‘Effects-Based’ Civil Rights Law: Comparing U.S. Voting Rights, Equal Employment Opportunity and Fair Housing Legislation*

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*We presented earlier versions of this paper at the following conferences: “New Legal Realism 10th Anniversary Conference: New Directions in Legal Empiricism,” organized by the *American Bar Foundation and the University of California-Irvine School of Law*, University of California-Irvine, August 29-30, 2014; “Rights and Their Translation into Practice: Toward a Synthetic Framework,” Rogers College of Law, Tucson, AZ, Nov. 2-3, 2012; “L’État des droits. Practiques des droits dans l'action publique," Université de Paris, Villetaneuse and Science-Po, Paris, June 25-26, 2012; Society for the Advancement of Socio-Economics, Milan Italy, June 27-29, 2013. We greatly appreciate comments received in those venues. Authorship is alphabetical; the authors contributed equally to this paper. Our research was supported by a National Science Foundation grant to Pedriana (SES-0963418, 2010-11) and a University of Arizona Social and Behavioral Sciences Research Professorship (2011-12) to Stryker. We thank those who agreed to be interviewed for this project. The views expressed in the paper are ours alone.

‘EFFECTS-BASED’ CIVIL RIGHTS LAW: COMPARING US VOTING RIGHTS, EQUAL EMPLOYMENT OPPORTUNITY, AND FAIR HOUSING LEGISLATION

Abstract

Between 1964 and 1968, the United States Congress enacted three potentially transformative civil rights laws: Title VII of the 1964 Civil Rights Act, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. Evidence suggests that overall, voting rights was by far the most successful, fair housing was a general failure, and Title VII fell somewhere in between. We seek to explain these divergent outcomes through comparative-historical analysis, illuminating current civil rights legal and policy debates. Explanatory accounts focusing on white support/resentment or state internal resources including formal enforcement powers, established bureaucratic infrastructure and capacities, and policy entrepreneurship can help us understand and explain outcomes of *particular* civil rights policies, but no extant explanation can fully explain observed differences across all three cases. We propose and provide evidence for an alternative hypothesis: *the extent to which each policy incorporated a "group-centered effects" (GCE) statutory and enforcement framework* explains comparative differences in their relative success. Focusing on systemic group disadvantage rather than individual harm, discriminatory consequences rather than discriminatory intent, and substantive group results rather than formal procedural justice for individual victims, GCE provides a sociologically-driven legal and cultural framework for defining, proving and remedying unlawful discrimination. Until recently, voting rights embodied a very aggressive GCE approach; equal employment partially embodied some elements of this approach. Resentment, especially among Northern whites, may help explain why, despite having the most aggressive policy entrepreneur, fair housing failed to institutionalize GCE in its early enforcement.

Introduction

In June of 2013, the U.S. Supreme Court struck down Section 4 of the 1965 Voting Rights Act (*Shelby County v. Holder* [2013]). Also known as the statistical "trigger," Section 4 was arguably the single greatest contributor to black enfranchisement over the last half-century because it legislated a statistical formula automatically establishing liability for former states of the confederacy without the need for case-by-case litigation requiring proof of discriminatory intent. Many commentators and activists decried the ruling as confirmation that longstanding voting protections were under attack. As one activist colorfully summarized, "[in] 2013, we [now have] less voting rights than they had [in] 1965…THIS…IS…OUR…SELMA…NOW!" (quoted in Rutenberg 2015, p. 48).

Almost exactly two years later, the Supreme Court ruled that plaintiffs alleging housing discrimination could win their case by proving a discriminatory "effect" without having to prove discriminatory intent (*Texas Dept. of Housing v. Inclusive Communities* [2015]). The *New York Times* opined that the decision "forcefully reminded state and local governments that the Fair Housing Act of 1968 forbids them from spending federal housing money in ways that perpetuate segregation," and should help prevent "affordable housing policies [from making] racial isolation worse" (2015, p. A18).

Both cases—and the responses to them—signal that the efficacy of U.S. voting rights and fair housing policies rest in part on judicial construction and interpretation of legal doctrine. From a broader sociological perspective, they invoke more general theoretical and empirical questions: *what factors best explain the strength/weakness of civil rights policies and why have some civil rights laws been more successful than others since their legislative enactments in the mid-to-late 1960s?* This paper addresses these fundamental questions through historical-

comparative analysis of three potentially transformative civil rights laws: Title VII of the 1964 Civil Rights Act (prohibiting employment discrimination based on race, sex, religion and national origin), the Voting Rights Act of 1965 (VRA, removing systemic barriers to minority voters), and the Fair Housing Act of 1968 (FHA, banning race, religious and national origin discrimination in the sale and rental of housing). Historical evidence reveals—and civil rights scholars concur—that voting rights was by far the most successful of the three; fair housing was a general failure; and Title VII fell somewhere in between, achieving a modicum of success that surpassed fair housing, but came nowhere near the achievements of voting rights.

What explains these divergent outcomes? Scholarly literature in political sociology suggests that civil rights policy success is conditioned largely on state-internal resources including formal enforcement powers, established bureaucratic infrastructure and capacities, and aggressive "policy entrepreneurs." Another argument ties civil rights policy success to the degree of white support or resentment. We argue that while each of these arguments helps interpret and explain *particular* civil rights policy outcomes, none adequately explains *comparative outcomes* across all three cases. We offer an alternative that can do so.

Theoretically grounded in the sociology of law, we argue that divergent outcomes of U.S. voting, employment, and housing legislation can best be explained by *the extent to which each incorporated a statutory and enforcement model we call the "group-centered effects" (GCE) framework*. The GCE framework provides a *sociologically-driven* legal and cultural frame of reference for defining, proving, and remedying unlawful discrimination. The framework focuses on systemic *group disadvantage* rather than individual harm, discriminatory *consequences* rather than discriminatory intent, and substantive, remedial *group results* rather than formal procedural justice for individual victims or alleged wrongdoers.

