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Keywords

Equal Credit Opportunity Act, ECOA, Arbitrary discrimination, Special Purpose Credit Program

SPECIAL CREDIT PROGRAMS: A WELL-INTENTIONED IDEA GONE BAD

By Luke Reynolds*

Every consumer deserves an equal opportunity to access the credit market, and that credit should never be withheld because of sex or any other factor not related to ability and willingness to repay the loan.¹

Decades ago, lenders could refuse to provide credit to qualified borrowers based solely on arbitrary characteristics such as race, religion, or sex.² Moreover, when faced with equally creditworthy loan applicants, lenders would charge certain borrowers higher loan rates for no legitimate reason.³ Congress passed the Equal Credit Opportunity Act (“ECOA”)⁴ to forbid arbitrary discrimination.⁵ But, did the ECOA fully protect consumers from facing discrimination on the basis of arbitrary characteristics?⁶

At the same time that Congress outlawed discrimination in “any aspect” of a credit transaction on a prohibited basis, it specifically allowed “affirmative” discrimination on these same grounds. Any such affirmative action credit program is called a “Special Purpose Credit Program” (“SPCP”)⁷, known as the consumer credit equivalent to affirmative action hiring plans.⁸ For instance, a disadvantaged Black applicant could legally be turned down because of the color of her skin if she applied for an SPCP designed for Native Americans.⁹ Both large and small lenders currently offer SPCP programs that make credit available on preferential terms to certain groups.¹⁰

This article will not take a position on whether affirmative action is constitutional or whether it is beneficial for society. Rather, this article will argue that SPCPs are limited by equal protection principles external to the ECOA. This question is timely because “affirmative action” and equal protection law have evolved in the 30 years since the ECOA and its SPCP provision was first passed. At least one law firm recently advised its clients to be mindful of a challenge to the SPCP under civil rights principles, in part, as a result of some of these changes.¹¹ While the Federal Reserve Board is required to regularly review and, if necessary, update the ECOA,¹² the SPCP section has received only perfunctory changes.¹³ The Federal Reserve Board is unlikely to mandate changes that negate the letter of the law in any regulation, including the ECOA, as the Board’s role is primarily to write regulations that implement the laws passed by Congress.¹⁴

This article is intended to fill a necessary void and analyze SPCPs in light of three decades of legal developments.¹⁵ Part I will provide a brief history of applicable constitutional and civil rights law, including the ECOA, to help the reader understand the context for SPCPs, and introduce the reader to SPCP pro-

grams. Part II will propose a multi-step analysis and argue that SPCPs are illegal under the equal protection clause. Part III will propose two amendments to the ECOA to ensure that SPCPs are available to satisfy special social needs without discriminating against any protected class. Finally, Part IV concludes in support of fair lending enforcement to advance public policy interests.

BACKGROUND-THE EXISTING LAW

A. IMPORTANT CONSTITUTIONAL PRINCIPLES

1. EQUAL PROTECTION

The Equal Protection (“E.P.”) clause¹⁶ has evolved substantially during the twenty-first century, as it is considered to be a “viable [and] powerful” strategy to challenge inequality.¹⁷ Simply put, the E.P. clause prohibits purposeful¹⁸ or “invidious discrimination.”¹⁹ Considering that certain classes or groups may benefit more than others from virtually any government action,²⁰ the courts apply one of three tests to assess the constitutionality of a challenged behavior.²¹ An E.P. analysis is essentially identical under both the Fifth and Fourteenth Amendments,²² as the primary difference is the level of government at issue.²³ However, the actor need not be a state or federal entity. Private conduct is considered to be state action in several circumstances, including conduct authorized by the state, which is significant for this article. Unfortunately, the Court does not have a precise test for state-authorized conduct, as it makes a determination after weighing the facts in each case.²⁴

2. AFFIRMATIVE ACTION LAW

An affirmative action program is designed to “change the outward and visible signs of yesterday’s racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.”²⁵ The constitutionality of affirmative action programs is evaluated under the equal protection clause because the equal protection clause “protect[s] persons, not groups.”²⁶ Tracing their origins to New Deal-era labor laws,²⁷ affirmative action programs started in the employment context and later expanded to college admissions.²⁸ Affirmative action is largely court-defined, as it is not expressly authorized in what is considered its statutory genesis, the Civil Rights Act of 1964.²⁹ One source of controversy is whether the Supreme Court abrogated this “unambiguously colorblind” statute through its decisions to allow affirmative action programs,³⁰ or whether its legislative history allows consideration of race “in order to alleviate the historic problem of racial

inequity.”³¹

Affirmative action law has undergone substantial change in the forty years since its inception. Most affirmative action cases are traceable to *Regents of the University of California v. Bakke*, which allowed a public university to consider race as a factor in its admissions process.³² The Court recently upheld the fundamental holding of *Bakke*, holding that it was legal to consider race as one of many factors,³³ yet illegal to automatically favor an applicant based on race.³⁴ Nonetheless, the Court will use strict scrutiny to determine whether governmental race-based affirmative action programs are narrowly tailored to the compelling government interest.³⁵

The preceding discussion applies only to affirmative action plans by governmental entities. The Supreme Court has noted that affirmative action programs by private actors do not trigger equal protection clause scrutiny.³⁶ Thus, the affirmative action principles delineated above will apply only to SPCPs that are operated, either directly or indirectly, by the government. Truly private SPCPs need not satisfy these rules. This section summarized the underlying law pertaining to the affirmative action-like component of SPCPs which permit otherwise illegal discrimination. The next section introduces these anti-discrimination laws.

B. ANTI-DISCRIMINATION LAW IN LENDING

While the Civil Rights Act (“CRA”) of 1968 generally prohibited discrimination by private actors in housing-related transactions,³⁷ it neither “proscribed” lending discrimination, nor established a comprehensive enforcement scheme.³⁸ Thus, the CRA was inadequate to protect creditworthy individuals against credit discrimination on “often irrational” grounds.³⁹

The ECOA was passed in 1974 to protect consumers on the basis of sex and marital status in response to reports of credit practices that ran contrary to the spirit of equality for all.⁴⁰ For instance, the ECOA was initially called a “Women’s Law”⁴¹ because creditworthy females often had been unable to obtain credit in their own names.⁴² Congress enhanced and expanded the ECOA two years later in 1976.⁴³ The ECOA prohibits a lender from discriminating in “any aspect” of a credit transaction on the basis of sex, marital status, race, color, religion, national origin, age, receipt of public assistance income, or exercising certain consumer rights in good faith.⁴⁴ The ECOA protects a consumer in all stages of the credit process from the lender’s conduct before it receives an application, the decision whether to approve the application and on what terms, to the treatment of the consumer once becoming a customer.⁴⁵

1. OVERVIEW OF SPCPS

The SPCP was added to the ECOA in 1976. The three types of SPCPs include: those authorized by law for the benefit of an economically disadvantaged class;⁴⁶ those offered by a non-profit corporation for its members or an economically disadvantaged class;⁴⁷ and those offered by a for-profit organization to meet special needs.⁴⁸ To qualify, the targeted group need not prove historical disadvantage or disparate treatment.⁴⁹

Credit unions, as not-for-profit institutions,⁵⁰ fall into the second category. Thus, while banks and for-profit lenders must satisfy legal formalities before establishing an SPCP, a credit union can create an SPCP without a formal plan for any group or for any reason.⁵¹ Credit unions requested and received this special treatment compared to other lenders because they feared violating the ECOA by restricting lending to their members.⁵² Simply put, Congress wanted to permit “church-affiliated credit unions” to only serve their members.⁵³ Thus, Congress sought to protect credit unions using the SPCP provision.

