "whether there is a telephone in the applicant's residence."[182] While the widespread use of individual cell phones makes this provision virtually obsolete today, before 1974 a telephone listing that was not in the applicant's name could negatively affect a married woman's credit score.

Regulation B also focuses on lender policies and practices associated with childrearing. For instance, the Fed's regulatory guidance on childrearing states:

> In evaluating creditworthiness, a creditor shall not make assumptions or use aggregate statistics relating to the likelihood that any category of persons will . . . rear children or will, for that reason, receive diminished or interrupted income in the future.[183]

The Fed first proposed to ban all questions and considerations regarding childrearing.[184] However, upon reflection, it recognized that lenders may have legitimate concerns in this area. For instance, borrowers who plan to support children in college or who pay child care expenses will have less disposable income to repay their debts. To balance these concerns with fair credit objectives, the Fed deleted the proposed ban from the final regulation and allowed

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[180] *Id.* § 202.10 (a)(1).

[181] *Id.* § 202.6 (b)(4).

[182] *Id.*

[183] *Id.* at § 202.6 (b)(3).

[184] *See* Proposed Regulation B Implementing the 1974 Equal Credit Opportunity Act, 40 Fed. Reg. 18,183, 18,185 (Apr. 25, 1975) (to be codified at 12 C.F.R. pt. 202).

creditors to ask pertinent questions pertaining to raising children, such as an applicant's intentions regarding day-care arrangements or intentions regarding the financing of a child's college education, provided that men as well as women are asked these questions.[185] Because of past bias against women with children, Regulation B implies that lenders cannot ask applicants to list the number and ages of their "children."[186] Instead, the Regulation states that "a creditor may inquire about the number and ages of an applicant's dependents . . . "[187]

The lending environment that pre-dated the ECOA was disproportionately favorable to men. The historical context of the statute suggests that Congress sought to change the climate for women when it passed legislation that makes it illegal for lenders to discriminate because of an applicant's sex or marital status. To facilitate the change it believed Congress desired, the Fed immediately interpreted the ECOA in a manner that removed intentional and unintentional barriers that impeded equal access to credit for women before 1974. Given the variety of lender policies and practices that adversely affected women before the statute's enactment, it seems that the Fed got it right and correctly understood that Congress intended for the ECOA to authorize disparate impact liability. Indeed, it is difficult to fathom that Congress would have intended for the practices mentioned in the previous section to continue after it enacted legislation to make credit equally available to qualified applicants regardless of sex and marital status. This observation is not meant to dispute the obvious appeal of the disparate treatment method of proving discrimination that focuses on evidence of the lender's intent to discriminate. When such evidence exists, disparate impact theory becomes obsolete. Although the disparate treatment theory has merit, it is hard to defend its exclusive use in ECOA cases given that it will not sufficiently assist many of the most vulnerable members of society Congress sought to protect.

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[185] 12 C.F.R. § 202.5 (d)(3); Regulation B, 68 Fed. Reg. 13,144, 13,164, (March 18, 2003) (to be codified at C.F.R. pt. 202).

[186] § 202.5 (d)(3). *See also supra* Section II.B.3.b (discussing the ways lenders were biased against women with children).

[187] § 202.5 (d)(3).

After Congress amended the ECOA in 1976 and extended the statute's prohibited bases to include race, religion, national origin, and age, among others, the Fed proposed revisions of Regulation B to implement the amendments.[188] Included among the proposals were rules for use of information creditors obtained from applicants. In its presentation of the proposals for public comment, the Fed noted that "in the legislative history of the amended Act, the courts are directed to take account of the 'effects' test developed in employment discrimination cases."[189] Further, the Fed interpreted the expression "effects test" with respect to credit to mean:

> the use of certain information in determining creditworthiness, even though such information is not specifically proscribed, may violate the amended Act if the use of that information has the effect of denying credit to (a substantial portion) of a class of persons protected by the Act . . . unless the creditor is able to establish that the information has a manifest relationship to creditworthiness.[190]

Stated differently, the Fed interpreted the ECOA's legislative history to mean that Congress intended the statute to include disparate impact claims. This interpretation is consistent with how the Fed interpreted the ECOA soon after Congress enacted the statute in 1974. Accordingly, the Fed's final revisions of Regulation B that implement the 1976 amendments describe the effects test concept that should be adopted in ECOA cases.[191] This concept is synonymous with disparate impact.

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[188] Press Release, Fed. Reserve Bank of N.Y. (July 15, 1976).

[189] *Id.*

[190] *Id.*

[191] Equal Credit Opportunity, 41 Fed. Reg. 29,870, 29,874 (July 20, 1976) (noting that Section 202.6(a) discusses the effect test under the amended ECOA).

C. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*

1. Background

In *Inclusive Communities,* two lower courts and the Supreme Court addressed whether the Fair Housing Act allows plaintiffs to use disparate impact theory to prove their discrimination claims.[192] The case involved a dispute over the discriminatory method the Texas Department of Housing ("the Department") used to distribute federal tax credits for low-income housing developments.[193] Inclusive Communities alleged that the factors the Department considers when deciding which developments should receive tax credits have the effect of concentrating low-income housing in predominately minority communities.[194] It did not allege that the Department's distribution method was part of a concerted effort to intentionally perpetuate segregated housing patterns; rather Inclusive Communities argued that the plan violated the FHA because of its disparate impact on minority communities.[195]

The lower courts ruled in favor of the plaintiff on the question whether disparate impact claims are cognizable under the FHA.[196] The District Court for the Northern District of Texas not only found that Inclusive Communities' use of disparate impact theory created a valid FHA claim, it also issued a remedial order to ameliorate the discriminatory effects of the Department's method for determining which developments would receive tax credits.[197] Thus, the order contained additional factors the Department must consider as part of its tax-credit criteria.[198] The Fifth Circuit agreed that Inclusive Communities presented a cognizable disparate impact claim.[199] Nevertheless, it reversed and remanded the case because it believed

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[192] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

[193] *Id.* at 2513–14.

[194] *Id.* at 2514.

[195] *See id.*

[196] *Id.* at 2515.

[197] *Id.* at 2514.

[198] *Id.*

[199] *Id.* at 2515.

the district court was wrong to add factors to the Department's tax-credit criteria and therefore did not apply the correct standard for determining whether the Department's policies violated the FHA.[200] The Department petitioned for, and the Supreme Court granted, certiorari on the sole question of whether disparate impact claims are cognizable under the FHA.[201]

2. The Court's Opinion

Writing for the Court's majority, Justice Kennedy held that disparate impact claims are indeed cognizable under the FHA.[202] The Court grounded its decision in the FHA's text and the statute's clear congressional intent.[203] Near the end of the opinion, the Court noted that the policies behind the FHA also support disparate impact liability. Looking first to the text of the statute, the Court compared Sections 804(a) and 805(a) of the FHA[204] to Section 703(a) of Title VII[205] of the 1964 Civil Rights Act and Section 4(a) of the ADEA,[206] both of which the Court had previously allowed disparate impact claims.[207]

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[200] *Id.*

[201] *Id.*

[202] *Id.* at 2525.

[203] *Id.* at 2518–19.

[204] FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race, color, religion, sex, familial status, or national origin" or "to discriminate against any person in" making certain real-estate transactions "because of race, color, religion, sex, handicap, familial status, or national origin." Fair Housing Act, 42 U.S.C. §§ 3604–3605 (2012).

[205] Section 703 of Title VII makes it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964).

[206] Section 4(a) of the ADEA makes it unlawful for an employer to "discriminate against any individual respect to his" employment conditions "because of such individual's age." Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C § 623(a) (1967).

[207] *Inclusive Cmtys.*, 135 S. Ct. at 2516–19. *See also* Smith v. City of Jackson, 544 U.S. 228, 237 (2005) ("Thus the text focuses on the *effects* [sic] of the action on the employee rather than the motivation for the action of the

The Court determined that the language of all three statutes includes results-based catchalls that support disparate claims.[208] Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment *in any way which would deprive or tend to deprive* any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[209] Previously, the Court held in *Griggs v. Duke Power Company* that under Title VII, absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds for minority groups and are unrelated to measuring job capability" because "Congress directed the thrust of the Act to the consequences of employment practices, not simply to motivation."[210]

The ADEA, in language almost identical to Title VII, makes it unlawful for an employer "to limit, segregate, or classify his employees *in any way which would deprive or tend to deprive* any individual of employment opportunities . . . because of such individual's age."[211] In *Smith v. Jackson,* a plurality of a divided Court determined that the ADEA allows disparate impact claims.[212] The plurality opinion relied on *Griggs* and the similarity between the language of Title VII and the ADEA, noting that both statutes focus "on the *effects* of the action on the employee rather than the motivation for the action of the employer."[213]

Using this reasoning, the Court looked to the similarities between the language in the FHA, Title VII, and the ADEA to

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employer."); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

[208] *Inclusive Cmtys.*, 135 S. Ct. at 2519.

[209] Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

[210] *Griggs*, 401 U.S. at 432 (1971). The Court did not analyze Title VII's language in support of this conclusion, but it did quote Section 703(a) in a footnote. *Id.* at 426 n.1.

[211] 29 U.S.C. § 623(a)(2) (emphasis added).

[212] Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (plurality opinion). Justice Scalia concurred in the judgment, opining that the ADEA was ambiguous and the Court should thus defer to the Equal Employment Opportunity Commission's interpretation of the ADEA. *See id.* at 243 (Scalia, J., concurring).

