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The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There

*By Peter N. Cubita and Michelle Hartmann**

INTRODUCTION

In recent years there has been a series of credit discrimination pricing cases in the automotive finance area predicated principally upon the assumption that the Equal Credit Opportunity Act (ECOA) prohibits certain facially-neutral practices that have a disparate impact or "effect" on a protected class.[1] Recent United States Supreme Court decisions examining whether other civil rights statutes prohibit disparate impact discrimination suggest a need to examine critically the foundations of this assumption. Courts concluding that the ECOA prohibits disparate impact discrimination that is not business-justified generally have done so without scrutinizing the text of the ECOA discrimination proscription.[2] They have tended

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1. *See generally* Nicole F. Munro, Jean L. Noonan & R. Elizabeth Topoluk, *Recent Developments in Fair Lending and the ECOA: A Look at Housing Finance and Motor Vehicle Dealer Participation*, 60 BUS. LAW. 627, 635–44 (2005). The plaintiffs in these automotive ECOA cases have alleged that purchasers of retail installment sale contracts may be held liable, principally on a disparate impact theory, for the alleged discriminatory acts of automobile dealers in determining the annual percentage rates (APRs) on the retail installment sale contracts that they sell to banks, sales finance companies and other purchasers of installment sale contracts.

2. *See, e.g.*, Smith v. Chrysler Fin. Co., No. Civ. A. 00-6003 (DMC), 2003 WL 328719, at *6 (D.N.J. Jan. 15, 2003); Osborne v. Bank of Am. N.A., 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002); Wise ex rel. Wilson v. Union Acceptance Corp., No. IP 02-0104-C-M/S, 2002 WL 31730920, at *3–4 (S.D. Ind. Nov. 19, 2002) (citations omitted); Jones v. Ford Motor Credit Co., No. 00 Civ. 8330 (LMM), 2002 WL 88431, at *3–4 (S.D.N.Y. Jan. 22, 2002); Coleman v. General Motors Acceptance Corp., 196 F.R.D. 315, 326 & n.23 (M.D. Tenn. 2000) (collecting cases), *rev'd on other grounds*, 296 F.3d 443 (6th Cir. 2002); Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030–31 (N.D. Ga. 1980). *Cf.* Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("We express no opinion about whether a disparate impact claim can be pursued under ECOA.") (citation omitted); Midkiff v. Adams County Reg'l Water Dist., 409 F.3d 758, 771–72 (6th Cir. 2005) ("[T]his Court [in *Golden*] assumed that disparate impact claims are permissible under the ECOA. We make the same assumptions and need not resolve the

to rely instead upon the following three non-statutory references to the "effects test": (i) excerpts from congressional committee reports issued in connection with the ECOA Amendments of 1976, which did not amend the relevant statutory text; (ii) a footnote to Federal Reserve Board (FRB) Regulation B (Regulation B) which, based upon these committee report excerpts, merely recites that "[t]he legislative history of the Act indicates that Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness;"[3] and (iii) a related Official Staff Commentary (Commentary) provision that effectively reiterates the point and cites the same committee reports. However, recent Supreme Court decisions involving alleged discrimination have stressed the primacy of the statutory text in determining what Congress proscribed and what it resolved to leave alone. This article examines the text of the ECOA credit discrimination proscription, and these non-statutory references to the "effects test," with a view toward discerning the meaning of the statutory text and the intent of the enacting Congress.

The Text of the ECOA Credit Discrimination Proscription Does Not Prohibit Discriminatory Effects

Numerous decisions of the United States Supreme Court have recognized that, "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished."[4] Indeed, one distinguished jurist has stated that "the Supreme Court insists that we take statutes seriously, bending their language only when the text produces absurd results."[5] Although some courts have held that the ECOA proscribes disparate impact discrimination, surprisingly little judicial attention has

complex statutory questions that these issues present because the Midkiffs' proposed ECOA claim contains a fundamental flaw that renders an amendment to add this claim futile.") (citation omitted); Golden v. City of Columbus, 404 F.3d 950, 963 & n.11 (6th Cir.) ("Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are.") (*dicta*) (citations omitted), *cert. denied*, 126 S. Ct. 738 (2005); Rodriguez v. Ford Motor Credit Co., No. 01-C-8526, 2002 WL 655679, at *4 (N.D. Ill. Apr. 19, 2002) ("Ford Credit disputes whether plaintiffs may proceed under a disparate impact theory under the ECOA. Without deciding this open issue, the court evaluates plaintiff's motion for class certification under both theories."). Other commentators also have expressed opposing points of view without scrutinizing the text of the ECOA credit discrimination proscription. *See generally* Gwen A. Ashton, *The Equal Credit Opportunity Act from a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANKING L. 465, 478–81 (1998); Earl M. Maltz & Fred H. Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 356–46 (1978).