SPCPs are intended to help economically disadvantaged individuals or meet special social needs. It is possible that the SPCP provision was partially motivated by a federal commission report⁵⁴ that recommended low-income individuals receive credit on competitive terms, and presented case studies on programs that help the disadvantaged. Regardless, Congress had in mind programs based on the applicant’s age when creating the SPCP for for-profit organizations,⁵⁵ as Congress did not intend to prohibit positive credit programs aimed at “young adults.”⁵⁶ SPCPs are clearly not limited to certain age groups, as the three examples provided in Regulation B for SPCP programs targeted to a specific audience are “race, national origin, or sex.”⁵⁷

The SPCP allows creditors to engage in conduct that would otherwise be discriminatory.⁵⁸ A lender may require all participants in a SPCP to share a “common characteristic,” such as age, while barring from the program those who do not meet this characteristic.⁵⁹ A creditor does not have free reign, though. As a lender, the creditor is still subject to all other provisions of the ECOA and cannot discriminate other than by requiring this common characteristic. SPCPs also cannot be structured to evade the requirements of the ECOA. It is unlikely that a SPCP can be used for any residential real estate-related loan program because the Fair Housing Act does not include a SPCP exception.⁶⁰

2. SPCPS IN PRACTICE

Just as Congress intended,⁶¹ a SPCP may overtly discriminate against specific protected classes or disparately treat⁶² certain groups. The Federal Reserve Board⁶³ acknowledged this when it found that a New York State law that prevented a SPCP from being established on the basis of “race, creed, color, national origin, sex, or marital status” was preempted by the ECOA.⁶⁴ The Federal Reserve Board evidently realized that Congress intended to allow SPCPs to discriminate. Furthermore, while not dispositive of the issue, the United States Department of Justice (“DOJ”) has stated in court filings that a SPCP may be based on race, assuming the program meets all the other legal requirements.⁶⁵

The Federal Reserve Board proposed to clarify the regulation to indicate that a SPCP “should not have the effect of depriving people who are not part of the class of rights or opportunities they otherwise would have.”⁶⁶ Regardless, federal bank examiners are instructed to encourage banks offering SPCPs based on a protected class to rename and restructure the program based on factors “not prohibited by the ECOA,” such as “first-

time home buyer.”⁶⁷

Indeed, the SPCP is used in a discriminatory manner. For instance, the Virginia Housing Development Authority (“VHDA”) precluded unmarried couples from participating in a preferential loan program by requiring that the applicants be related by “blood or marriage.”⁶⁸ A federal court dismissed an ECOA claim for marital status discrimination on which the plaintiff would “plainly prevail”⁶⁹ because the VHDA program was a SPCP authorized by state law. Additionally, Mobil Oil and the former OmniBank offered a SPCP that allowed female or minority borrowers preferential treatment in the lending process when seeking a loan.⁷⁰ Credit unions offer preferential credit programs targeted to an age group under 62.⁷¹ While it is unknown how many SPCP programs are in existence, the federal Office of Thrift Supervision (“OTS”)⁷² issued a guidance letter to the lenders it regulates in response to SPCP inquiries from thrifts.⁷³

THE SPECIAL PURPOSE EXCEPTION IS LIMITED IN SCOPE

A. BASIC OVERVIEW AND ANALYSIS

SPCP programs face limitations not inherent in the ECOA. SPCPs may violate equal protection concepts or exceed the scope of the ECOA law. Based on an equal protection analysis, I offer here a multi-step test to gauge their legality.⁷⁴

The first step is to determine whether the SPCP discriminates against a protected class. The eligibility requirements for a SPCP may be based on either neutral factors or on the applicant’s membership in a protected class. An example of the former is a program that offers any first-time, low-income homebuyer with a credit on closing costs. An example of the latter is a program that offers any person under 25 years of age with a preferred rate on an installment loan. Both program structures are *now* legal under the ECOA. However, it is clear that only programs in the first category *should* be presumed legal. The analysis for the first category of programs will end for purposes of this article, although these programs would be illegal if they violate the disparate treatment rules of the ECOA.⁷⁵ By contrast, programs in the second category should be suspect owing to their use of a prohibited class, and hence proceed to the next step of the analysis.

The next step of analysis is to identify the type of discrimination.⁷⁶ Discrimination can occur during either the *underwriting* process (when the lender decides whether to approve the loan request), or after approval when the *terms and conditions* (such as rates) are set. For instance, a program that enables those under age 25 to receive a credit card regardless of their credit history is an example of a lender discriminating during the underwriting process, while a program offering a loan rate discount only to women would be an example of discrimination through terms and conditions.

From there, the analysis splits depending on the type of discrimination involved. Any program that offers terms and conditions that are preferential compared to ordinary borrowers

is illegal, as SPCPs are not empowered to discriminate in this matter.⁷⁷ For any program that discriminates in the underwriting process, the analysis hinges on whether the SPCP is operated by a public or private entity. If the SPCP is *purely* private, the lender discrimination is authorized because the program falls under the SPCP exception to the normal anti-discrimination rules of ECOA. Equal protection principles would not regulate the private actor’s conduct. If the SPCP is public or governmental, the proper level of scrutiny to evaluate the SPCP is determined based on the protected class at issue. This article argues that all SPCPs, even those offered by private lenders, must be analyzed in this way.

The 5th Amendment and 14th Amendment generally provide no protection against discrimination committed by private actors.⁷⁸ Thus, an equal protection claim against a private entity for a discriminatory program will fail if the lender is not (either directly or indirectly) a state actor.⁷⁹

However, the Constitution prohibits discrimination by a private entity when there is a “sufficiently close nexus” between the government and the lender’s questionable practice.⁸⁰ The government must provide sufficient encouragement, “either overt or covert,” to make it responsible for the practice.⁸¹ In the words of Judge Friendly, “the state must be involved not simply with some activity...alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury...the state action, not the private action, must be the subject of complaint.”⁸² For example, governmental authorization does not exist when a statute governs deregulated, traditional business conduct,⁸³ yet does when the law creates a climate in which private parties may choose to discriminate.⁸⁴

SPCPs easily fit the second category as the SPCP creates an exception that permits discrimination that would otherwise be illegal; it is essentially a “statutory invitation to private actors to discriminate.”⁸⁵ In other words, lenders would be unable to practice illegal discrimination *but for* the government’s SPCP exception. This is clearly an invitation to discriminate; the government is the root cause of the private actor’s discrimination. One commentator has noted that the Supreme Court will find invitations to discrimination to be state action, as enticing discrimination is different from allowing the free market to independently develop.⁸⁶ Consequently, all SPCPs must be analyzed as state-administered programs.