Why Voting, Employment and Housing are 'Comparable'

Important similarities across these three civil rights "cases" make them appropriate for comparison. Each was legislated within a relatively short five-year span (1964-68) by a democratic-controlled Congress and President amidst a movement—albeit at different stages—for black civil rights. Later implementation for each took place within a renewed conservative political environment. While fair housing alone was *enacted* coterminous with emerging conservatism, we take account of this in our analysis.[1] Comparing voting, employment, and housing allows us to explore divergent outcomes among three civil rights policies enacted in similar (not identical) ways, at similar times, and within similar political contexts.

Defining and Comparing Case Outcomes

Because voting rights, equal employment, and fair housing legislation varied according to their subsequent "success" or "effectiveness" (we use these terms interchangeably), our analysis contributes to literature linking law to social change (Stryker 2007). Yet how does one define more vs. less effective civil rights legislation?

One approach defines success as creating formal legal rights against discrimination accompanied by an official enforcement structure. To the extent legislation does this, it might be considered effective (Belz 1991). This is problematic, however, because formal legal rights "on the books" do not translate automatically into use of law in practice, even when enforcement structures are created (Friedman 2005). Alternatively, one might evaluate effectiveness by

[1]We use the terms law and policy interchangeably to refer to civil rights legislation. In our conclusion, we note evidence from federal law combating racially segregated schooling that also supports our GCE framework. However—and notwithstanding Title VI of the Civil Rights Act authorizing cutting off federal funds to school districts engaged in race discrimination—the central analogous litigation in public school cases involved constitutional interpretation not legislation, so enforcement of anti-discrimination in education is not strictly comparable to voting, employment and housing (see Sutton 2001).

measuring impact, especially the extent to which legislation transforms resource distributions between the majority and a disadvantaged minority (Rosenberg 1991). Recent sociological research on EEO law attempts to do just this (Kalev and Dobbin 2006; Kalev, Dobbin and Kelly 2006; Hirsch 2009; Skaggs 2008, 2009; Stainback and Tomaskovic-Devey 2012).

However, cross-case comparison of civil rights laws evokes an "apples and oranges" dilemma; laws prohibiting discrimination in voting, employment and housing involve different institutions and practices. Voting rights success indicators including registration rates and voter turnout are relatively easy to measure, and most scholars agree these are key indicators of success for that domain (Lempert and Sanders 1986; Grofman, Handley and Niemi 1992; Sutton 2001). Once poll tax and literacy test barriers are removed, voting inequalities are not contingent on other inequalities (Lempert and Sanders 1986). Thus, if black voter registration rates skyrocket as they did in Mississippi from 6.7 percent in March of 1965, to 59.6 percent in September of 1967, it is reasonable to attribute a substantial part of this jump to the August, 1965 VRA (Grofman, Handley and Niemi 1992, p. 23).[2]

By contrast, many factors other than discrimination shape minority-white outcomes in labor and housing markets, so teasing out anti-discrimination law's impact is harder and subject to more controversy (Smith and Welch 1984; Donohue and Heckman 1991; Holzer and Neumark 2000; Ross and Galster 2005; Collins 2008). Minority relative to white labor market outcomes *are* contingent on minority-white inequalities in education (Lempert and Sanders 1986). Housing outcomes *are* contingent on race and ethnic inequalities in occupation, income, and wealth (Islam and Asami 2009).

[2] The black-white gap in voter registration in Mississippi halved between March of 1965 and September of 1967.

Controversy over defining, measuring and modeling specific impacts of any one statute does not however, preclude comparative analyses (Ackerman 2014). At a global level, there is much scholarly agreement that, while it could have been far more effective, equal employment-affirmative action law had some positive effects on labor market outcomes of minorities and women (Leonard 1984, 1990; Donohue and Heckman 1991; Stryker 2001; Sutton 2001; Kalev and Dobbin 2006; Skaggs 2009; Hirsch 2009). Scholars further agree that federal equal employment law was *less* effective than the VRA (Lempert and Sanders 1986; Ackerman 2014; Sutton 2001).

There is virtual consensus that fair housing was a substantial failure (Ackerman 2014; Staats 1978; Massey and Denton 1993; Denton 1999; Daye 2000; Yinger 2001; Bonastia 2000, 2006; Johnson 2011). Bonastia (2000, 2006) persuades that equal employment legislation was far *more* successful than fair housing. Employment discrimination experts suggest that equal employment law *did* remedy much overt race discrimination in employment such that today's employment discrimination is of a subtler nature (Sturm 2001). In housing, however, newer, subtler forms of discrimination were accompanied by "the stickiness of quite ordinary forms of discrimination: refusal to rent, sell or make properties available to blacks on the same terms as whites" (Johnson 2011, p. 1191).

Rather than trying to offer a universal concept of legal success/effectiveness, we avoid pitfalls by emphasizing consensual global ordering rather than precise numerical estimates of relative impact. Following standard practice among historical-comparativists seeking causal explanation of similarity and difference in macro-case outcomes, we conceive and analyze each case holistically. This allows cross-case comparison notwithstanding that each case is historically unique (Ragin 1987; Stryker 1996; Pedriana 2005).