3. 12 C.F.R. § 202.6(a) n.2 (2005).

4. *E.g.*, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).

5. Neal v. Honeywell Inc., 33 F.3d 860, 862 (7th Cir. 1994) (Easterbrook, J.) (citations omitted), *abrogated on other grounds*, Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 125 S. Ct. 2444 (2005). Judge Easterbrook's observation was made in reviewing a lower court decision that had invoked the principle that remedial statutes should be construed broadly to achieve a result not sustainable under the statutory language. In so doing, he emphasized that "the essential question is not which way the statute points but how far it directs one to go" and concluded that "[n]o principle of statutory construction says that after identifying the statute's accommodation of competing interests, the court should give the favored party a little extra." *Neal*, 33 F.3d at 862.

been devoted to the actual text of the ECOA credit discrimination proscription. The credit discrimination proscription is contained in subsection 701(a) of the ECOA, which declares it "unlawful for any creditor *to discriminate against* any applicant . . . *on the basis of* race, color, national origin" or any other prohibited basis.[6] The Regulation B general rule against discrimination is phrased similarly, providing that "[a] creditor *shall not discriminate against* an applicant *on a prohibited basis* regarding any aspect of a credit transaction."[7] Neither the ECOA discrimination proscription nor its Regulation B counterpart references discriminatory or adverse effects.

A comparison with discrimination proscriptions of other statutes is illuminating. The language of the ECOA credit discrimination proscription is comparable to that contained in what the United States Supreme Court has identified as "the disparate treatment wing of Title VII," which prohibits discrimination "*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."[8] Indeed, the Supreme Court has held that comparable language in various other discrimination statutes prohibits only intentional discrimination and not conduct that merely has a discriminatory effect. For example, Title VI of the Civil Rights Act of 1964 provides that "no person . . . shall, on the ground of race, color or national origin . . . be subjected to discrimination under any program or activity" covered by Title VI.[9] The Supreme Court has held that this language prohibits only intentional discrimination.[10] Likewise, Title IX prohibits discrimination "on the basis of sex" and, consequently, the Court of Appeals for the Sixth Circuit has ruled that this provision does not allow an individual to bring a disparate impact claim.[11]

By contrast, Congress has used very different language when it wishes to proscribe facially-neutral practices that have a disparate impact. The disparate impact theory of discrimination had its genesis in *Griggs v. Duke Power Co.*,[12] a Title VII employment discrimination case decided several years before the ECOA was en-

6. 15 U.S.C. § 1691(a) (2000) (emphasis added).

7. 12 C.F.R. § 202.4(a) (2005) (emphasis added).

8. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added); *see* Lorance v. AT&T Techs., Inc., 490 U.S. 900, 915 (1989) (referring to "§ 703(a)(1) [of Title VII], 42 U.S.C. § 2000e-2(a)(1)," as "the disparate treatment wing of the statute"), *abrogated on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078-79 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)). The holding in *Lorance* ultimately was superseded by the Civil Rights Act of 1991 with respect to seniority system claims under Title VII. Specifically, the Civil Rights Act of 1991 amended Title VII, 42 U.S.C. § 2000e-5(e)(2), to provide that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . when . . . a person aggrieved is injured by the application of the seniority system or provision of the system." Pub. L. No. 102-166, § 112, 105 Stat. at 1078–79.

9. 42 U.S.C. § 2000d (2000).

10. Alexander v. Choate, 469 U.S. 287, 293 (1985); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610–12, 642 (1983); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287, 328–40, 352 (1978); *see also* Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001), discussed *infra* notes 39–45 and accompanying text.

11. Brindisi v. Regano, 20 Fed. App. 508 (6th Cir. 2001) (relying on *Sandoval*).

12. 401 U.S. 424 (1971).

acted in 1974. In holding that "the [disparate impact] objective of Congress in the enactment of Title VII is plain from the language of the statute," the United States Supreme Court relied statutorily on paragraph (2) of section 703(a) of Title VII of the Civil Rights Act of 1964.[13] Paragraph (2) of section 703(a), which appropriately is characterized as the disparate impact wing of Title VII, provides as follows:

> It shall be an unlawful employment practice for an employer . . .
> (2) to limit, segregate, or classify his employees . . . in any way *which would deprive or tend to deprive* any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race . . . .[14]

In *Smith v. City of Jackson*, a recent United States Supreme Court case concerning whether the Age Discrimination in Employment Act of 1967 (ADEA) proscribes disparate impact discrimination, a plurality of the Court reiterated that this Title VII "text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[15]

More importantly, all three opinions in *Smith* also acknowledge that identical "effects" language in paragraph (2) of section 4(a) of the ADEA is the only possible statutory source for the ADEA disparate impact proscription.[16] Significantly, neither of these seminal disparate impact decisions relied upon, respectively, para-

13. 401 U.S. at 425 n.1, 429–30 (quoting 42 U.S.C. § 2000e-2(a)(2)); *see* Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1541–42 (2005) (Stevens, J.) ("We . . . squarely held [in *Griggs*[that § 703(a)(2) of Title VII did not require a showing of discriminatory intent. While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well.") (footnote omitted) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1998)). *But see Smith*, 125 S. Ct. at 1557 (O'Connor, J., concurring in judgment) ("As the plurality tacitly acknowledges, *ante*, at 1542, the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived purpose, . . .").