B. WHY STATE ADMINISTERED SPCPs FAIL EQUAL PROTECTION ANALYSIS

This section will analyze SPCPs that are *expressly* state authorized or *considered* state actions.⁸⁷ In reality, though, this discussion applies to *all* SPCP programs since, as shown earlier, all SPCP programs are government authorized. To recap, the alleged state interest in allowing governmental entities and non-profits to create SPCPs is to help an “economically disadvantaged class of persons,” for credit unions to serve their members, and allow private entities to meet “special social needs.”⁸⁸

A court performs the Equal Protection Clause analysis using

the appropriate level of scrutiny. The court will use an intermediate scrutiny test for sex, strict scrutiny for race, color, religion, and national origin, and rational basis scrutiny for marital status, age, receipt of public assistance income, or exercising certain consumer rights in good faith.

1. ANALYSIS UNDER STRICT SCRUTINY: RACE, COLOR, RELIGION & NATIONAL ORIGIN

Affirmative action programs based on race or national origin must use a strict scrutiny, or narrowly tailored, least discriminatory⁸⁹ means to meet a compelling state interest.⁹⁰ Any SPCP based on classifications that are subject to strict scrutiny (race, color, religion, and national origin) fails this test.

The Supreme Court has held that any person has “the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny,” and that “benign” discrimination cannot be held to a lower standard of scrutiny.⁹¹ The Court later went a step further, and struck down a university admissions program that automatically favored applicants on the basis of race.⁹² The Court applies strict scrutiny to suspect programs based on color, religion, or national origin.

Regarding SPCPs, the Fifth Circuit found an analogous federal program unconstitutional. In *Moore v. USDA*, the plaintiff was denied financing from a USDA program designed to help “socially disadvantaged groups” due to his race, as the notification letter stated, in part, “No Whites.”⁹³ Although his Fifth Amendment equal protection claim failed for seeking monetary damages and not equitable relief, the plaintiff succeeded in his ECOA claim.⁹⁴

A SPCP is not the least discriminatory means to accomplish Congress’s stated goal or to serve its intended purpose. For instance, consider the situation of an immigrant from an impoverished Eastern European nation who owns a small business in an impoverished community, yet would be precluded, simply because of skin color, from participating in a major bank’s SPCP offering preferential underwriting standards.⁹⁵ The stated goal of helping the economically disadvantaged is clearly not served when a business is unable to receive special financing terms because of the owner’s race or national origin. Consequently, any SPCP that is structured based on a particular class of individuals benefits solely that class and excludes similarly situated individuals in other classes.

Likewise, it would clearly be more effective to offer credit under a streamlined program to any individual without a credit history, rather than only to those who share an arbitrary or immutable characteristic (such as age). In other words, a program structured around neutral factors, such as economic need, would be the most beneficial to society and most effectively fulfill Congress’ stated goals.⁹⁶ Perhaps this is why President Clinton shifted the focus of affirmative action policy solely from membership in a protected class to residence in an economically distressed area as defined by poverty and unemployment data.⁹⁷ Consequently, the least burdensome means test is not satisfied by SPCPs.

Additionally, Congress could have clarified that a credit union may only lend to its members without creating a much broader exception that favors credit unions over banks with respect to the ECOA.⁹⁸ Therefore, these SPCPs are not narrowly tailored (nor the least discriminatory means) to meet Congress’ goals of helping economically disadvantaged individuals, protecting credit unions, or meeting special social needs.⁹⁹ Disadvantaged individuals and credit union members will receive the same credit opportunities when a SPCP is structured on a neutral basis.

2. ANALYSIS UNDER INTERMEDIATE SCRUTINY: GENDER

Gender discrimination is evaluated using intermediate scrutiny, although recent cases indicate that it is an elevated level of intermediate scrutiny review.¹⁰⁰ A program that discriminates on the basis of gender violates the equal protection clause, unless it serves an important governmental interest¹⁰¹ and has an exceedingly persuasive justification.¹⁰² For instance, it was illegal to grant alimony in a divorce to the wife only, as the Court held that it was not appropriate to use gender as a proxy for need or assume the male was the primary breadwinner.¹⁰³ Interestingly, gender-based affirmative action programs are less likely to be invalidated than race-based programs.¹⁰⁴

Nonetheless, the outcome of SPCPs using intermediate scrutiny is the same as with strict scrutiny earlier. Specifically, courts will review the stated purpose of any affirmative action program to ensure its legality.¹⁰⁵ As one court stated, “when government undertakes affirmative action, it must present a ‘strong basis in evidence’ for doing so.”¹⁰⁶

Here, Congress failed to adequately support its decision to implement this affirmative action program to discriminate based on a protected class. The House hearings do not discuss the SPCP provision, except for testimony by an industry representative who sought an exemption from the ECOA for “negative discrimination that results in the denial of credit” or “reverse discrimination” programs.¹⁰⁷ The House hearings included testimony on “affirmative approaches” by lenders, which were targeted to underserved, inner-city areas as much as they were designed to help “minority businessmen.”¹⁰⁸ The Senate hearings, interestingly, refer to the House hearings as being the justification for the SPCP exception.¹⁰⁹ Therefore, SPCPs based on gender must fail because Congress failed to provide the requisite strong justification.

3. ANALYSIS UNDER RATIONAL BASIS SCRUTINY: MARITAL STATUS, AGE, RECEIPT OF PUBLIC ASSISTANCE INCOME, OR GOOD FAITH EXERCISE OF CERTAIN CONSUMER RIGHTS

It is possible some SPCPs could be based on a protected category within the ECOA, yet be subject only to rational basis constitutional scrutiny.¹¹⁰ For example, a program could offer a credit card to customers between ages 18 and 25 without regard for the applicant’s length of credit experience. This program is discriminatory against older borrowers who do not have credit histories, as these older borrowers are, at a minimum, not encouraged to apply, and would be subject to the normal under-

writing criteria that would preclude them from obtaining credit.

It is likely that a SPCP based on any category reviewed using rational basis scrutiny would satisfy an equal protection analysis. Under rational basis scrutiny, a law is upheld assuming its means are, at least remotely, related to a health, safety, or moral concern of government, even if there is a less discriminatory policy available.¹¹¹ Additionally, courts will give particular deference to the legislature on social and economic legislation.¹¹² In short, courts give broad deference to the government when conducting a review using the rational basis standard.¹¹³ Thus, a SPCP structured on any of these criteria would meet constitutional scrutiny.