At a higher level of abstraction, voting rights, equal employment, and fair housing law share several common characteristics. Each seeks to expand the resources, opportunities and life chances of disadvantaged minorities in a given societal sector; each presupposes that one fundamental means to achieve that end is to legally prohibit discrimination on the basis of race or other protected classifications; and each includes a compliance structure to administer and/or enforce the law. It is against this more abstract conceptual backdrop that these three civil rights policies can be compared and contrasted *on their own terms and with respect to their specific mission and objectives*. Conceived this way, voting rights policy, for example can be considered the most effective of the three not because voting gains for minorities can be directly compared to employment or housing gains (for all the reasons given earlier); but because voting rights, *within its own policy universe*, more successfully translated the legal requirement of nondiscrimination into more fundamental and lasting transformations in the political life of racial minorities than did equal employment or fair housing policy, respectively, in minority economic and residential life. To supplement our comparative analysis, we also consider how evidence of varying effectiveness *within* each policy realm may be associated with explanatory factors that buttress or undermine our argument. We focus especially on 1965-85, but also discuss subsequent enforcement, including key recent Supreme Court rulings.

Alternative Explanations for Civil Rights Policy Outcomes

Formal Enforcement Power

Enforcement power is among the most cited explanations for civil rights policy success. Voting rights research points to the Justice Department's (DoJ's) unprecedented enforcement authority as key to VRA success (Light 2010; Garrow 1978; 1986 Lawson 1985; Thernstrom

2009; Davidson and Grofman 1994). Fair housing research links failure to the Department of Housing and Urban Development's (HUD's) near complete lack of formal powers (Lamb 2005, p. 22; Lee 1999; Denton 1999).

But if presence or absence of strong enforcement power can explain differences in voting rights and fair housing, it cannot explain why equal employment fared better than fair housing. Title VII's shortcomings are linked consistently to a weak Equal Employment Opportunity Commission (EEOC) (Edelman 1992; Greenberg 1994; Skrentny 1996). For its first seven years, EEOC statutory authority and enforcement structure were virtually identical to that of HUD. Both were allowed only to conciliate and persuade. In both cases, if conciliation failed, individual private plaintiffs had to file lawsuits in federal court (Pedriana and Stryker 2004; Lee 1999).[3] Formal enforcement power alone, then, cannot explain the divergent early fates of Title VII and the FHA.

Bureaucratic Capacities

A well-developed bureaucratic infrastructure and strong administrative capacities (vs. lack thereof) is another explanation for divergent outcomes. "State-centered" theories have long held that centralized administrative/enforcement bodies with established departments, consistent internal rules, clear lines of authority, large budgets, and a large cadre of experienced, career oriented technical experts have greater capacity to achieve policy goals (Amenta 1998; Skocpol and Finegold 1982; Skocpol 1985). Under this definition, both the DoJ and HUD were in a far more advantageous position than was the brand new EEOC, yet the EEOC performed

[3] Title VII and the FHA gave the DoJ limited authority to prosecute "pattern or practice" lawsuits (about which we say more later). But by overwhelming margins, private and individual court cases were the primary means of ensuring compliance with both Acts (Lee 1999; Pedriana and Stryker 2004).

considerably better than its HUD counterpart.

Bonastia (2000, 2006) offered an alternative bureaucratic capacity argument in the specific context of civil rights. In his comparative analysis of Title VII and fair housing, he concluded that Title VII fared better than fair housing because HUD, unlike the EEOC, was situated within a disadvantaged "institutional home." Bonastia observed that fair housing enforcement was buried within a large HUD bureaucracy, and hampered by competition for scarce HUD resources already spread thin among other missions, including construction of subsidized public housing, mortgage and loan assistance, and community relations. By contrast, the EEOC was a "single mission" agency whose only job was to enforce Title VII; in the absence of a bureaucratic labyrinth, the EEOC could thus more effectively administer and enforce the law with far less bureaucratic confusion, rivalry, and red tape.

Yet Bonastia's argument is suspect because, single mission or not, the early EEOC cannot plausibly be considered "advantaged" in any sense of the word. Virtually all Title VII historians concur on this point (e.g., Graham 1990, Blumrosen 1993; Pedriana and Stryker 2004). According to Skrentny (1996, p. 122), "[t]he circumstances of its [the EEOC's] beginnings…could fairly be described as a fiasco…The first years of the EEOC were characterized by disorganization." Pedriana and Stryker (2004, p. 713) wrote of the EEOC's absence of "bureaucratic machinery to smoothly set Title VII into motion. The Commission lacked any semblance of a coherent organization. The agency had no official organizational structure, virtually no staff, and no office headquarters."

From a theoretical standpoint, Bonastia's claim about the importance of single-mission agencies for successful enforcement is partly challenged by the Justice Department's (DoJ's) far greater success in enforcing the VRA. Like HUD, the DoJ was spread thin; it was responsible

for *all* federal law enforcement, of which civil rights was a tiny part. In civil rights, Justice's Civil Rights Division (CRD) got just one percent of the DoJ budget. Until its 1969 creation of functional sub-units, the CRD dealt with *all* civil rights, not just voting (Graham 1990; Rose 2005). Thus, the DoJ's CRD does not appear particularly "advantaged," yet voting rights enforcement was far more effective than fair housing enforcement. And as our analyses will show, some of HUD's greatest remedial leverage came from the multiple programs it administered (Johnson 2011).

In short, whether one favors the original state-centered conception of bureaucratic capacity, or Bonastia's "single mission" argument, neither can adequately explain why Title VII did better than fair housing, or why voting rights did *so much better* than both Title VII *and* fair housing.

Policy Entrepreneurs

A third argument suggests that "policy entrepreneurs," defined by Pedriana and Stryker (2004, p. 720) as "reform-minded, ideologically driven, and/or career-minded bureaucrats who strive to design and shape state policies," are essential to effective enforcement (Amenta 1998; Heclo 1974; Skocpol 1992). This also cannot fully explain observed comparative outcomes. Of the three cases, *fair housing* seems the best example of a strong policy entrepreneur. George Romney, HUD secretary under President Nixon, aggressively pursued strategies not just to end discrimination in housing sales and rentals, but to achieve urban and suburban racial and economic integration. Romney envisioned HUD playing a central role with the federal purse and carrot and stick approaches toward local communities and the banking industry (Lamb 2005; Ackerman 2014). But his efforts were unsuccessful.