[213] *Id.* at 235–36.

conclude that the FHA must also allow disparate impact claims.[214] The relevant portion of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[215] The Court determined that the phrase "otherwise make unavailable" was the functional equivalent of "otherwise adversely affect," which appears in both the Title VII and the ADEA, because both phrases "look to the results" and "serve as catchall phrases."[216] The Court justified the differences in the phrases as grammatically necessary in the context of the sentence.[217]

The Court next looked to the FHA's legislative history and determined that the clear congressional intent was for the FHA to include disparate impact claims. Along these lines, the Court discussed the FHA's 1988 amendments.[218] At the time of the amendments, every federal Court of Appeals to have considered whether disparate impact claims are cognizable under the FHA had determined that they were, and Congress considered but decided against amending the FHA to foreclose disparate impact liability.[219] The Court applied the implicit ratification doctrine of statutory interpretation and concluded that Congress must have intended for the FHA to recognize disparate impact claims because "[i]f a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation."[220]

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[214] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

[215] Fair Housing Act (FHA), 42 U.S.C. § 3604(a) (2012) (emphasis added).

[216] *Inclusive Cmtys*., 135 S. Ct. at 2519.

[217] *Id.* The dissent argued that "because of" is the FHA's operative phrase, the plain meaning of which limits the FHA to disparate treatment claims. *Id.* at 2527–28 (Alito, J., dissenting). The majority dismissed this concern by noting that the phrase "because of" also appears in Title VII and the ADEA, but per *Griggs* and *Smith* does not restrict Title VII and the ADEA to disparate treatment claims; thus, it likewise must not restrict the FHA to disparate treatment claims. *Id.* at 2519.

[218] *Id.* at 2540–41.

[219] *Id.* at 2519–20.

[220] *Id.* at 2520 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)) (ellipses omitted). The

The Court further noted that the 1988 amendments included three exemptions that would be superfluous without reading the FHA to include disparate impact liability.[221] The amendments declared that the FHA does not: (1) prohibit appraisers from including any factors not explicitly protected in the FHA in their appraisals; (2) prohibit the disparate treatment of drug convicts; or (3) prohibit reasonable maximum-occupancy restrictions.[222] Because the FHA would permit this conduct if it were restricted to disparate treatment liability only, the Court concluded that Congress must have understood the FHA to create disparate impact liability as well as disparate treatment.[223]

Finally, the Court concluded that the FHA's statutory purpose supports disparate impact liability, that purpose being "to eradicate discriminatory practices within a sector of the Nation's economy."[224] To accomplish this purpose, the Court noted that disparate impact claims are necessary to combat the effects of exclusionary zoning practices, discriminatory ordinances that bar the construction of certain types of housing units, as well as "unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[225]

The Court's decision in *Inclusive Communities* demonstrates that the Supreme Court does not think that a textual analysis is dispositive to resolution of the issue of whether a statute authorizes disparate impact liability. Instead, the Court's use of a three-factor test—the statute's text, historical background, and policy implications—suggests the contrary. Although the Court focused

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dissent rejected this "implicit ratification" theory, arguing that it can only apply when the legal question can be regarded as settled, which the dissent argued was not the case in 1988 because the United States had taken a contrary position and the Supreme Court had not spoken on the issue. *Id.* at 2539 (Alito, J., dissenting).

[221] *Id.* at 2511.

[222] *Id.* at 2537 n. 3.

[223] *See id.* at 2521. For its part, the dissent argued that these exemptions were, at most, reflective of a compromise between legislators who were satisfied with the Courts' of Appeals reading of the FHA and those who were not. *Id.* at 2538. (Thomas, J., dissenting).

[224] *Id.* at 2511.

[225] *Id.* The Court concluded its opinion with a lengthy discussion of the limits of disparate impact liability. *Id.* at 2522. This discussion is beyond the scope of this Article.

more heavily on the language of the FHA, it is a mistake to think that the Court was somehow indicating that the statute's historical information and policy considerations were merely incidental to its decision. Importantly, the Court's analysis of all three factors belies this argument. What is also important is how other courts have analyzed and resolved the issue of whether the ECOA authorizes disparate impact liability.

D. ECOA Disparate Impact Case Law

Every federal court considering whether the ECOA permits disparate impact liability has held that it has;[226] but the question has received little discussion in the case law. While most of the courts addressing the issue are federal district courts, the Ninth Circuit is the only federal appellate court to directly answer the question.[227] That said, Fifth Circuit dicta has suggested that disparate impact claims are cognizable under the ECOA.[228] In addition, the D. C. Circuit and Sixth Circuit have assumed without deciding that disparate impact claims are cognizable.[229]

The District Court for the Eastern District of Wisconsin was the first to consider the question in *Vander Missen v. Kellogg Citizens National Bank of Green Bay*.[230] In that case, the plaintiff sought to compel an interrogatory regarding the defendant-bank's antidiscrimination policies under a theory that evidence of pervasive disparate impact discrimination would entitle the plaintiff to punitive damages.[231] The Court surveyed the ECOA's legislative

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[226] Procaccini, *supra* note 17, at S57.