A PROPOSAL FOR REFORM

Since SPCPs are presumably illegal under equal protection analysis in light of the information presented above, the ECOA must be amended. This is because a SPCP should never be based on a protected class, and credit unions should be held to the same standards as banks under the ECOA. Two amendments are proposed below.

First, the ECOA should be amended to prevent membership in a protected class from being a prerequisite for participation in a SPCP. This may be accomplished by adding a provision to § 1691(c) that states, “A credit assistance or special purpose credit program may not base its eligibility guidelines upon whether a person is a member of a class of persons defined in § 1691(a).” This amendment would preserve Congress’s intent to enhance the credit opportunities available to the disadvantaged, yet would protect a person from discrimination based on immutable characteristics such as race or sex. The change would also ensure that SPCPs are subject to relaxed judicial scrutiny.¹¹⁴

For instance, a hypothetical SPCP designed to help those without established credit histories should not be limited to only those under age 25, as older individuals may not have credit histories due to legitimate reasons such as being a recent immigrant to the United States or heritage from a culture that shuns traditional financial service providers. A hypothetical program based on class helps borrowers solely of a specific class who have a credit problem, and not those in other classes with the same credit problem. If the fair lending laws are relevant, a lender should not be given the flexibility to discriminate when a viable alternative is available to prevent discrimination.

Second, credit union issues require another amendment to the ECOA. As described earlier, credit unions are broadly granted more flexibility than banks to use SPCPs to discriminate. However, this is not the only way that credit unions receive favorable treatment under the ECOA. The National Credit Union Administration (“NCUA”) enforces federal credit unions’ compliance with the ECOA.¹¹⁵ The NCUA must refer to the DOJ all patterns or practices of ECOA violations that involve either illegal discrimination in “any aspect”¹¹⁶ of a credit transaction or the improper discouragement or denial of applications.¹¹⁷ The DOJ provides Congress with an annual report

summarizing the ECOA referrals it receives from the federal regulatory agencies.¹¹⁸ These reports indicate that the NCUA has made no referrals to DOJ, while the four bank regulatory agencies have referred dozens of substantive ECOA violations to DOJ. For instance, a General Accounting Office Report showed that the NCUA made none of the 53 referrals between 1990 and 1995,¹¹⁹ and none of the 140 cases sent to DOJ between 1999-2004.¹²⁰

On the one hand, the fact that the NCUA referred no ECOA matters to DOJ could be an excellent sign because it suggests that credit unions are in compliance with the fair lending laws. Granted, credit unions are often smaller and less complex than many banks, thereby indicating less fair lending risk.¹²¹ A former NCUA administrator even testified before Congress that credit unions are “different” from other lenders because they “do not deal with the general public” but rather those affiliated through a common bond.¹²² Alternatively, it could indicate either that the NCUA is not making referrals to DOJ when required, or the Interagency Fair Lending Procedures are not being properly implemented during examinations of federal credit unions.

Unfortunately, based on the author’s review of credit union websites in April of 2005, it appears that the second scenario may be true.¹²³ Congress intended the mandatory referral provision of the ECOA to be an “enforcement mechanism” when adding it to the ECOA in 1991.¹²⁴ Credit unions already receive preferred treatment compared to banks in other areas.¹²⁵ Congress did not intend for the NCUA to put a low priority on the ECOA.¹²⁶ This is particularly important as credit unions are becoming more analogous to banks by getting larger, more complex, and merging together.

Therefore, §1691 (c)(2) should be amended to clarify that credit unions can lend to their members without violating the ECOA, but may not otherwise receive less scrutiny than banks when establishing a SPCP. The change can be accomplished by revising §202.8(a)(2) to read, “It is not a violation of this section for a nonprofit organization to extend credit only to its members. A nonprofit organization may also create a special purpose program to meet special social needs pursuant to the standards prescribed in regulations by the Board.”

It is essential that the extra discretion given to credit union-run SPCPs be eliminated and their rules mirror those for private lenders. As mentioned earlier, Congress intended this provision simply to protect credit unions from ECOA challenges. Amending this provision will allow Congress to clarify that credit unions may not use a credit assistance program to discriminate without first meeting the same requirements as a bank. After all, it does not matter to a consumer whether she is discriminated against by a SPCP operated by a bank or a credit assistance program operated by a credit union. These proposed changes to the ECOA will ensure that every creditworthy consumer has equal access to credit regardless of immutable or arbitrary characteris-

tics such as race or national origin that fall under equal protection analysis.

CONCLUSION

It is important that we do not forget that illegal discrimination still occurs in housing and finance despite the substantial achievements achieved over recent years.¹²⁷ Enforcing fair lending laws is not just a safety-and-soundness issue or a con-

sumer protection issue that affects solely one institution's members. Rather, fair lending enforcement is necessary to further the national public policy goal of ensuring equal access to credit by creditworthy borrowers. This article has shown that the SPCP provision of the ECOA has not been updated to reflect the changes in equal protection law over the past three decades. By enacting the proposals propounded in this article, Congress can ensure that all have equal access to credit.

ENDNOTES

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¹ 120 Cong. Rec. 19,213 (June 13, 1974) (statement of Sen. William Brock proposing an amendment to H.R. 11221 that would later become the ECOA, 93d Cong. (1974)).

² S. REP. NO. 94-589, at B-28-29 (1976) (summarizing hearing record that was "replete" with examples of discrimination); FEDERAL RESERVE SYSTEM, DISCRIMINATION IN CONSUMER CREDIT MARKETS 19-20 (1982) (finding evidence of lending discrimination on the basis of race, age, and marital status in pre-ECOA credit markets).

³ U.S. DEPT. OF HUD, EQUAL CREDIT OPPORTUNITY: ACCESSIBILITY TO MORTGAGE FUNDS BY WOMEN AND MINORITIES 4-19 (1980) (reporting on study results that found minorities are charged higher interest rates than whites); see also 120 Cong. Rec. 19,213 (June 13, 1974) (statement of Sen. William Brock) (stating "women simply cannot get credit on the same basis as men").

⁴ 15 U.S.C. § 1691 (2006).

⁵ Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1500 (1974) (Congressional Findings) ("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. . . by an absence of discrimination. . .").

⁶ See, e.g., Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words that Actually are There*, 61 BUS. L. 829, 842 (2006) (concluding that Congress did not authorize disparate impact discrimination claims to be brought under the ECOA); Vincent Di Lorenzo, *Legislative Heart and Phase Transitions: An Exploratory Study of Congress And Minority Interests*, 38 WM. & MARY L. REV. 1729, 1767-68 (1997) (asserting the Congressional response to "neighborhood lending discrimination has been weak," and concluding over a 31-year period, the fair lending bills enacted by Congress were less responsive to the needs of minorities than proposed legislation).