By contrast, the EEOC never produced a Romney-like far-sighted leader. The EEOC's first chairman, FDR Jr., showed little commitment to strong Title VII enforcement, was routinely absent during Congressional appropriations hearings, and resigned within a year. His successors did little better. Nor, with a few key exceptions, did senior staff show major commitment to the agency during its formative years (Graham 1990; Skrentny 1996; Pedriana and Stryker 2004; Stryker, Docka-Filipek and Wald 2012). In its first five years, the EEOC had eleven different commissioners, four chairpersons, six general counsels, six executive directors, and seven compliance directors (Hill 1977). Yet the EEOC achieved more in curtailing discriminatory employment than did HUD in curtailing housing discrimination.

The VRA also calls the policy entrepreneur argument into question. Although top CRD lawyers were committed to enforcing the VRA, they initially counseled President Johnson and civil rights activists—both of whom favored the most aggressive enforcement possible—that such broad vision might be *too* aggressive in ways that breached constitutional boundaries (Graham 1990; Lawson 1976, 1985; Branch 2006). The CRD routinely opted *not* to send federal registrars into southern counties with demonstrable histories of black disfranchisement, even though the VRA authorized doing so. DoJ lawyers preferred to allow local southern officials to comply voluntarily, with direct federal oversight a last resort (Garrow 1978; Light 2010). Despite lacking an aggressive policy entrepreneur, the VRA achieved success to which both equal employment and fair housing paled in comparison.

In sum, core explanatory concepts favored by political sociologists—enforcement power, bureaucratic capacities and infrastructure, and policy entrepreneurship—all help explain civil rights law outcomes. But comparatively, none can adequately explain why voting rights did so much better than both equal employment and fair housing, or why equal employment achieved at

least a modicum of effectiveness while fair housing fell flat.

Socio-legal scholars *do* make enforcement power arguments consistent with the success of voting rights contrasted with equal employment and fair housing. These scholars argue that success is enhanced when civil rights laws provide for *government,* as opposed to private enforcement (Burstein 1991; Epp 1998; Sutton 2001; Stryker 2007).[4] Consistent with emphasizing *government* enforcement, the DoJ could initiate lawsuits supporting minority voting rights (Sutton 2001); neither the pre-1972 EEOC nor the pre-1988 HUD could initiate lawsuits (Pedriana and Stryker 2004; Lamb 2005). Still, both Title VII and the FHA allowed the DoJ to prosecute "patterns or practices" of discrimination (82 Stat 81 [1968]; 78 Stat 241 [1964]), so it is unclear why early EEO law should have been more effective than fair housing. It is equally unclear why both should have been so much less effective than voting rights law.

We incorporate aspects of government enforcement into our analysis below. But we argue that the *type of enforcement strategy* in both government-initiated and private lawsuits is more critical than is government enforcement per se. Before turning to our own explanatory framework, we address one final alternative: Nixon and the politics of white resentment.

Nixon and White Resentment

Richard Nixon's election in 1968 is often considered a watershed in U.S. civil rights history. This victory is explained in part by white backlash against an increasingly militant civil rights movement, urban rioting, and government overreach (Garrow 1986; Graham 1990; Lamb 2005).

[4] Burstein's (1991) study of Title VII cases in federal appellate court, 1965-85, found a statistically significant and substantial positive effect on plaintiff-employees' chances of winning a discrimination lawsuit when government prosecuted the case on behalf of injured parties.

Whites might have been less suspicious of aggressive voting rights enforcement because "[g]iving one person the vote does not take away the vote from anyone else" (Lempert and Sanders 1986, p. 361). By contrast, whites may have been more threatened by enforcement dictating where and with whom their children went to school, or whom they must let into their neighborhoods. Exploiting white anxiety for electoral gain, Nixon strongly opposed busing to achieve school integration. He fought against interpreting the FHA to require racial and economic integration of suburban neighborhoods (Graham 1990; Sutton 2001; Ackerman 2014).

Though the Nixon/white resentment thesis carries significant weight, it is better tailored to explain collapse of aggressive fair housing than to explain comparative policy success across all three policy domains. It is not clear whether the key factor is white resentment or vocal presidential opposition, or whether both must be present to minimize civil rights policy success. Lamb's (2005) study of fair housing under Nixon suggests that both conditions worked together to undermine fair housing enforcement, but it cannot determine whether white resentment/ presidential opposition also is applicable to other civil rights policies. We suggest caution.

Somewhat ironically, fair housing legislation was born in 1966, in conjunction with "a larger bill to protect civil rights workers, who were being intimidated, beaten, and even killed *as they attempted to organize and register Blacks to vote* throughout the South" (Mathias and Morris 1999, p. 22, emphasis ours). White southerners did try to resist the VRA, and well they might, since restricting voting to whites was a pillar of Southern white supremacy. In any event, if voting rights did produce comparatively less resentment among whites than did equal employment or fair housing, we would also expect federal voting rights laws *prior* to 1965 to have been more successful than were fair housing and equal employment law. Evidence casts grave doubt on such a claim.

When the 1965 VRA was enacted, the right to vote free of discrimination already was guaranteed by the Constitution and two federal statutes. Southern whites resisted the 15th Amendment, and Reconstruction's end meant "the beginning of the movement to exclude blacks totally from the southern electorate" (Sutton 2001, p. 7). While the Civil Rights Acts of 1957 and 1960 also outlawed race discrimination in voting, scholars unanimously agree these laws did almost nothing to enfranchise southern blacks (Branch 1988; Light 2010; Garrow 1978; Thernstrom 2009; Lempert and Sanders 1986, pp. 356-358; Grofman, Handley and Niemi 1992, p. 15; Sutton 2001, p. 169). If the right to vote really was less a threat to white interests than other civil rights issues, why did Southern states push so hard to roll back Reconstruction-era gains in black voting? Why did two voting rights laws proximate in time to the 1965 VRA enfranchise a negligible number of blacks, yet the 1965 VRA succeeded where these earlier laws failed?