14. *Griggs*, 401 U.S. at 425 n.1, 429–30 (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added); *see also Smith*, 125 S. Ct. at 1541–43 & n.6 (Stevens, J.) (counterpart ADEA disparate impact decision referring, *inter alia*, to "[o]ur unanimous interpretation of § 703(a)(2) of the Title VII in *Griggs* [as] . . . a precedent of compelling importance").

15. 125 S. Ct. at 1542 (Stevens, J.). *Smith* also considered the implications of an ADEA provision stating that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n[(a) . . . where the differentiation is based on reasonable factors other than age discrimination . . . ." *Id.* at 1543–44 (quoting 29 U.S.C. § 623(f)(1)). In a separate opinion, Justice Scalia concurred in the judgment and in all except Part III of the plurality opinion. As to Part III, Justice Scalia "agree[d] with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the" EEOC. *Smith*, 125 S. Ct. at 1546 (Scalia, J., concurring in part and concurring in judgment). *But see Smith*, 125 S. Ct. at 1549 (O'Connor, J., concurring in judgment) ("I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA.").

16. *See Smith*, 125 S. Ct. at 1540–42 & nn. 6 & 7 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.); *id.* at 1548 (Scalia, J., concurring in part and concurring in judgment) ("of course, the only provision of the ADEA that could conceivably be interpreted to effect such a prohibition is § 4(a)(2)"); *id.* at 1549–50 (O'Connor, J., concurring in judgment, joined by Kennedy and Thomas, JJ.) (citation omitted) ("Neither petitioners nor the plurality contend that the first paragraph [of the ADEA discrimination proscription[, § 4(a)(1), authorizes [ADEA] disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age.") (emphasis added). Chief Justice Rehnquist did not participate in the decision of the *Smith* case.

graph (1) of Title VII section 703(a) or paragraph (1) of ADEA section 4(a), which are comparable to the ECOA credit discrimination proscription insofar as they prohibit discrimination "against" an individual "because of" race, age and the like.[17] *Griggs* and *Smith* thus validate what is apparent from the plain language of the ECOA: the statutory text of ECOA section 701(a) contemplates only the proscription of disparate treatment with respect to credit transactions.

The ECOA credit discrimination proscription is substantially similar to its Title VI and IX counterparts and strikingly dissimilar to the Title VII and ADEA disparate impact proscriptions construed by the United States Supreme Court in *Griggs* and *Smith*. Unlike the Title VII and ADEA disparate impact proscriptions, the ECOA credit discrimination proscription does not speak in terms of the "effects" of a practice on an applicant nor does it speak in terms of practices that deprive, tend to deprive or otherwise adversely affect applicants because of their race, color, national origin or gender.[18] Indeed, the following juxtaposition of the ECOA credit discrimination proscription as originally enacted and the general Title VII employment discrimination proscriptions as originally enacted reveals a clear symmetry with respect to their disparate treatment proscriptions and a glaring distinction with respect to the proscription of disparate impact discrimination:

17. *See Smith*, 125 S. Ct. at 1542 n.6 (Stevens, J.) ("In reaching a contrary conclusion, Justice O'Connor ignores key textual differences between § 4(a)(1), which does not encompass disparate-impact liability, and § 4(a)(2). Section (a)(1) makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* because of *such individual's* age.' (Emphasis added.) The focus of the section is on the employer's actions with respect to the targeted individual.").

18. The D.C. Circuit recently noted as much in affirming the denial of a class certification motion, observing that the "ECOA contains no such [effects] language." Garcia v. Johanns, 444 F.3d at 633 n.9 ("Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that 'otherwise adversely affect' a protected individual. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 125 S. Ct. 1536, 1540, 161 L. Ed. 2d 410 (2005) (ADEA); Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (Title VII). ECOA contains no such language. We express no opinion about whether a disparate impact claim can be pursued under ECOA.") (citation omitted).