⁷ SPCP will be used in this article to refer to both special purpose credit programs (see 12 C.F.R. § 202.8(a)(3) (2005)) (describing programs offered by a for-profit organization) and credit assistance programs (see 12 C.F.R. § 202.8(a)(1)-(2)) (describing programs offered by non-profit organizations or authorized by law). These programs are described in more detail *infra*.

⁸ DEE PRIDGEN, CONSUMER CREDIT AND THE LAW 183 (2004) (drawing comparison between the SPCP provision and affirmative action hiring plans). For an example of one affirmative action program, see 42 U.S.C. § 2000e-16(b)(1) (2006) (authorization for affirmative action programs in federal government hiring).

⁹ See DAVID MCF. STEMLER, FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL 4-50 (2004) (illustrating the application of the SPCP exception and emphasizing how a lender using the SPCP exception must be careful to comply with ECOA's anti-discrimination rules).

¹⁰ See, e.g., *infra* notes 71 and 95 for examples.

¹¹ Fried Frank, *Fair Lending Alert*, available at <http://www.fhhsj.com/fairlend/flarch/fl950807.htm> (Aug. 7, 1995) (last accessed Mar. 18, 2007) (warning lenders of the possibility of a discrimination charge if a credit application is denied because the applicant does not qualify for a special purpose credit program due to the applicant's race).

¹² The Board must review Regulation B at least once every ten years pursuant to the Economic Growth and Regulatory Paperwork Reduction Act § 2222, 12 U.S.C. 3311 (1996). Also, the Board has always had the ability to amend Regu-

lation B at any time pursuant to the regular administrative rulemaking process. 15 U.S.C. § 1691b (2005) (giving the Board power to prescribe regulations to implement the ECOA); see Equal Credit Opportunity, 68 Fed. Reg. 13,144 (Mar. 18, 2003) (describing the Board's two most recent comprehensive reviews of Regulation B as occurring in 1985 and 1998).

¹³ See, e.g., Equal Credit Opportunity, 68 Fed. Reg. 13,144 (Mar. 18, 2003) (to be codified at 12 C.F.R. pt. 202) (adjusting the exceptions for public utilities credit, modifying self-test rules, expanding record retention requirements, and clarifying several terms); Equal Credit Opportunity, 60 Fed. Reg. 29,965 (Jun. 7, 1995) (to be codified at 12 C.F.R. pt. 202) (revising Official Staff Commentary).

¹⁴ 15 U.S.C.S. § 1691b (2005) (stating "the Board shall prescribe regulations to carry out the purposes of this subchapter").

¹⁵ SPCP programs have never been evaluated by courts for compliance with general constitutional or civil rights principles, which is essential since ECOA is primarily a civil rights law. See generally *United States v. American Future Systems, Inc.*, 743 F.2d 169, 177-82 (3d Cir. 1984) (finding the defendant did not have a SPCP program in place because it did not meet technical requirements); *Diaz v. Virginia Hous. Dev. Auth.*, 101 F. Supp. 2d 415, 420 (E.D. Va. 2000) (District Court upholding the validity of a SPCP, but warning that the "exception is not boundless" because of Constitutional constraints); DAVID MCF. STEMLER, FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL 4.48 (2004) (describing and analyzing SPCPs).

¹⁶ U.S. Const., amend. XIV, cl. 5.

¹⁷ JAMES KUSHNER, GOVERNMENT DISCRIMINATION 40 (2004) (observing that the Supreme Court no longer sees the equal protection clause as a "last resort" constitutional argument, as evidenced by its holdings in cases such as *Bush v. Gore*, 531 U.S. 98 (2000)).

¹⁸ *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (noting the requirement of "purposeful discrimination" – which is when an actor overtly intends to discriminate – as being a "common thread" in earlier cases); For examples of these overt discrimination cases, see, e.g., *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (concluding that it was illegal for courts to have a "purpose" – or intent – of excluding African-Americans from the jury); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) (holding that a finding of "intentionally segregative" actions by a school board establishes a prima facie case of unlawful segregation in the school district).

¹⁹ *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (requiring strict scrutiny of a law compelling sterilization of certain habitual criminals because the law's unequal impact on similarly situated offenders could lead to invidious discrimination against certain classes for arbitrary reasons. *Id.* at 541. For example, those who committed grand larceny by stealing chickens were subject to the law, while embezzlers were not. *Id.* at 539.).

²⁰ See LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 651 (1995) (stating that "almost every government action involves some form of discrimination," and explaining how even imposing a tax can lead to discrimination claims).

²¹ Depending upon the group affected by the discrimination, courts judge a suspect law's legality using the rational basis test (the law must be reasonable and designed to achieve a legitimate governmental purpose) (see *McGowan v. Maryland*, 366 U.S. 420, 425-29 (1961)), intermediate scrutiny (the law must be substantially related to the achievement of an important objective) (see *Craig v. Boren* 429 U.S. 190, 197-04 (1976)), or strict scrutiny (the law must be the least restrictive means to accomplish a compelling state interest) (see *Johnson v. California*, 543 U.S. 499, 505-06 (2005)). See generally LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 621, 621-2 (2001) (describing the tests courts use to analyze equal protection claims).

²² See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (stating, in dicta, that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" while considering the constitutionality of a campaign finance reform law).