Nixon's early record on voting rights also partly undermines the white resentment thesis. During Congress' 1970 debates on extending the VRA, Nixon sought to placate resentful white southerners—an electoral constituency he coveted (Graham 1990, p. 303, 361). Trying to destigmatize the south, Nixon proposed that the literacy test ban in covered southern states be extended to the entire nation. He tried to water down the VRA's most powerful provision—Section 5—requiring pre-clearance by the Justice Department for any proposed change in voting procedure in covered jurisdictions. Civil rights proponents in Congress and the press claimed Nixon was trying to weaken voting rights enforcement in the south and accelerate white southerners' flip to the Republican Party (Graham 1990, pp. 360-62, Edsall and Edsall 1991).

Nixon's early stance on voting rights might not have been as vitriolic as his stance on busing and housing integration, but Nixon still tried to weaken the VRA to placate southern

whites. Even so, the 1965 VRA—unlike its predecessors—produced significant black enfranchisement in the South, especially in states where white resistance to black voting had been especially high (Grofman, Handley and Niemi 1992).

The preceding arguments are summarized in Table 1.

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Enforcement power, bureaucratic infrastructure and capacities, and policy entrepreneurship, in conjunction with the Nixon/white resentment thesis, all contributed to voting rights, equal employment, and fair housing outcomes. But none of these factors can explain adequately, *from a comparative standpoint*, the specific hierarchy of outcomes observed across the three cases. Based on prior arguments, voting rights should *not* have been as effective as it was, equal employment opportunity should have been *less* effective than it was and fair housing should have been *more* effective than it was. We now turn to an alternative law-centered explanation that *can* explain patterns of variation across the three cases.

Explaining Comparative Civil Rights Outcomes:
The Group-Centered Effects (GCE) Framework

Max Weber (1978) distinguished between formal and substantive law, suggesting the former represented the highest form of Western legal rationalization. Formal law emphasized rule-following, general procedures equally applicable to all lawsuits, and reasoning within an *internal* referential system strictly separated from considering broader social context or impact. Substantive law and justice were oriented purposely to achieving economic, social and political goals. Contemporary socio-legal scholars clarified and built on this distinction (Lempert and Sanders 1986; Stryker, 1989; Savelsberg 1992; Sutton 2001; Pedriana and Stryker 2004; Stryker,

Docka-Filipek, and Wald 2012). We further refine the idea of substantive law, linking it to ideas of collective legal mobilization and legal interpretation as "law in action" (Burstein 1991; Pedriana and Stryker 2004).

Pessimists critical of law's capacity to produce social change are right that lawsuits are tedious, expensive, and typically won by "repeat players" (usually corporate defendants) that litigate similar cases routinely and have large legal and financial resource advantages over individual plaintiffs who are "one shot players" (Galanter 1974). Civil rights statutes often are ambiguous and provide for weak enforcement (Edelman 1992; Dobbin and Sutton 1998; Sutton 2001; Dobbin 2009). Courts cannot enforce their own rulings (Rosenberg 1991). Judicial remedies usually are reactive, tailored to redress injuries suffered by individual complainants rather than operating proactively to change institutionalized behavior patterns (Chesler, Sanders and Kalmuss 1988; Edelman 1992; Ackerman 2014; Nielsen, Nelson and Lancaster 2010). Judges in employment cases increasingly defer to practices employers have adopted to comply with equal employment law (Edelman et al 2011). Some of these strategies do improve minority and female outcomes, but other deferred to practices do not (Edelman et al 2011; Kalev, Dobbin and Kelly 2006).

For all these reasons, the legal deck typically is stacked against members of subordinate groups. However, we consolidate and build on research arguing that, *under some conditions,* law provides a resource for progressive social change, enhancing economic resources, political empowerment and/or positive identity change for the disadvantaged (Lempert and Sanders 1986; Burstein 1991; McCann 1994; Sutton 2001; Sturm 2001; Scheingold 2004; Ackerman 2014; Pedriana and Stryker 2004; Hull 2006; Kalev and Dobbin 2006; Stryker 2007; Skaggs 2008, 2009; Hirsch 2009; Dobbin 2009; Stryker, Docka-Filipek, and Wald 2012). While emphasizing

the import of substantive law, our argument pertains *only* to laws that increase legal resources of disadvantaged and marginalized classes and groups.

Comparing voting rights to equal employment and school desegregation, Lempert and Sanders (1986, p. 390) suggested that among other factors shaping efficacy, civil rights laws relying for enforcement on methods of proof emphasizing strict liability (i.e., discriminatory effects) would be more effective than laws relying on a criminal law concept of liability (i.e., the strongest version of discriminatory intent) because "the need to show intentionality gets in the way of enforcement." Sutton (2001) showed that strict liability is the most *substantive* method of legal proof because it establishes liability based purely on social impact/results, rather than on *any* concept of intent.[5] For Sutton too, strict liability is among factors influencing civil rights enforcement success, because it typically is harder to show actors' *intent* than to show the *effects* of actions or structures (see also Stryker 2001; Ackerman 2014).[6] "Critical legal scholarship" laments U.S. courts' refusal to *expand* strict liability in civil rights law beyond a few beachheads, charging this promotes *in*effectiveness (Freeman 1990; Kairys 1998). Pedriana and Stryker (2004, p. 709) suggested that Title VII was differentially effective over time because it was a "moving target," in which enforcers' willingness to use substantive, effects-based legal interpretation to prove discrimination ebbed and flowed over time (see also, Ackerman 2014). We incorporate different legal concepts of liability, along with other aspects of legal interpretation and enforcement, into a *broader frame of reference capturing more vs. less*

[5] Strict or absolute liability holds actors responsible for all the consequences of voluntary acts causing injury, *regardless of intent or prior knowledge* (Sutton 2001). Workman's compensation relies on strict liability as do some types of product liability (Lempert and Sanders 1986). Lawyers point out that negligence standards for proving liability in tort law do not dispense with proof of intent but do modify proof standards so that the negligence version of "intent" is easier to prove than the criminal law version (e.g., Blumrosen 1972)..

substantive orientation to civil rights law that we call the "group-centered effects" framework (GCE).