[227] *See* Miller v. Am. Express Co., 688 F.2d at 1235 (9th Cir. 1982).

[228] Haynes v. Bank of Wedowee, 634 F.2d 266, 269 n.5 (5th Cir. 1981).

[229] Garcia v. Johanns, 444 F.3d 625, 633 (D.C. Cir. 2006); Golden v. City of Columbus, 404 F.3d 950, 963 (6th Cir. 2005). Without reaching the issue, the Sixth Circuit in *Golden* wrote that "it appears" disparate impact claims are cognizable under the ECOA. *Golden*, 404 F. 3d at 963 n.11. The D.C. Circuit in *Garcia* "express[ed] no opinion" on the subject but noted differences in the language of the ECOA on the one hand, and Title VII and the ADA on the other. *Garcia*, 444 F.3d at 633 n.9.

[230] Vander Missen v. Kellogg-Citizens Nat'l Bank of Green Bay, 481 F. Supp. 742, 745 (E.D. Wis. 1979).

[231] *Id.* at 744–45.

history and concluded that Congress indeed intended the *Griggs* "effects test" to apply to the ECOA but did not intend for disparate impact liability to be a basis for punitive damages.[232]

The leading district court case recognizing ECOA disparate impact liability, though, is *Cherry v. Amoco Oil Co.*[233] In that case, the defendant-creditor denied the plaintiff, a white woman, a credit card based in part on her zip code.[234] Specifically, the plaintiff alleged racial discrimination and argued that the creditor's policy of assigning a low score to her zip code in its credit scoring system had a disproportionate impact on individuals in her predominately black neighborhood.[235] Because of the ECOA's legislative history and purpose, the court held that the statute authorized disparate impact claims.[236] The court noted that the ECOA's drafters "assume[d] that the 'effects test' [would] be utilized in cases under the [ECOA]."[237] It further observed that without disparate impact liability, the ECOA "will provide a remedy only in those rare cases where a company deciding on credit expressly states it is denied for a prohibited reason," and that "discrimination in credit transactions is more likely to be of the unintentional, rather than the intentional, variety."[238] The court nevertheless found for the defendant following a bench trial because the plaintiff's evidence only showed a disparate impact on people living in predominantly black neighborhoods, rather than an actual disparate impact on black applicants.[239]

In 1982, the Fifth Circuit became the first federal appellate court to address the issue in *Haynes v. Bank of Wedowee.*[240] In *Haynes,* the plaintiff, a married woman, claimed that the defendant bank violated the ECOA by engaging in marital status discrimination

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[232] *Id.* at 745–46.

[233] *See* Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1029–30 (N.D. Ga. 1080).

[234] *Id.* at 1027–28. The plaintiff was white but alleged she had standing because the defendant's discriminatory policy harmed her. *Id.*

[235] *Id.* at 1028.

[236] *Id.* at 1029–30.

[237] *Id.* at 1029.

[238] *Id.* at 1030.

[239] *Id.*

[240] Haynes. v. Bank of Wedowee, 634 F.2d 266, 270 (5th Cir. 1981).

when it terminated her loan because of her husband's bankruptcy.[241] The Court held that the bank acted legitimately when it accelerated the plaintiff's loan because her husband's bankruptcy threatened the assets in the joint bank account she shared with him and upon which she relied for her loan extension.[242] The Court in that case noted in dicta that impact theories were cognizable under the ECOA because they were expressly endorsed by Regulation B.[243] However, the Court noted that the plaintiff did not rely upon an appropriate disparate impact theory in the case.[244]

A year later, the Ninth Circuit directly endorsed disparate impact liability in *Miller v. American Express Co.*[245] In *Miller,* the defendant-bank terminated the plaintiff's supplementary credit card following the death of her husband, who was the primary account holder.[246] A provision of Regulation B forbade this practice, but the defendant argued that this provision was beyond the scope of the ECOA because terminating a supplementary credit card after the death of a primary account holder is not necessarily discriminatory.[247] Citing *Cherry* and with little further discussion, the Court held that the ECOA allows disparate impact claims.[248] Importantly, the Court also held that an ECOA plaintiff need not even show that a practice statistically disadvantages a protected group so long as the plaintiff's membership in a protected group somehow caused the adverse action.[249]

The other courts to have recognized disparate impact liability under the ECOA have done so with little to no analysis of the issue. Some simply cite to Regulation B and cases from other jurisdictions that have recognized disparate impact theory.[250] Others have taken

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[241] *Id.* at 267.

[242] *Id.*

[243] *Id.* at 269 n.5.

[244] *Id.*

[245] Miller v. Am. Express Co., 688 F.2d 1235, 1237 (9th Cir. 1982).

[246] *Id.* at 1237.

[247] *Id.* at 1239.

[248] *Id.* at 1239–40.