ENDNOTES CONTINUED

- ²³ See LEE EPSTEIN & THOMAS WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 620 (2001) (concluding that while state or local government practices are challenged under the Fourteenth Amendment Equal Protection Clause, and the Fifth Amendment Due Process Clause guarantees essential fairness at the federal level, courts apply the same general principles in either circumstance).
- ²⁴ *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (noting that the Court did not attempt the “impossible task” of creating a test for a state’s involvement in discrimination, as the determination must be made by “sifting facts and weighing circumstances on a case-by-case basis”).
- ²⁵ *U.S. v. Paradise*, 480 U.S. 149, 156 (1987) (describing an order imposing hiring quotas on the defendant state agency that engaged in unlawful discrimination); See also Exec. Order No. 10,952, 26 F.R. 6577 (1961) (using the phrase “affirmative action” for the first time, directing federally funded contractors to “take affirmative action to ensure that applicants are employed. . . without regard to the race, creed, color, or national origin”).
- ²⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the Court must evaluate whether the *personal* right to equal protection is breached when government makes classifications based upon a protected *group*). In this case, the lower court was ordered to consider whether a law met strict scrutiny when it precluded a firm from winning a construction contract solely because it was not a “disadvantaged” business. *Id.* at 205.
- ²⁷ See, e.g., Exec. Order No. 8802, 6 F.R. 3109 (1941) (banning employment discrimination by the federal government and defense contractors).
- ²⁸ MARK TUSHNET, *A COURT DIVIDED* 226-7 (2005) (tracing the history and background of affirmative action law).
- ²⁹ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964); see, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (permitting race to be one of several criteria for admission to a medical school); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (permitting a set-aside in a public works program for minority businesses to remedy past discrimination); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (permitting a program that set aside 50 percent of openings for Blacks to correct past hiring discrimination); *Local 28, Sheet Metal Workers Intern. Assn. v. EEOC*, 478 U.S. 421 (1986) (permitting a set-aside of 29 percent of new openings for minorities). For a concise history of affirmative action law, see Jerry Wegman, *Affirmative Action Today*, available at <http://www.cbe.uidaho.edu/wegman/AFFIRMATIVE%20ACTION%20TODAY-htm.htm>.
- ³⁰ Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L.R. 87, 90 (1997) (arguing that the Court deviated from the colorblind standard set in the Civil Rights Act). Lund pointed to decisions such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that facially neutral employment practices that have a disparate impact upon minorities are illegal, unless there is a valid business necessity for the practice) and *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding an employment program that set aside 50 percent of certain jobs for Black applicants).
- ³¹ Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 334 (1996).
- ³² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
- ³³ *Grutter v. Bollinger* 539 U.S. 306 (2003) (upholding as narrowly tailored a law school admission policy that considered the applicant’s race as one of several “soft variables” – such as the applicant’s enthusiasm and the quality of the applicant’s undergraduate institution – because it considered all pertinent elements of diversity during the application process and was designed to select applicants who have the most potential to contribute to the school’s diversity, regardless of their race).
- ³⁴ *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down an undergraduate admissions policy that automatically awarded 20 of the 100 points necessary for admission to applicants from certain minority groups because it was not narrowly tailored to the compelling state interest of achieving educational diversity).
- ³⁵ *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (noting, while considering a prison policy that grouped inmates by race, that the Court always uses strict scrutiny to review all racial classifications, even those that are benign); *Gratz*, 539 U.S. at 270 (noting, while reviewing a university affirmative action program, that it is “well established” racial classifications are subject to strict scrutiny).
- ³⁶ See, e.g., *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (reversing a lower court enjoining a private employer from instituting racial quotas for an employment training program because it was a “private, voluntary, race-conscious affirmative action effort.” *Id.* at 204.). However, while beyond the scope of this piece, it should be noted that some programs may be scrutinized under other laws. See, e.g., 42 U.S.C. § 2000e (2006) (Title VII of the Civil Rights Act of 1964 that prevents certain employment-related discrimination); 42 U.S.C. § 2000d (2006) (Title VI of the Civil Rights Act of 1964 that prohibits discrimination in programs that receive federal funding).
- ³⁷ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-14 (1968) (upholding a claim under the Civil Rights Act for racial discrimination between two private parties, yet noting that the Act imposed few other constraints on private housing-related discrimination).
- ³⁸ *Johnson v. Zaremba*, 381 F. Supp. 165, 167 (N.D. Ill. 1973) (comparing the differences between the Civil Rights Act and the Fair Housing Act in a lawsuit for alleged discrimination in the rental housing market).
- ³⁹ *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of Rep. Sullivan) (describing need for anti-discrimination law), reprinted in 121 CONG. REC. 27,136 (Aug. 1, 1975); see also H.R. REP. NO. 94-210, at B-66 (1975) (additional views of Rep. Sullivan observing there were no laws before 1972 to prohibit credit discrimination based on sex or marital status).
- ⁴⁰ Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) (describing the “need” to “make credit available with fairness, impartiality, and without discrimination”); S. REP. NO. 93-278, at B-3-B-4 (describing and summarizing the discriminatory acts that established a “clear pattern of discrimination”).
- ⁴¹ *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of Rep. Sullivan) (describing the original ECOA as being useless to address other forms of discrimination), reprinted in 121 CONG. REC. 27,136 (Aug. 1, 1975); see also THE NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE U.S.* 152 (1976) (summarizing “numerous documented accounts” of consumer credit discrimination against women).
- ⁴² GLEN WALKER, *CREDIT WHERE CREDIT IS DUE* 46 (1979) (describing context for ECOA’s passage).
- ⁴³ Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1976).
- ⁴⁴ 15 U.S.C. § 1691 (2006).
- ⁴⁵ See S. REP. NO. 93-278, at B-2 (describing the scope of ECOA); DEE PRIDGEN, *CONSUMER CREDIT AND THE LAW* 148-50 (2004) (describing the comprehensive approach of ECOA).
- ⁴⁶ 12 C.F.R. § 202.8(a)(1) (2005).
- ⁴⁷ 12 C.F.R. § 202.8(a)(2) (2005).
- ⁴⁸ 12 C.F.R. § 202.8(a)(3) (2005). Those offered by a for-profit organization, such as a bank, must be operated pursuant to a written plan for the purpose of “extend(ing) credit to a class of persons who, under the organization’s customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.”
- ⁴⁹ See *Diaz*, 101 F. Supp. 2d at 421-22 (holding a credit assistance program need not be targeted to a “historically disparately treated or disadvantaged” group).
- ⁵⁰ 12 U.S.C. 1752(1) (2006) (defining a credit union to be a “cooperative association”).
- ⁵¹ 121 Cong. Rec. 27,137 (Aug. 1, 1975) (statement of Rep. Sullivan) (indicating Congress did not want to prevent credit unions from lending only to their members).
- ⁵² This particularly holds true for credit unions chartered to serve a narrowly defined group, such as members of a church. See S. REP. NO. 94-685, at B-22 (1976) (clarifying the Congressional intent leading to the adoption of the special purpose credit exception was, in part, to permit credit unions to restrict lending to members only); see DAVID MCF. STEMLER, *FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL* 4-4; 4-48 (2004) (describing how credit unions benefit from the SPCP exception).
- ⁵³ 121 Cong. Rec. 27,137 (Aug. 1, 1975) (statement of Rep. Sullivan).
- ⁵⁴ *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Congress 502 (1974).
- ⁵⁵ 121 Cong. Rec. 27,138 (Aug. 1, 1975) (statement of Rep. Sullivan) (stating the Subcommittee writing the special purpose provision intended to permit age-based credit programs).
- ⁵⁶ S. REP. NO. 94-589, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 407 (explaining the purpose of the legislation).
- ⁵⁷ 12 C.F.R. § 202.8(c) (2005).
- ⁵⁸ PAUL BARRON & MICHAEL A. BERENSON, *FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING* § 8:12 (2006), available at Westlaw, FRREML § 8:12 (explaining the special purpose credit program and how it legalizes programs that would otherwise be discriminatory).
- ⁵⁹ 12 C.F.R. § 202.8(b)(2) (2005).
- ⁶⁰ The anti-discrimination provision of the Fair Housing Act is at 42 U.S.C. 3604 (2006) and contains no SPCP-like exceptions.