The GCE Framework and Comparative Analysis

The GCE framework includes four core principles. First, discrimination is understood to be a routine feature of social life that systematically disadvantages minority groups, not an isolated act of malice or bad intent against certain individuals. Second, the logical way to prove discrimination is by reference to broader patterns of minority representation. Where minorities are significantly underrepresented in access to valued resources or institutions, it is assumed such wide disparities are at least partly attributable to discriminatory processes rooted in historical disadvantage and/or current practices that may or may not be intentional. Liability is established by consequences (i.e., "effects") rather than intent.

Third, the GCE framework is most concerned with *substantive group results* as the proper remedy for proven discriminatory patterns. Results are normally achieved by remedies designed to increase minority representation (Sutton 2001; Pedriana and Stryker 2004; Stryker 2001).[7] This contrasts with passive nondiscrimination, or formal procedural justice focused on complaint processing and grievance mechanisms, or narrowly tailored compensation for individual victims.

Fourth, consistent with evaluating civil rights policies in terms of their results for minority groups, and with establishing liability and remedies based on patterns of group

[7]The group-centered effects framework provides conceptual foundation for *remedial* affirmative action (Belton 2014; Belz 1991; Skrentny 1996), but is broader than affirmative action. Except when affirmative action is argued to constitute reverse discrimination against whites because it takes race into account, it pertains to remedies but *not* to liability for discrimination (Stryker 2001). See our discussion of Title VII enforcement for further information on results-based remedial action and reverse discrimination challenges to it.

representation, the GCE framework is conducive to *class actions*, whether public or private. Class actions are a form of collective legal mobilization consolidating many similar claims into one lawsuit usually involving large stakes in financial awards and/or legal precedent (Stryker 2007).[8]

The GCE framework is not a discreet, "either/or" characteristic present or absent in each case. We instead imagine it along an ideal-type continuum in each domain. At one end is a pure, GCE approach; at the other a statutory and enforcement model confined to individual plaintiffs, requiring proof of discriminatory intent, ignoring statistical patterns produced by institutionalized practices, and eschewing results-oriented remedies in favor of procedural and compensatory remedies for individual victims of discrimination. In between are many legal nuances and gradations. We examine *the extent to which* each civil rights policy "on the books" and "in action" incorporated such an approach and from this we extract our central hypothesis: *civil rights effectiveness varies by the degree to which civil rights law embodies the GCE statutory and enforcement framework.* More specifically, our GCE hypothesis presumes that voting rights was most successful because it embodied the strongest GCE approach, fair housing was the least successful because it embodied the weakest GCE approach, and equal employment fell somewhere in between because it incorporated a moderate GCE approach.

Our GCE framework for comparative analysis dovetails with constitutional scholar Bruce

[8]Socio-legal scholars treat class actions similarly to government enforcement and enforcement by public interest law firms seeking new precedent as potential avenues for civil rights plaintiffs' legal success (Galanter 1974; Burstein 1991; Epp 1998; Sutton 2001). We argue that increased equality between advantaged and disadvantaged is likely to the extent that judicial precedent played for and won, whether through private or government litigation, embodies the GCE framework. Note that although *all* class actions attack *systemic* practices, and thus embody this element of GCE, only some class actions are litigated according to pure effects-based methods of proving liability. Others are litigated according to a particular type of intent-based standard in which statistics on group representation become relevant to proving *intent* to engage in systemic discrimination (for more technical discussion, see Stryker 2001).

Ackerman's *We the People* (Volume 3): *The Civil Rights Revolution* (2014). Examining the history of voting, employment, housing and public accommodations, Ackerman's primary objective is to situate civil rights legislation within the broader development of the US constitutional order. However, Ackerman's book evidences growing concern by legal scholars not just with legislative histories, texts, and formal judicial rulings, but also with administrative enforcement and the strategic mobilization of legal doctrines that expand or constrain possibilities for effective civil rights legislation. Our comparative analysis complements and extends Ackerman (2014) by systematizing and incorporating the variable legal approaches to liability and remedy for discrimination into an explicit and overarching *sociological* frame of reference for understanding civil rights policy success. Each of the four components of our GCE framework look beyond racial animus, discriminatory intent and procedural justice for *individuals* to statistical indicators, routine institutional practices, and resulting resource and reward distributions between majority and minority *groups*

Immediate Causes vs. Historical Process

Our core argument that comparative civil rights outcomes can be explained by reference to the GCE framework is an argument about immediate or "proximate" cause.[9] However, we are fully aware that such immediate causes are themselves the result of historical processes and pathways that can be thought of as more distal causes. Thus, the comparative historical *sequences* through which each of our cases arrived at greater or lesser commitment to the GCE framework requires analysis, but such analysis is beyond the scope of this paper. Here, our

[9] Here we invoke the term proximate to signal a cause or causes most immediate in time to the consequence we want to explain. This should not be confused with proximate cause in the technical legal sense as a key element—along with negligence—for proving liability in tort cases.

primary objective is to show how the comparative effectiveness of three major civil rights laws can be explained by the greater or lesser presence of GCE, without systematically comparing how and why each case arrived at its level of commitment to such a strategy.