TITLE VII vs. ECOA AS ORIGINALLY ENACTED
COMPARISON OF RELEVANT STATUTORY PROSCRIPTIONS

Statute	Pub. L. No. 88-352, tit. VII, § 703(a), 78 Stat. 241, 255 July 2, 1964 (emphasis added)	Pub. L. No. 93-495, tit. V, § 503, ECOA § 701(a), 88 Stat. 1500, 1521 October 28, 1974 (emphasis added)
Section	DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN Sec. 703. (a) It shall be unlawful employment practice for an employer—	TITLE VII—EQUAL CREDIT OPPORTUNITY § 701. Prohibited discrimination
Disparate Treatment Proscription	(1) 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; or	(a) It shall be unlawful for any creditor ***to discriminate against*** any applicant ***on the basis of*** sex or marital status with respect to any aspect of a credit transaction.
Disparate Impact Proscription	(2) ***to limit, segregate, or classify*** his employees ***in any way which would deprive or tend to deprive*** any individual of employment opportunities or ***otherwise adversely affect his status*** as an employee, ***because of*** such individual's race, color, religion, sex, or national origin.	**No Counterpart ECOA Provision**

Congressional silence is all that appears in the ECOA quadrant corresponding to the Title VII disparate impact proscription. The same illuminating comparison could be made of the ECOA discrimination proscription and the general ADEA discrimination proscriptions which, as the United States Supreme Court recently noted in *Smith*, were enacted shortly after Title VII and were modeled on the general Title VII employment discrimination proscriptions.[19]

When Congress enacted the ECOA in 1974, and when it amended the statute in 1976 to expand the prohibited bases, Congress was aware of its prior Title VII and ADEA enactments and it further was aware that the United States Supreme Court had concluded in *Griggs* that paragraph (2) of section 703(a) of Title VII

19. *See Smith*, 125 S. Ct. at 1540–41 (Stevens, J.).

was the statutory source of the Title VII proscription against employment practices that have a disparate impact on a protected class.[20] Indeed, one could not persuasively argue otherwise since Congress is presumed to legislate with an institutional awareness of existing statutory and decisional law.[21] Had Congress intended to proscribe facially-neutral credit practices that would adversely affect an applicant on the basis of his or her race, color, age or national origin, it would have included in ECOA section 701(a) an additional discrimination proscription modeled on paragraph (2) of Title VII section 703(a) and paragraph (2) of ADEA section 4(a). The Congressional failure to enact an ECOA counterpart to these Title VII and ADEA disparate impact proscriptions therefore is compelling evidence—indeed the best evidence—that the enacting Congress intended to limit the scope of the ECOA credit discrimination proscription to disparate treatment.[22] However, neither the courts that have addressed this issue nor the FRB appear to have noticed that the statutory text does not proscribe practices that merely have discriminatory effects.

Decisions Permitting Disparate Impact Claims are Premised Upon Non-Statutory Sources That Lack Any Apparent Statutory Foundation in the Discrimination Proscription

Sources of the Effects Test

Courts addressing the issue of whether disparate impact discrimination is proscribed by the ECOA generally have not analyzed the language of the ECOA

20. *See* S. Rep. No. 94-589, at 4–5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406 (discussing the 1971 and 1975 Title VII decisions in, respectively, *Griggs* and *Albermarle*).

21. *See generally* West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991) ("[I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently."). *But see* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65–66, 125 S. Ct. 460, 470–71 (2004) (Stevens, J. concurring) ("In recent years, the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."). The decision in *Casey* that expert fees were not recoverable "costs" under 42 U.S.C. § 1988 ultimately was superseded by Congress, which amended 42 U.S.C. § 1988 in 1991 to authorize the recovery of expert fees by a prevailing party. Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991) (codified at 42 U.S.C. § 1988(c)). Its reasoning, however, regarding clearly expressed inconsistency of policy remains valid.

22. *See* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 714–15 (7th Cir. 1998) (refusing to apply tests derived from Title VII to ECOA); Castaneda v. Pickard, 648 F.2d 989, 1000–01 (5th Cir. 1981) (rejecting disparate impact claim under 20 U.S.C. § 1703(d) of Title VI because statutory language prohibiting discrimination "on the basis of race" did not resemble counterpart proscriptive language in Title VII); Alvin C. Harrell & Laurie A. Lucas, *Equal Credit Opportunity in the 1990s: Implications for Creditors' Institutions*, 49 Consumer Fin. L. Q. Rep. 83, 87 (1995) ("In *Washington* [v. *Davis*, 426 U.S. 229 (1976)], the Supreme Court concluded that extensions of the effects test . . . beyond those areas specifically governed by the applicable statute . . . should await legislative prescription.") (footnote omitted). In their article, Professors Harrell and Lucas note that "the *Griggs* and *Albermarle* cases were carefully distinguished from the rules of general applicability that controlled in *Washington* on grounds that *Griggs* and *Albermarle* were decided under a limited statutory provision currently found in Title VII of the Civil Rights Act of 1964." Harrell & Lucas, 49 Consumer Fin. L. Q. Rep. at 87.