[249] *Id.*

[250] *See, e.g.*, Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315, 325 (M.D. Tenn. 2000), overruled by Coleman v. General Motors Acceptance Corp., 296 F.3d 443 (6th Cir. 2002) (citing Regulation B and cases from other

for granted without any relevant discussion that disparate impact liability is permitted under the ECOA.[251]

Collectively, the ECOA case law reflects the need for courts to provide greater evidentiary support for their holdings that disparate impact claims are permissible under the ECOA. As the *Inclusive Communities* case shows and this Article demonstrates, a detailed analysis of the ECOA's historical background and policy considerations would strengthen court decisions. Although the ECOA caselaw is supportive of disparate impact liability, the fact remains that the caselaw is notably thin. Not many courts have addressed the question. A consensus of lower-court decisions favoring disparate impact liability would provide greater support for the view that the ECOA should be understood to authorize impact analyses. In addition, such fully litigated cases would help to remove some of the doubt and uncertainty some may have regarding the validity of impact methodology in fair lending claims. Notably, robust FHA jurisprudence was among the reasons that the Supreme Court decided in *Inclusive Communities* that the FHA permits disparate impact liability. Further scrutiny of the Court's reasoning process provides key insights into whether the Court would likewise decide that disparate impact liability is included in the ECOA.

III. APPLYING INCLUSIVE COMMUNITIES TO THE ECOA

The Supreme Court's reasoning in *Inclusive Communities* focused on the language of the FHA's anti-discrimination provision, the FHA's legislative history, and the policy objectives the statute seeks to achieve. The extent to which these factors would likely influence the Court to decide that disparate impact claims are valid under the ECOA, addressed next, demonstrates the significant role of historical information to a court's decision.

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jurisdictions for proposition to show disparate impact claims are cognizable under ECOA); Sayers. v. Gen. Motors Acceptance Corp., 522 Fed. Supp. 825, 839 (W.D. Mo. 1981) (containing a similar analysis).

[251] *See, e.g.*, Miller v. Countrywide Bank, 571 F. Supp. 2d 251, 255 (D. Mass. 2008) (treating ECOA claim as identical to FHA claim); Salandra v. Citibank, Fed. Say. Bank, No. 93-C-4164, 1996 WL 332451, at *2 (N.D. Ill. June 13, 1996) (noting a case where a similar analysis was used).

A. Statutory Language

The Court in *Inclusive Communities* reasoned that because the FHA's statutory language was sufficiently close to that of Title VII and the ADEA, the FHA must likewise support disparate impact liability.[252] Although the Court took some liberties in making this comparison, the FHA's language is far closer to Title VII and the ADEA than the ECOA's language is. Critically, the Court wrote that the FHA, Title VII, and the ADEA all "look to results" and include "catchall phrases."[253] For instance, Title VII includes the phrase "in any way"[254] and the FHA includes the word "otherwise."[255]

The ECOA contains no comparable language. The ECOA's operative text states simply that "it shall be unlawful for any creditor to discriminate against any applicant."[256] This provision mentions the action verb "discriminate" but makes no explicit reference to effect. In comparison, the ADEA protects older workers from employment actions that discriminate against and "adversely affect" them.[257] Also, Title VII emphasizes both the forbidden action and the result: it forbids the acts of "limit[ing], segregate[ing], or classify[ing]" and the effects of "depriv[ing] or tend[ing] to deprive" any individual of employment opportunities "in any way."[258] Additionally, Title VII bans employment actions that "adversely affect" employees because of race and other protected characteristics.[259]

Likewise, the FHA provision at issue in *Inclusive Communities* forbids the acts of "refus[ing] to sell or rent" and "refus[ing] to negotiate" and the effects of "otherwise mak[ing] unavailable or

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[252] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519–21 (2015).

[253] *Id.* at 2419.

[254] Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 (1968).

[255] Fair Housing Act (FHA), 42 U.S.C. § 3604 (2012).

[256] Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(a) (2012).

[257] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a)(2) (2012).

[258] 42 U.S.C. § 2000e-2(a)(2).

[259] *Id.*

denying[ing] . . . a dwelling to a person because of race."[260] The Court concluded that "otherwise making unavailable" is the functional equivalent of "adversely affected."[261] The Court justified this difference between the language in Title VII and the FHA as grammatically necessary.[262] The significant differences between the structure of Title VII and the ECOA do not justify a similar argument. Also, the ECOA has no analogous "catchall" word or phrase, as was vital in the Court's comparison of the FHA to Title VII and the ADEA.[263]

Although *Inclusive Communities'* textual analysis does not support ECOA disparate impact claims, it does not prohibit a court from finding that such claims are cognizable under the ECOA. The Supreme Court appeared persuaded by the fact that the FHA's effects-based and catchall language broadened its reach. "Discriminate," being the operative word in the ECOA, is broad standing alone and thus may not require language analogous to Title VII or the FHA to achieve the same result.[264] Indeed, the ECOA's legislative history reveals congressional intent not to define "discriminate" so that courts and regulators would have flexibility to determine precisely what type of practices and actions the statute should proscribe.[265]

B. Congressional Intent

The Court in *Inclusive Communities* also relied on the FHA's legislative history to reach its conclusion that Congress intended disparate impact claims to be cognizable under the FHA. Indeed, even before it analyzed the statute's text, the Court provided a "brief history of the FHA's enactment"[266] and laid an appropriate

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[260] 42 U.S.C. § 3604(a).