Making this analytic distinction allows us to partly reconcile our core argument with alternative explanations discussed earlier. For example, one of the reasons why fair housing never pursued an aggressive GCE approach may be *because* there was so much white resentment to integrated housing. Similarly, one reason why equal employment wound up with a moderate GCE enforcement strategy may be *because* Title VII was weak and the agency enforcing it had little formal power, yet pressure from civil rights constituencies promoted creative enforcement that provided courts with the opportunity to construct some effects-based methods of proving and remedying employment discrimination (Pedriana and Stryker 2004). While we will tackle systematically the historical *processes* that led to greater or lesser fidelity to the GCE framework in a subsequent paper, in this paper our concern is with the *impact* of that framework.

The following sections present our comparative analysis of the three cases. We first compare the legislative context and statutory language of voting rights, equal employment opportunity and fair housing legislation. We then move to enforcement, concentrating especially on the early enforcement of each statute. Since American judicial enforcement is a precedent-based, backward looking system, the early institutionalization period creates key path dependencies shaping later litigation, administrative and judicial enforcement. Judicial enforcement approaches and argumentation frameworks established early on thus have disproportionate influence on the effectiveness and impact of regulatory statutes (Stryker, Docka-Filipek and Wald 2012). We thus concentrate especially on the period prior to 1985. We do provide brief analysis of continuities and change within each legislative domain after the mid-

1980s, concentrating especially on breaks with earlier path dependencies.

The Legislative Context and Statutory Language of

Voting Rights, Equal Employment Opportunity, and Fair Housing Law

Debated and passed amidst a mostly peaceful civil rights movement in which non-violent protest exposed Jim Crow's hypocrisy and brutality by generating violent white southern repression, Title VII and the VRA were more similar in context for enactment than either was to fair housing. The general northern public, Congress, and the President supported Title VII and the VRA (Burstein 1985). Still, it took President Kennedy's death and President Johnson's subsequent leadership to fully galvanize Congress (Graham 1990, p. 135).

By 1968, the northern inter-racial coalition had splintered. Black militants rejected nonviolence and integration; white activists became preoccupied with the Vietnam War (Garrow 1986; Branch 2006; Chen 2009). Images of black rioters and burning cities from Los Angeles to Detroit replaced images of southern violence inflicted on peaceful protestors, and Congress grew more skeptical about expanding black civil rights (Graham 1990, pp. 255-273). In 1966-67, President Johnson sent Congress a bold civil rights bill including a fair housing section. Congress refused (Graham 1990; Mathias and Morris 1999). Finally, in the wake of Martin Luther King's assassination, pro-civil rights members of the 90th congress pushed through a housing bill banning public and private discrimination in housing sales and rentals (for details see Graham 1990, p. 270-273; Mathias and Morris 1999).

Thus, Title VII and the VRA were enacted during *northern* consensus favoring relatively bold new civil rights protections. Fair housing was enacted when that consensus had begun eroding, but when Congress had not yet abandoned pro-civil rights impulses and President Johnson remained firmly in support. But when we turn attention to each statute's *text*, the

similarities between Title VII and the VRA end and Title VII's similarities with the FHA begin. Title VII and the FHA's language and requirements are almost identical, and neither resembles that of the VRA. Table 2 summarizes our comparative discussion of the text of the three statutes.

--Table 2 about Here--

Written in the legal vernacular of individual nondiscrimination, Title VII required proof of discriminatory intent to establish discrimination (Graham 1990; Blumrosen 1993; Skrentny 1996; Pedriana and Stryker 1997, 2004). Title VII's enforcement structure—administered by the newly created EEOC—required aggrieved individuals to file a formal complaint. The EEOC would investigate, and if it found the complaint meritorious, would engage the offending employer in conciliation talks (Sovern 1966; Graham 1990). If conciliation failed, the EEOC had no formal authority to prosecute or order employers to do anything. The complainant could only opt to lump it or file a private civil suit for injunctive and/or compensatory relief in federal court (Pedriana and Stryker 2004).

FHA language and enforcement structure were almost indistinguishable from Title VII (82 Stat 81 [1968]). Key FHA provisions were written in the language of individual nondiscrimination. HUD could investigate complaints of housing discrimination, but, like the EEOC, had no formal enforcement authority beyond voluntary conciliation. Also like Title VII, the FHA allowed complainants to file private civil actions in federal district court if HUD could not secure an agreement. Both laws further required that EEOC/HUD officials defer enforcement to states with their own equal employment/fair housing laws. Only if this failed could the EEOC/HUD commence enforcement. Both Title VII and the FHA *did* authorize the DoJ to sue repeat offenders when the attorney general found a "pattern or practice" of discrimination in employment/housing (78 Stat 241 [1964]; 82 Stat 81 [1968]).

In contrast, the 1965 VRA used an effects-based statistical "trigger" to *legally define* voting discrimination. According to VRA Section 4, any state voting district that: 1) used literacy tests or similar devices; and 2) had less than a 50% registration rate and/or turnout in the 1964 presidential election was *automatically deemed in violation* (Grofman, Handley and Niemi 1992, pp. 16-19). Targeted areas were southern states, including Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina" (Grofman, Handley, and Niemi 1992, p. 17).

Once Section 4 triggered a violation, Sections 4(a) and Section 5 suspended literacy tests (or their equivalent) and required that the Attorney General "pre-clear" *any* future change to any voting requirement in an offending jurisdiction (Graham 1990, p. 174; Grofman, Handley, and Niemi 1992, p. 17). This was unprecedented expansion of federal authority over state voting criteria. Under Section 5 pre-clearance, unless the Attorney General or the District of Columbia District Court found that "the proposed voting change did *not* have the purpose *or the effect* of denying or abridging the right to vote on account of race or color," voting rules remained frozen (Grofman et al 1992, p. 17, emphases ours).