discrimination proscription. They have tended to rely instead upon the following three non-statutory references to the effects test: (i) post-enactment references to the "effects" test in congressional committee reports relating to the ECOA Amendments of 1976; (ii) a reference to those committee reports in a footnote to Regulation B; and (iii) a Commentary provision referring to those committee reports.[23]

The Non-Statutory References to the Effects Test are Based Upon Excerpts From Subsequent Committee Reports

The FRB Commentary to Regulation B contains the following reference to the effects test and the aforementioned congressional committee reports:

> *Effects test.* The effects test is a judicial doctrine that was developed in a series of employment cases decided by the U.S. Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e-2). *Congressional intent that this doctrine apply to the credit area is documented in the Senate Report that accompanied H.R. 6516, No. 94-589, pp. 4–5; and in the House Report that accompanied H.R. 6516, No. 94-210, p.5.* The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact . . . .[24]

A footnote to Regulation B similarly states that: "[t]he legislative history of the Act indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the U.S. Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable *to a creditor's determination of creditworthiness.*"[25]

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23. *See, e.g., Osborne*, 234 F. Supp. 2d at 812; *Wise*, 2002 WL 31730920, at *3–4; *Chrysler Fin.*, 2003 WL 328719, at *6; *Jones*, 2002 WL 88431, at *3–4; Coleman v. GMAC, 196 F.R.D. 315, 326 (M.D. Tenn. 2000), *rev'd on other grounds*, 296 F.3d 443 (6th Cir. 2002) (citations omitted). *See generally* 15 U.S.C. §§ 1691b(a)(1), 1691e(e) (2000). *But see Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring in judgment) ("Of course, it is elementary that 'no deference is due to agency interpretations at odds with the plain language of the statute itself.'") (quoting Public Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989)).

24. 12 C.F.R. pt. 202, Supp. I, ¶ 6(a)-2, at 55 (2005) (emphasis added). The "effects test" comment proceeds, by way of example, to discuss a minimum income requirement.

The Official Staff Commentary to Regulation B, including the "effects test" comment, was adopted in 1985. 50 Fed. Reg. 48,018, 48,050 (Nov. 20, 1985). Subsequently, on June 7, 1995, the Board added to the effects test comment language relating to the burdens of proof for Title VII employment cases in the aftermath of the Civil Rights Act of 1991. 60 Fed. Reg. 29,965, 29,968 (June 7, 1995). To the extent that this Comment may be intended to suggest that the amended Title VII disparate impact burdens of proof are applicable to the ECOA, it is plainly inconsistent with the recent United States Supreme Court decision in *Smith*.

25. 12 C.F.R. § 202.6(a) n.2 (2005) (emphasis added). This footnote does not purport to extend beyond creditworthiness determinations. *But see, e.g., Coleman*, 196 F.R.D. at 326–27 & n.23.

These two administrative references to the effects test are themselves derived, in turn, from Senate and House Committee Reports dated January 21, 1976 and May 14, 1975, respectively. The Senate Committee Report states that "courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions" and, therefore, "judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs* . . . and *Albermarle Paper Company* . . . are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof."[26] The House Committee Report contains an even more attenuated reference to *Griggs* and the "effects test."[27] Thus, the notion that the ECOA credit discrimination proscription prohibits certain facially-neutral practices that have a discriminatory effect is premised ultimately upon these excerpts from congressional committee reports.

The Committee Reports Were Issued During a Subsequent Congress That Did Not Amend the Text of the Credit Discrimination Proscription in Relevant Part

Excerpts from congressional committee reports are a slim reed upon which to erect a disparate impact edifice. Indeed, this situation illustrates the danger inherent in resorting to legislative history without first inquiring whether the statutory text is ambiguous or whether unambiguous statutory text might produce an absurd result. As Justice Scalia recently explained, legislative history "lends itself to a kind of ventriloquism" pursuant to which "[t]he Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists)."[28] The distinguished scholar Professor Laurence Tribe has echoed these sentiments in his criticism of "the *statutory* interpreter who would have us substitute unexpressed and unenacted thoughts for whatever text actually passed through the fires of bicameral approval and presentment to the president for signature or veto."[29] In short, "[t]he text of the law is not just evidence about how much one interest . . . should be preferred

26. S. Rep. No. 94-589, at 4–5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406. The judicial construction of employment discrimination legislation referenced in the Senate Report was, as *Griggs* and *Smith* make clear, a judicial interpretation that the effects language of paragraph (2) of Title VII section 703(a) proscribes certain facially-neutral practices that have a discriminatory effect. Thus, to the extent that *Griggs* was intended to serve as a guide with respect to the ECOA, a review of the judicial construction of the Title VII discrimination legislation at issue in *Griggs* would have revealed that it was premised on a discrimination proscription for which there was no counterpart in the ECOA.

27. H.R. Rep. No. 94-210, at 5 (1975).

28. *See Koons*, 543 U.S. at 73–74, 125 S. Ct. at 474 (Scalia, J., dissenting).