[261] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518–19 (2015).

[262] *Id.* at 2519.

[263] *Id.* at 2517-2518; *see* Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (2012).

[264] For an argument that the text of the ECOA should be read to establish disparate impact liability, see Procaccini, *supra* note 17, at S51–53.

[265] *See Hearings*, *supra* note 16.

[266] *Inclusive Cmtys.*, 135 S. Ct. at 2515.

foundation for understanding precisely what is at stake when courts interpret civil rights legislation. The Court began by tracing the nation's legal efforts to combat housing discrimination based on race from 1917 to 1968, the year that Congress passed the FHA.[267] The ECOA's pre-enactment history likewise provides insight to courts that are faced with the question of whether a statute, under a proper interpretation, prohibits decisions with disparate impact. As Part II shows, both intentional and unintentional discriminatory practices historically hindered a woman's access to credit. Because disparate treatment and disparate impact discrimination were prevalent before Congress passed the ECOA, eradication of both must have been what Congress intended when it enacted legislation that targeted abuses in the credit industry based on sex and marital status.

The Court in *Inclusive Communities* also examined the FHA's post enactment history. Looking to this history, the Court first held that Congress, in effect, ratified the unanimous understanding of the federal courts by amending the FHA in 1988 without adopting any amendment that would have restricted the FHA to disparate treatment claims.[268] Although this same logic applies to the ECOA, it does not apply with equal force.[269] Since *Vander Missen* in 1979, every court to rule on the issue has indeed held that the ECOA authorizes disparate impact claims, and Congress has amended the ECOA multiple times since *Vander Missen.*[270] But there is far less

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[267] *Id.* at 2515–16.

[268] *Id.* at 2525.

[269] Miller v. Am. Express Co., 688 F.2d 1235, 1241–42 (9th Cir. 1982); Procaccini, *supra* note 17, at 57.

[270] *See, e.g.*, Guerra v. GMAC LLC, 2:08-CV-01297-LDD, 2009 WL 449153 at *3 (E.D. Pa. 2009) (citing a series of cases that recognize disparate impact claims under the FHA and the ECOA); Sayers v. General Motors Acceptance Corp., 522 F. Supp. 835, 842 n.1 (W.D. Mo. 1981) (noting that "Although Congress has indicated in the ECOA's legislative history that an 'effects test' should be used in actions brought under the ECOA, this Court does not believe that Congress intended the 'effects test' to be the exclusive test for discrimination."); Cragin v. First Federal Savings and Loan Ass'n., 498 F. Supp. 379, 384 (D. Nev. 1980) (relying on the Senate Report to the 1976 ECOA Amendments, which reads "In determining the existence of discrimination . . . courts or agencies are *free to look at* the effects of a creditor's

case law on ECOA disparate impact liability than there was FHA disparate impact case law at the time of the 1988 FHA amendments. By 1988, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits had all held that disparate impact claims are authorized under the FHA.[271] In comparison, by 2010—the date of the most recent ECOA amendments—only the Ninth Circuit had held that disparate impact claims are cognizable under the ECOA with the Fifth Circuit in dicta supporting such claims.[272]

It is worth noting that the *Inclusive Communities* dissent criticized the Court's conclusion that even a consensus among nine Courts of Appeals was sufficient to impute to Congress an intent to adopt this consensus when it amended the FHA in 1988.[273] The dissent argued that there needed to be a legal consensus to impute such an intent to Congress and denied that such a consensus existed.[274] This argument would resonate much louder in opposition to ECOA disparate impact liability—although there is no actual disagreement, most courts remain undecided and there might not be a sufficient legal consensus.

Nevertheless, the Court in *Inclusive Communities* found convincing that Congress considered and rejected a proposal to amend the FHA to eliminate disparate impact liability.[275] Congress likewise did not act on proposed amendments to eliminate disparate

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practices as well as the creditor's motives or *conduct* individual transactions.") (emphasis added).

[271] *See* Keith v. Volpe, 858 F.2d 467, 482–84 (9th Cir. 1988); Huntington Branch, N.A.A.C.P. v. Huntington, 844 F.2d 926, 934 (2d Cir. 1988) *aff'd* Town of Huntington v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 17 (1988); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Smith v. Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1181 (8th Cir. 1974).

[272] *See* Miller v. Am. Express Co., 688 F.2d 1235, 1237–39 (9th Cir. 1982); Haynes v. Bank of Wedowee, 634 F.2d 266, 269 n.5 (5th Cir. 1981).