ENDNOTES CONTINUED

- ⁶¹ See S. REP. NO. 94-685, at B-22 (1976) (clarifying the Congressional intent leading to the adoption of the special purpose credit exception as being that of overriding ECOA's general anti-discrimination rules for the purposes delineated in the law).
- ⁶² See Patrick J. McEnerney, *Targeted Programs, Mortgage Banking Dec. 1994*, at 46 (advising lenders to "consider the possibility" of disparate impact caused by a "well-intended" program).
- ⁶³ Congress directed the Federal Reserve Board to write the regulations governing SPCPs.
- ⁶⁴ Equal Credit Opportunity: Preemption of New York Law, 53 Fed. Reg. 45,756 (Nov. 14, 1988).
- ⁶⁵ Brief of Amici Curiae United States, Hargraves v. Capital City Mortgage, 147 F.Supp.2d 1, at III-A-7 (D.D.C. 2000) (No. 98-1021), available at <http://www.usdoj.gov/crt/housing/documents/hargraves1.htm> (last accessed Mar. 18, 2007) (arguing that affirmative marketing programs are permitted by Fair Housing regulations and under the Special Purpose provision of ECOA).
- ⁶⁶ Equal Credit Opportunity, 59 Fed. Reg. 67235 revisions to (proposed Dec. 29, 1994). This proposal, however, was not adopted because the Federal Reserve Board was unclear "precisely how this condition applies in the credit context." Equal Credit Opportunity, 60 Fed. Reg. 29965 (June 7, 1995).
- ⁶⁷ Federal Financial Institutions Examination Council, *Interagency Fair Lending Procedures*, available at <http://www.ffiec.gov/PDF/fairlend.pdf> (last accessed Mar. 18, 2007).
- ⁶⁸ 13 VA. ADMIN. CODE § 10-40-30 (1997) (permitting unmarried couples to participate in the program beginning in 2003).
- ⁶⁹ *Diaz*, 101 F. Supp. 2d at 419 (permitting state to allow only married couples to participate in housing assistance program).
- ⁷⁰ Joyce Jones, *A Gusher of an Opportunity*, *BLACK ENTERPRISE*, Sept. 1996, at 19, available at http://www.findarticles.com/p/articles/mi_m1365/is_n2_v27/ai_18600912 (last accessed Mar. 24, 2007) (describing credit program).
- ⁷¹ See, e.g., Transportation Federal Credit Union, *Products and Services*, available at https://www.transfcu.com/prodserv/package_accounts.html#premiere50 (last accessed Mar. 18, 2007) (describing program that allows those age 50 or over to receive an extra ¼ percent loan rate reduction); Bulls Eye Credit Union, *Products and Services*, available at http://www.becu.net/products_services/savings/club_accounts.html (last accessed Mar. 18, 2007) (describing program that gives those under age 22 a one percent discount on loans); Texans Credit Union, *Freedom*, available at <http://www.texasncu.com/Disclosures.aspx?id=647> (last accessed Mar. 18, 2007) (describing program giving those under age 24 a .50 percent discount on an auto loan).
- ⁷² OTS is the federal agency that charters and regulates the thrift (savings bank & savings and loan) industry.
- ⁷³ Press Release, Office of Thrift Supervision, OTS Offers 'Special Purpose Credit Programs' Guidance (July 1, 1998), available at <http://www.ots.treas.gov/docs/7/77848.html> (last accessed Mar. 18, 2007).
- ⁷⁴ While this is the author's own proposed analysis, for an example of a multi-step discrimination analysis, see Federal Financial Institutions Examination Council, *Interagency Fair Lending Procedures*, available at <http://www.ffiec.gov/PDF/fairlend.pdf> (last accessed Mar. 18, 2007).
- ⁷⁵ The disparate impact test is also known as the effects test. See S. REP. NO. 94-589 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405; Equal Credit Opportunity, Revision of Regulation B, Official Staff Commentary, 50 Fed. Reg. 48,050 (Nov 20, 1985) (to be codified at 12 CFR pt. 202); Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268-9 (Apr. 15, 1994).
- ⁷⁶ Illegal practices that discourage applications from a protected class, such as redlining or preferential advertising, and practices that may discriminate against existing loan customers, are beyond the scope of this article.
- ⁷⁷ The law does not grant the ability to offer preferential rates in a special purpose program, only to "refuse to extend credit offered" under a special purpose program. 15 U.S.C.S. § 1691 (2005); see also S. REP. NO. 94-589, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 409; H.R. CONF. REP. NO. 94-239, at 8, reprinted in 1976 U.S.C.C.A.N. 403, 428 (clarifying the SPCP provision was intended to permit "denials of credit to persons ineligible for" SPCPs). Since a SPCP must comply with all provisions of ECOA not specifically exempted, and preferred rates are not specifically authorized, ECOA's general anti-discrimination rule prohibits offering preferential rates based on race, religion, or other protected classes. 12 C.F.R. § 202.8(b) (2005).
- ⁷⁸ Civil Rights Cases, 109 U.S. 3, 11-12 (1883) (finding Civil Rights Act unconstitutional).
- ⁷⁹ *Rannels v. Meridian Bancorp.*, 718 F. Supp. 10, 12-13 (E.D. Pa. 1989), aff'd, 893 F.2d 1331 (3d Cir. 1989), cert. denied, 494 U.S. 1017 (1990) (finding bank program that discriminated on age to provide non-loan discounts did not constitute sufficient state action to sustain a private plaintiff's equal protection lawsuit); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (holding the 14th Amendment may only be violated by state action).
- ⁸⁰ *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 (1974) (explaining holding in a due process claim against a private utility).
- ⁸¹ *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (explaining when private conduct constitutes state action).
- ⁸² *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968) (explaining when the acts of a private party can be imputed to the state).
- ⁸³ *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (upholding state law permitting a warehouse owner to threaten to sell a customer's property, despite the statute failing to meet constitutional due process standards).
- ⁸⁴ *Reitman v. Mulkey*, 387 U.S. 369 (1967) (finding unconstitutional a state law that prohibited the government from interfering with a private property owner's "right" to discriminate, holding the state "encouraged" private discrimination).
- ⁸⁵ *Sidney Buchanan*, State Authorization, 21 Hous. L. Rev. 1, 29 (1984) (describing state authorization of discrimination).
- ⁸⁶ *Id.* at 29-32 (1984).
- ⁸⁷ 12 C.F.R. § 202.8(a)(1) (2005).
- ⁸⁸ 12 C.F.R. § 202.8 (2005).
- ⁸⁹ *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).
- ⁹⁰ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
- ⁹¹ See *Adarand*, 515 U.S. at 201, 226 (remanding to determine whether the Small Business Administration program that allowed certain racial minorities to be presumed "socially disadvantaged" and eligible for economic benefits was narrowly tailored to serve a compelling governmental interest).
- ⁹² *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate admissions policy, holding that the University's deliberate and automatic preference of a racial class in the admissions process was not narrowly tailored to the state's interest in achieving diversity. *Id.* at 275.).
- ⁹³ *Moore v. USDA*, 55 F.3d 991, 992 (5th Cir. 1995).
- ⁹⁴ *Id.* at 995 (relying on *FDIC v. Meyer*, 510 U.S. 471 (1994)).
- ⁹⁵ See *Union Bank of California, FAQ*, available at http://www.uboc.com/business/main/0_2485_5543,00.html (last accessed Mar. 18, 2007) (stating that only women and minority-owned businesses are eligible to apply for a special credit program that features benefits such as a longer financing term than other loan products); Office of the Comptroller of the Currency, *Community Developments Online*, available at http://www.occ.treas.gov/cdd/CD_winter03/images/special.PDF (last accessed Mar. 18, 2007) (further describing the Union Bank of California program).
- ⁹⁶ See *supra* notes 53-60 and accompanying text.
- ⁹⁷ Exec. Order No. 13,005, 61 Fed. Reg. 26069 (May 16, 1996).
- ⁹⁸ See Part I of this article.
- ⁹⁹ See *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Congress 71 (1974) (statement of Jeffrey Bucher, Member, Board of Governors of the Federal Reserve System, "some credit unions are directly associated with churches or church-related organizations. An essential requisite to obtaining a charter for a credit union...is that the credit union have a specifically limited field of membership. Therefore, without some allowance, a church-affiliated credit union might be faced with the dilemma of granting credit to an applicant outside its field of membership and violating its charter, or denying credit to the applicant and violating the Act's sanctions.").
- ¹⁰⁰ JAMES KUSHNER, GOVERNMENT DISCRIMINATION 565-66 (2004).
- ¹⁰¹ *Craig v. Boren*, 429 U.S. 190 (1976).
- ¹⁰² *United States v. Virginia*, 518 U.S. 515 (1996).
- ¹⁰³ *Orr v. Orr*, 440 U.S. 268 (1979).
- ¹⁰⁴ See JAMES KUSHNER, GOVERNMENT DISCRIMINATION 566-68 (2004).
- ¹⁰⁵ *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986).
- ¹⁰⁶ *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1244 (11th Cir., 2001).
- ¹⁰⁷ *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 15 (1975) (statement of John Dillon, Executive Vice President, National BankAmericard).
- ¹⁰⁸ DC ADVISORY COMMITTEE TO THE US COMMISSION ON CIVIL RIGHTS, OBSTACLES TO FINANCING MINORITY ENTERPRISES 29-30, reprinted in *To Amend the ECOA of 1974: Hearing on H.R. 3386 Before the House Comm. on Banking, Currency, and Housing*, 94th Cong. 172 (1975).
- ¹⁰⁹ *Equal Credit Opportunity Act Amendments and Consumer Leasing Act: Hearing on S 483, 1900, 1927, 1961 and HR 5616 Before the Senate Comm. on Banking, Currency, and Housing*, 94th Cong. 24 (1975) (statement of Rep. Sullivan).
- ¹¹⁰ These categories are Marital Status, Age, Receipt of Public Assistance Income, or Good Faith Exercise of Certain Consumer Rights.