29. Laurence H. Tribe, *Comment*, *in* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 74–75 (Amy Gutmann ed., 1997) (emphasis added); *accord*, W. David Lawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383, 383–84 (1992) ("Members of Congress can make law by 'manufacturing' legislative history, thereby evading the Constitutional requirements for legislating that assure that laws receive the appropriate representative consent.").

over another . . . ; the text is the *decision* about what to do" with respect to the accommodation of competing interests — "a decision approved by the Constitution's own means, bicameral approval and presidential signature."[30]

Here, however, a close examination of the related ECOA Amendments of 1976 reveals an even more fundamental issue with respect to the asserted legislative history. These statements were made in committee reports issued during a subsequent Congress that did not amend the ECOA credit discrimination proscription in relevant part. Your authors submit, therefore, that it is unclear how these statements properly could be characterized as "history" with respect to the prior enactment or as probative of the intent of the enacting Congress.

The ECOA was enacted by the 93rd Congress and signed into law on October 28, 1974. The initial enactment declared it "unlawful for any creditor to *discriminate against* any applicant *on the basis* of sex or marital status with respect to any aspect of a credit transaction."[31] The House and Senate committee reports that have been relied upon as indicia of congressional intent were dated, respectively, May 14, 1975 and January 21, 1976 and were issued during the 94th Congress. They accompanied amendatory bills, introduced in the *subsequent* Congress that enacted the ECOA Amendments of 1976. Those amendments, *inter alia*, expanded the prohibited bases beyond sex and marital status to include race and other personal attributes.

Significantly, however, the nature of the underlying credit discrimination proscription was not amended in relevant part—it continued to declare it "unlawful for any creditor *to discriminate against* any applicant, with respect to an aspect of a credit transaction . . . *on the basis of*" specified personal attributes or other prohibited bases. The 1976 ECOA Amendments did not add to the credit discrimination proscription disparate impact language, comparable to that contained in Title VII and the ADEA, that would encompass practices that merely have a discriminatory effect.[32] Thus, because the subsequent Congress did not amend the ECOA in relevant part, the discussion in the 1975 and 1976 committee reports may not fairly be characterized as part of the legislative "history" of the statutory proscription, enacted by the prior Congress, that prohibited discrimination "on the basis of" specified personal attributes.[33]

The United States Supreme Court repeatedly has declined to treat comments by a subsequent Congress as "history" because it is "a hazardous basis for in-

30. *See Neal*, 33 F.3d at 862–63 (emphasis in original) ("[A]ll laws . . . are compromises among competing interests. . . . whether one of these interests triumphs over the other, or whether instead they coexist uneasily, is determined not by natural justice but by the political process, which created a text.") (Easterbrook, J.).

31. Amendment to the Consumer Credit Protection Act, Pub. L. No. 93-495, tit. V, § 503, 88 Stat. 1500, 1521–22 (current version codified at 15 U.S.C. § 1691(a)).

32. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251, 251–55 (current version codified at 15 U.S.C. § 1691(a)).

33. *Cf. Osborne*, 234 F. Supp. 2d at 811 n.3 (referring to "contemporaneous" House and Senate Reports).

ferring the intent of an earlier Congress."[34] Indeed, in a civil rights case involving distinctions in the "costs" provisions of various fee-shifting statutes, the Supreme Court has noted that "[t]he 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of 'interpreting' the law but of 'intuiting' or 'predicting' it."[35] In so doing, the Court explained that the statutory text is the touchstone of statutory interpretation and not even contemporaneous comments in committee reports may be invoked to override unambiguous statutory language:

> [Plaintiff] further argues that the congressional purpose in enacting Section 1988 must prevail over the ordinary meaning of the statutory terms. . . . As we have observed before, however, *the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text* adopted by both Houses of Congress and submitted to the President. *Where that contains a phrase that is unambiguous*—that has a clearly accepted meaning in both legislative and judicial practice—we *do not permit it to be expanded or contracted by the statements of* individual legislators or *committees during the course of enactment process.*[36]

While various courts have relied upon the committee reports relating to the ECOA Amendments of 1976, your authors are aware of only one decision addressing the assertion that "this post-enactment legislative history cannot override the explicit statutory text and is irrelevant to determining the intentions of the enacting Congress."[37] Although that decision rejected this argument based upon two Supreme Court cases that relied on subsequent legislative history, your authors respectfully submit that those Supreme Court decisions are distinguishable.[38]

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34. *See* Jones v. United States, 526 U.S. 227, 238 (1999). *See also* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980); Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311–12 (9th Cir. 1992) (refusing to consider conference report of a subsequent Congress).

35. *Casey*, 499 U.S. at 101 n.7 (emphasis added).

36. *Id.* at 98–99 (emphasis added) (citations omitted).