[273] *Inclusive Cmtys.*, 135 S. Ct. at 2538 (Alito, J., dissenting) (noting collected cases).

[274] *Id.* at 2539.

[275] *Id.* at 2520.

impact liability from the ECOA.[276] This part of the opinion provides some of the strongest support for extending disparate impact liability to the ECOA.

The Court also used the substance of the 1988 amendments to show that Congress must have understood the FHA to include disparate impact liability by noting that several of the amendments would have been superfluous if only disparate treatment claims were cognizable.[277] These amendments provided exceptions to FHA liability for certain scenarios that do not involve invidious discrimination based on a protected category, and thus would only require an exception if disparate impact claims were cognizable.[278] Although the ECOA also provides several exceptions to liability, there are no sufficiently analogous provisions. For instance, sections 1691(b) and (c) provide a list of "activities not constituting discrimination" under the ECOA.[279] But unlike the FHA exceptions added in the 1988 Amendments, these exceptions list scenarios in which the creditor may explicitly consider a protected category—i.e., exceptions to the rule prohibiting disparate treatment.[280]

C. Policy

The Court concluded its argument in favor of FHA disparate impact liability in *Inclusive Communities* with a discussion of the policy reasons behind the FHA. The Court notes two specific purposes of the FHA that are served by allowing disparate impact claims: "eradicat[ing] discriminatory practices within a sector of our Nation's economy" and "uncovering discriminatory intent," be it disguised or unconscious.[281]

Both policy reasons fit squarely within the ECOA's purpose and thus support ECOA disparate impact liability. There can be no

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[276] *See* Equal Credit Opportunity Act Amendments of 1995, H.R. 1699, 104th Cong. (1995); Equal Credit Opportunity Act Amendments of 1997, H.R. 229, 105th Cong. (1997); Regulation B, 62 Fed. Reg. 66,411,66,414 (Dec.18, 1997).

[277] *Inclusive Cmtys*., 135 S. Ct. at 2520.

[278] *Id.* at 2516, 2521.

[279] Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691(b), (c) (2012).

[280] *Id.*

[281] *Inclusive Cmtys*., 135 S. Ct. at 2521–22.

question that Congress passed the ECOA to "eradicate discriminatory practices within a sector of our Nation's economy."[282] Congressional recognition of the increasing necessity of credit in every day American life largely motivated it to enact the ECOA. As a Senate report on the 1976 amendments explained:

> Credit has ceased to be a luxury item, either for consumers or for business entrepreneurs. Consumer credit outstanding continues to grow at a phenomenal pace and now stands slightly below $200 billion, not even counting family 1-4 mortgage credit which would add more than $400 billion to that total. Virtually all home purchases are made on credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upwards of 15% of all consumer disposable income is devoted to credit obligations other than home mortgages.[283]

A House committee quoted the chairman of the U.S. Committee on Civil Rights, who made a similar point:

> It would be difficult to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Indeed, the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution.[284]

Likewise, the Court's recognition that disparate impact liability is often needed to counteract hidden discrimination echoes the *Cherry* Court's reasoning. The *Cherry* Court wisely concluded that without disparate impact liability the ECOA "will provide a remedy

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[282] *See id.*

[283] S. REP. NO. 94-589, at 3 (1976).

[284] H.R. REP. NO. 94-210, at 3 (1975).

only in those rare cases where a company deciding on credit expressly states it is denied for a prohibited reason," and further that "discrimination in credit transactions is more likely to be of the unintentional, rather than the intentional, variety."[285] Thus, it is clear that the policy reasons for FHA disparate impact liability, which the Court endorsed in *Inclusive Communities*, apply with equal force to the ECOA.

D. Summary

The Court's textual analysis and focus on the FHA 1988 Amendments indicate that the reasoning in *Inclusive Communities* is rather narrow and specific to the FHA. This narrow reading of the opinion suggests that although the ECOA's textual language is dissimilar to the FHA's, this does not forbid the conclusion that the ECOA creates disparate impact liability. That Congress expressed its intent to create disparate impact liability in the FHA in part through its implicit endorsement of the existing case law and via the 1988 Amendments, likewise does not undermine the strong support that exists for ECOA disparate impact claims as set forth in the legislative record and regulatory history. Courts and commentators have also advanced compelling arguments favoring disparate impact liability in lending discrimination claims.

As for ECOA commentators, the debate over disparate impact liability is intense. Supporters of disparate impact liability under the ECOA primarily use the legislative history of the ECOA amendments and Regulation B to support their claims. Typically, they buttress their analyses with the case law on the subject. Civil rights advocates Aleo and Svirksy, for example, argue that the clear congressional intent for the ECOA disparate impact liability as expressed in the history of the 1976 amendments coupled with Regulation B's subsequent interpretation show that disparate impact claims are cognizable.[286] Similarly, Procaccini, a strong advocate of ECOA disparate impact liability, extensively reviewed the post enactment legislative history to show that Congress likely intended

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[285] Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980).