ENDNOTES CONTINUED

¹¹¹ Scariano v. Justices of Supreme Court of State of Ind., 38 F.3d 920 (7th Cir. 1994).

¹¹² Dandridge v. Williams, 397 U.S. 471 (1970).

¹¹³ Allied Stores v. Bowers, 358 U.S. 522, 527-29 (1958) (holding that a legislative action will be upheld when reviewed under the rational basis test if the court finds that the legislature had “any” conceivable basis to enact the law. *Id.* at 528.).

¹¹⁴ See *Adarand*, 515 U.S. at 212-13 (stating that race-neutral programs are subject to relaxed judicial scrutiny).

¹¹⁵ 15 U.S.C.S. § 1691c(a)(3) (2005).

¹¹⁶ 15 U.S.C.S. § 1691e(g) (2005) (stating general referral rule); see 15 U.S.C.S. § 1691(a) (2005) (listing violations that are referable).

¹¹⁷ 12 C.F.R. § 202.17(b)(3) (2005).

¹¹⁸ 15 U.S.C.S. § 1691f (2005).

¹¹⁹ *Fair Lending: Federal Oversight and Enforcement Improved but Some Challenges Remain*, GAO # 96-145, available at <http://www.gao.gov/archive/1996/gg96145.pdf> (last accessed Mar. 18, 2007), page 40 (1996).

¹²⁰ See *The Attorney General's Annual Report to Congress Pursuant to the Equal Credit Opportunity Act* for each year between 1999 and 2004, available at <http://www.usdoj.gov/ct/> (last accessed Mar. 18, 2007); data for 1996, 1997, and 1998 are not available.

¹²¹ 136 Cong. Rec. S17472 (Oct. 27, 1990) (statement of Sen. Dixon)

(explaining rationale for allowing the NCUA to dedicate fewer examiners to consumer compliance issues, explaining credit unions are “less sophisticated” than banks).

¹²² *Banking Regulatory Agencies' Enforcement of the Equal Credit Opportunity Act and the Fair Housing Act*: Hearings before a Subcomm. of the House Comm. on Government Operations, 95th Cong. 199 (1978) (statement of Lawrence Connell, Administrator, National Credit Union Administration).

¹²³ This author contacted the NCUA regarding more than a dozen credit union websites with apparently illegal language. These pages included programs offering preferential rates to those under age 62, programs requiring a cosigner

without first determining whether the applicant independently qualifies for credit, and those that discourage unmarried couples from applying for credit. The NCUA committed to review the websites, but responded that some of the credit unions cited in the letter had already changed their sites or are no longer in existence. The NCUA also indicated faith in the ability of credit unions to comply with the ECOA and indicated that NCUA examiners will recommend referral to the Department of Justice when violations are identified. Regardless of the NCUA’s response, it is troubling that the websites, at least at one point during 2005, apparently violated the law, regardless of whether they are now corrected. By contrast, a similarly exhaustive search of bank websites revealed only four questionable pages, and all related to loan discounts offered beginning at an age less than 62. See Letter from David Marquis, Director, Office of Examination and Insurance, National Credit Union Administration, to Luke Reynolds (June 6, 2005) (on file with author).

¹²⁴ H. REP. NO. 102-330, at 1944 (1991).

¹²⁵ For example, credit unions enjoy significant federal tax advantages compared to banks.

¹²⁶ See 136 Cong. Rec. S17472 (Oct. 27, 1990) (statement of Sen. Dixon) (stating an exemption for the NCUA on examiner staffing levels does not “lessen the priority that Congress intends the NCUA to place on consumer compliance”).

¹²⁷ See, e.g., U.S. Dept. of HUD, *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study (HDS)*, available at <http://www.huduser.org/publications/hsgfin/hds.html> (last accessed Mar. 18, 2007) (paired tests found minority homebuyers subject to adverse treatment during the finance process); National Fair Housing Alliance, *2005 Fair Housing Trends Report*, available at <http://www.nationalfairhousing.org/> (last accessed March 24, 2007) (follow “News Archive” hyperlink; then follow “Trends and Reports” hyperlink and scroll to “2005 Trends Report” link) (467 mortgage lending complaints received during 2004 by member agencies).

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