37. Coleman v. GMAC, No. 3:98-0211, slip op. at 10 (M.D. Tenn. Aug. 21, 2003) (on file with *The Business Lawyer*).

38. *Id.* ("(the views of a Congress engaged in the amendment of existing law as to the intent behind that law are 'entitled to significant weight')") (quoting Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394–95 (1982) ("Although subsequent legislative history is not dispositive . . . the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement."). Although *Seatrain* stated that the views of subsequent Congresses "are entitled to significant weight," that statement was qualified both by the observation that this is "particularly so when the precise intent of the enacting Congress is obscure" and by the express acknowledgment that "the view of subsequent Congresses cannot override the unmistakable intent of the enacting one . . . ." *Seatrain*, 444 U.S. at 596 (citations omitted).

Seatrain involved the question of whether the Secretary of Commerce had the authority to terminate the foreign-trade-only restriction associated with a construction-differential subsidy when the vessel owners agreed to repay the subsidy in full. Although a discussion of the bases for distinguishing *Seatrain* is beyond the scope of this Article, we note that subsequent history was used in *Seatrain* for the limited purpose of buttressing the "conclusion that Congress did not forbid the transactions here at issue" after the Court: (i) initially noted that "[o]n the face of the statute, the [Commerce] Secretary's broad contracting powers and discretion to administer the [Merchant Marine] Act seemed to com-

The Statutory Text as an Administratively Unexpandable Reflection of What Congress "Resolved to Leave Alone"

United States Supreme Court decisions of recent vintage have scrutinized statutory text when considering the question of whether disparate impact claims are cognizable under other discrimination statutes.[39] Consistent with this statutory focus, the Supreme Court, and certain of the Justices, have suggested that administrative agencies may not be at liberty to "effectuate the purposes" of statutes that proscribe only intentional discrimination by adopting regulations that expand upon those purposes by prohibiting facially-neutral practices that have a disparate impact. For example, the Supreme Court decision in *Alexander v. Sandoval*[40] held that a disparate impact regulation, adopted by the Departments of Justice (DOJ) and Transportation (DOT) under Title VI of the Civil Rights Act of 1964 could not be invoked by a private party to challenge an Alabama policy of administering driver's license examinations only in English. The *Sandoval* decision was premised on the conclusion that the regulation could not create such a private right because, "[f]ar from displaying congressional intent to create new rights," the congressional delegation of administrative authority in "[section] 602 limits agencies to 'effectuat[ing] rights already created by [section] 601,'" which proscribed only intentional discrimination.[41]

Although a more detailed examination of *Sandoval* and its implications is beyond the scope of this article,[42] *Sandoval* serves to frame the fundamental question of whether an administrative agency validly may adopt a regulation proscribing disparate impact discrimination pursuant to a statute whose text proscribes only intentional discrimination or disparate treatment. Because the petitioners did not challenge the validity of the DOJ and DOT disparate impact regulation, *Sandoval* "assumed for the purposes of deciding th[e] case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid."[43] The Court remarked *in dicta*, however, that statements in its prior decisions suggesting that regulations promulgated under Title VI may validly proscribe activities that have a disparate impact "even though such activities are permissible under [section] 601" are "in considerable tension with the rule in *Bakke* and *Guardians* that [section] 601 forbids only intentional discrimination . . . ."[44]

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prehend the authority urged by petitioners here"; and (ii) found that "[t]here is no language suggesting that Congress intended to rule out permanent releases of the type at issue here." *Seatrain*, 444 U.S. at 588, 594–95.

In *Zipes*, a case involving the question of whether the Title VII administrative filing requirement was jurisdictional, subsequent legislative history was used for the limited purpose of confirming a conclusion that was apparent from the language and structure of Title VII and legislative history from the enacting Congress. *Zipes*, 455 U.S. at 394–95.

39. *See Sandoval*, 532 U.S. at 280–81; *Guardians Ass'n*, 463 U.S. at 610–12, 642.

40. 532 U.S. 275 (2001).

41. *Id.* at 289–90.

42. A few district court decisions have addressed *Sandoval*-based arguments with respect to the ECOA. *See, e.g., Wise*, 2002 WL 31730920, at *3–4; *Osborne*, 234 F. Supp. 2d at 811–12 & nn.3–4; *Chrysler Fin.*, 2003 WL 328719, at *6 (distinguishing *Sandoval* on various bases).

43. 532 U.S. at 281–82.

44. *Id.* at 281–82 (citing *Guardians Ass'n*, 463 U.S. at 612–13 (O'Connor, J., concurring in judgment)).