[286] Aleo & Svirsky, *supra* note 106, at 59–60, 62.

and understood the ECOA to allow disparate impact claims, which she supports with Regulation B and the existing case law.[287]

In opposition to these common arguments, Cubita and Hartmann argue that the legislative history and administrative interpretations cannot override the ECOA's clear textual language.[288] They argue that the oft-cited congressional reports endorsing disparate impact liability are irrelevant to interpretation because they were released while Congress was drafting the 1976 Amendments, after the original language was enacted.[289] Furthermore, they argue that Regulation B "merely recites the fact that the legislative history of the [ECOA] indicates that Congress intended an 'effects test' concept" which is "not equivalent to making a considered administrative determination that 'the purposes of this title' . . . include the eradication of discriminatory effects."[290]

Cubita and Hartmann are on the wrong side of this debate. Their argument that congressional support for disparate impact liability comes primarily from reports that were released after the statute was enacted, overlooks the ECOA's abundant pre-enactment history that reveals congressional support for combatting intentional and unintentional lending discrimination. Also, a major flaw in Cubita and Harmann's principle argument that a textual analysis trumps all others when determining if a statute includes impact claims is its failure to recognize the Supreme Court's three-part test articulated in *Inclusive Communities.* Although the Court included a textual analysis among the three factors to be considered, it did not state that this factor alone was conclusive.

IV. Conclusion

Some people may be unable to imagine a time when lenders discounted the income of working women or a time when lenders automatically perceived a woman's name change as a negative change to her creditworthiness. Yet, those times existed and an incalculable number of women suffered devastating economic

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[287] Procaccini, *supra* note 17, at S53–69.

[288] Cubita & Hartmann, *supra* note 9, at 830–31.

[289] *Id.* at 837–38.

[290] *Id.* at 841 (internal quotation marks and alterations omitted).

consequences because of facially neutral credit policies and practices. The ECOA's pre-enactment and post-enactment history shows that Congress passed the ECOA in 1974 in part to remedy such unfairness to women. This history also reveals that disparate impact theory is the mechanism Congress intended for lending discrimination victims to be able to use to combat policies and practices that appear fair in form, but are disproportionately adverse in effect.

The question of the validity of impact theory in fair lending cases has taken center stage in the debate over how best to achieve credit equality in the twenty-first century. The outcome of this debate has dire consequences for consumers. The settlements between indirect auto lenders and the CFPB are illustrative. In its lawsuits against indirect auto lenders, the CFPB claimed disparate impact discrimination based on race and national origin and obtained settlements that awarded over $143 million dollars to consumers. If the ECOA is found not to authorize disparate impact liability, this compensation would probably be labeled illegitimate. Moreover, no future ECOA plaintiffs could be compensated for harm caused by lenders' disparate impact discrimination, even if they were able to prove it in court. This would be a sad day for credit equality advocates.

Congress recognized the importance of credit in American society when it enacted the ECOA. The lawmakers realized that the statute could serve important social values by protecting the right of consumers to enhance their economic status through credit transactions. To ensure that credit is dispensed fairly, the ECOA's history shows that Congress sought to eliminate both intentional and unintentional barriers that impede credit equality.

The Supreme Court's reasoning in *Inclusive Communities* signifies that historical consciousness is vital when a court must determine whether Congress intended for a statute to authorize disparate impact liability. Indeed, the Court's discussion of the FHA's legislative history and policy objectives highlights the significance of a statute's historical background to decisionmakers and offers great insight into how the Court should rule on the validity of impact theory to prove lending discrimination claims. A

legal realist[291] who believes that Congress is motivated largely by policy considerations should look at the Court's historical focus and policy discussion as a signal that the Court that decided *Inclusive Communities* believes disparate impact liability is a necessary antidiscrimination tool that is inherent in fair lending legislation.

ECOA plaintiffs deserve the right to prove disparate impact claims, as Congress apparently intended. Women fought for and won this battle decades ago. It would be a step backwards for society if this antidiscrimination tool is removed from litigation of fair lending claims. While some may find the very concept of liability for unintended discrimination as an affront to justice and fairness, the truth is that restricting the ECOA to disparate treatment claims is incompatible with the statutory goal of equality for all creditworthy applicants. To eliminate any doubt some may have regarding congressional intent, policymakers should amend the ECOA to expressly state that impact analysis is a valid proof method. If they fail to do so, the U.S. Supreme Court should follow its holding in *Inclusive Communities* and decide that disparate impact liability is indeed cognizable under the ECOA.

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[291] Legal realism is a method for understanding the law that focuses on law, not as rules alone, but also as what officials do with them. Most legal realists believe that law results from some balance between the role of earlier created rules, social and historical facts, and the social and intellectual backgrounds of the officials. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 170, 195 (1992) (discussing the foundations for and legacy of Legal Realism).