The *Sandoval* Court further observed how odd it seemed for the dissent to suggest that a disparate impact regulation may effectuate the purpose of an intentional discrimination statute by prohibiting conduct which the statute permits:

> We cannot help observing, however, how strange it is to say that disparate-impact regulations are "inspired by, at the service of, and inseparably intertwined with" [section] 601, post, at 1531, when [section] 601 permits the very behavior that the regulations forbid. *See Guardians*, 463 U.S. at 613, . . . (O'Connor, J., concurring in judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply 'further' the purpose of Title VI; they go well *beyond* that purpose").[45]

Indeed, Justice O'Connor's concurring opinion in *Guardians* aptly noted that, although "an agency's legislative regulations will be upheld if they are 'reasonably related' to the purposes of the enabling statute, . . . we would expand considerably the discretion and power of agencies were we to interpret 'reasonably related' to permit agencies to proscribe conduct that Congress did not intend to prohibit."[46] Justice O'Connor thus concluded that "'[r]easonably related to' simply cannot mean 'inconsistent with.'"[47]

The issue of the scope of the administrative authority conferred by ECOA section 703(a) is arguably premature because the FRB has not included in Regulation B a provision affirmatively proscribing certain facially-neutral practices that produce a discriminatory effect. Thus, assuming *arguendo* that the FRB possesses the requisite statutory authority, one might legitimately argue that it has not exercised that authority by adopting a Regulation B analogue to paragraph (2) of section 703(a) of Title VII or its ADEA counterpart. Instead, the FRB has adopted a footnote to Regulation B that merely recites the fact that "[t]he legislative history of the Act indicates that Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness" and a related Commentary provision that effectively reiterates this point.[48] These repetitive administrative references to the post-enactment history are not equivalent to making a considered administrative determination that "the purposes of this title," as reflected in the text of its discrimination proscription, include the eradication of discriminatory effects.[49] Indeed, as one commentator has noted previously, "[t]here is no apparent statutory basis for these references."[50]

45. *Id.* at 286 n.6 (emphasis in original).

46. *Guardians Ass'n*, 463 U.S. at 614 (O'Connor, J., concurring in judgment) (distinguishing Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973)).

47. *Guardian Ass'n*, 463 U.S. at 614 (O'Connor, J., concurring in judgment).

48. *See supra* notes 24–25 and accompanying text.

49. The notion that these administrative references to the effects test speak authoritatively to what the statutory language actually proscribes brings to mind Justice O'Connor's recent observation, in *Smith v. City of Jackson, Miss.*, regarding an EEOC regulation relating to the ADEA: "This discussion serves to illustrate why it makes little sense to attribute to the agency a construction of the relevant statutory text that the agency itself has not actually articulated so that we can then 'defer' to that reading. Such an approach is particularly troubling where applied to a question as weighty as whether a statute does or does not subject employers to liability absent discriminatory intent. This is not, in

In any event, however, the foregoing discussion of the ability of administrative agencies to expand upon statutory discrimination proscriptions suggests that one should resolve the threshold question of whether the text of the ECOA credit discrimination proscription prohibits only disparate treatment without resort to the "effects test" footnote to Regulation B and/or the related Commentary provision. Only by doing so can one properly determine "the purpose of" the ECOA credit discrimination proscription and whether any related administrative action is effectuating that purpose or going well beyond it. Otherwise one is effectively putting the administrative cart ahead of the statutory horse despite the fact that "[a]n administrative agency is itself a creature of statute" which "may play the sorcerer's apprentice but not the sorcerer himself."[51]

Conclusion

An eloquent jurist observed that statutory "interpretation . . . is a process whereby we figure out the meaning of the words that are actually there; interpreting the sounds of silence is a euphemism for rewriting."[52] Although the statutory language should be the starting point in a statutory construction exercise, there has been a tendency to assume that the ECOA proscribes disparate impact discrimination without pausing to examine carefully the text of the ECOA credit discrimination proscription and to consider whether textual differences in employment discrimination proscriptions reflect clearly expressed differences in policy. "Yet there is no rule that all statutes addressing related topics mean the same thing . . . ."[53] Your authors submit that an examination of the text of the ECOA credit discrimination proscription, and a comparison of the language used in the counterpart Title VII and ADEA discrimination proscriptions, reveals that Congress chose to treat employment discrimination and credit discrimination differently in this respect. There is only statutory silence where an ECOA disparate impact proscription should be found had Congress intended to proscribe discriminatory effects.

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my view what *Chevron* contemplated." *Smith*, 125 S. Ct. at 1559–60 (O'Connor, J., concurring in judgment).

50. *See* Harrell & Lucas, *supra* note 22.

51. *Sandoval*, 532 U.S. at 291; *Guardians Ass'n*, 463 U.S. at 614 (O'Connor, J., concurring in judgment).

52. Graham v. United States, 96 F.3d 446, 450 (9th Cir. 1996) (Kozinski, J., dissenting).

53. *Neal*, 33 F.3d at 863 (Easterbrook, J.).

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