Thus, the VRA's statutory text unambiguously incorporated an aggressive GCE framework for voting rights enforcement. The definition of liability and the remedy—abolition of all literacy tests, whether or not their intent had been to discriminate, and pre-clearance explicitly focused on results of proposed rule changes—hinged on effects. The statutory statistical trigger made it easy to show violation, and made clear that the violation in covered jurisdictions was structural and systemic. Covered jurisdictions could *not* invoke form over substance to get out of violator status and need for pre-clearance.

Meanwhile, Title VII and the FHA were saddled with intent-based liability and case-by-

case, individual victim-focused complaint processing ill-suited to attack broader discriminatory patterns. Any movement toward a more substantial GCE approach in employment or housing discrimination would require creative enforcement that would have to contend with potentially constraining statutory language, (including a compromise provision added to Title VII that explicitly signaled the requirement to prove intent) (Pedriana and Stryker 1997, p. 646).

Enforcing Voting Rights, Equal Employment and Fair Housing

Beyond the VRA's aggressive statutory embodiment of GCE compared with the almost complete absence of GCE in the text of either Title VII or the FHA, to what degree did subsequent administrative and judicial enforcement embrace GCE, further shaping the comparative effectiveness of the three civil rights policies? Table 3 provides a side-by-side comparison of key enforcement pertinent to evaluating the degree to which law enforcement in each of the three realms incorporated GCE. Treating first voting rights, then equal employment opportunity, and finally fair housing, the following subsections discuss the evidence summarized in Table 3, drawing out implications for comparative effectiveness among the three policy arenas and also for effectiveness within each policy arena over time.

--Table 3 about Here--

Voting Rights

Armed with an effects-based text and massive expansion of federal authority, the VRA had an immediate and lasting impact on black voter registration. Just months after enactment, almost 80,000 blacks were registered in the most intransigent southern counties. By the end of the VRA's first year, southern black registration increased 50%; by 1969, over one million southern blacks had registered, "the vast majority under the supervision of the same local registrars who formerly prevented them doing so" (Light 2010, p. 64; see also U.S. Commission

on Civil Rights 1970). By 1967, the black-white voter registration gap in covered jurisdictions had diminished from 44.1% in 1965, at the time the VRA passed to 27.4% in September, 1967 (Grofman, Handley and Niemi 1992, p. 23). By 1972, 57 percent of eligible blacks were registered in the seven originally covered states, reducing the black-white registration difference from 44 to 11 percent (Light 2010, pp. 64-65).

Did these quick, transformative changes come from mass expansion of formal enforcement authority as many scholars claim? Yes, but with fundamental caveats. First, DoJ's remedial pre-clearance embodied a group-centered effects approach requiring any violating jurisdiction to prove its proposed voting rule changes would *not* have a racially discriminatory effect. Second and more important, remedial pre-clearance would have meant little without the blanket and automatic group-centered effects-based liability for violation established by Section 4's statistical trigger.

Had the 1965 VRA required the DoJ to enforce case-by-case, showing intent to discriminate against all who complained of discrimination, the DoJ would have followed the tedious, ineffective process that hamstrung the 1957 and 1960 Voting Rights Acts. Under this scenario, pre-clearance would have been invoked but rarely, even though it would have remained on the books. Pre-clearance was potent because it could be activated immediately by Congress' statistical trigger deliberately tailored to define most of the Deep South in violation. Thus, a *particular type* of strong enforcement power—a legislatively established GCE approach--— dramatically increased black voter registration, reducing the black-white registration gap by 75 percent. Without statutory language unambiguously reflecting this approach, the DoJ would not have been able to quickly and easily translate pre-clearance into far-reaching group results.

Though President Nixon tried to weaken VRA enforcement, the VRA amendments of

1970 further extended pre-clearance to include jurisdictions in which less than half the voting age population was either registered to vote or had voted in the 1968 Presidential election. This extended pre-clearance to some jurisdictions in the north (Grofman, Handley, and Niemi 1992, p. 19). Since 1970, Congress has re-authorized pre-clearance three more times, in 1975 (for five years), 1982 (for 25 years) and 2006 (for another 25 years), albeit over Southern resistance and, in both 1982 and 2006, without further updating Section 4's coverage formula (Grofman, Handley and Niemi 1992, p. 39; Toledano 2011, p. 396-7. The 1975 amendments also expanded VRA protections to language minorities (Grofman, Handley, and Niemi 1992, pp. 20-21).

With respect to judicial construction, prior to the 2013 Supreme Court decision in *Shelby County v. Holder*, substantial judicial doctrine further extended GCE in voting rights. For example, in *Allen v. State Board of Elections* (1969), the Supreme Court ruled that Section 5 of the VRA extended beyond protecting the right to cast a ballot to ensure that minority groups had a reasonable opportunity to elect their preferred candidates. At issue were changes in election procedures in Mississippi and Virginia that "diluted" the minority vote, that is, minimized its impact. Ruling that VRA pre-clearance applied to changes in election procedures as well as to changes in registration and ballot access, the Court stated that voting included "all action necessary to make a vote effective …The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" (*Allen*, 1969, pp. 565-66, 569).

After *Allen*, the DoJ used pre-clearance "to encourage a shift from at-large systems, where black votes can be diluted by white majorities, to single-member district systems, where a geographically concentrated black minority can successfully unite behind a single candidate" (Sutton 2001, p. 171). From 1970 to 1985, African-Americans increased their percentage of city council members in the South from 1.2 percent to 5.6 percent, below their population percentage

but still a substantial gain (Sutton 2001, p. 171). Grofman and Davidson's (1994) analysis of city council elections shows that much of this growth came from change in the type of election. Handley and Grofman's (1994) similar analyses of African-American gains in state legislative elections suggest that DoJ pressure to redraw district boundaries and create single-member districts was crucial. African-Americans were 1.3 percent of state senators and 1.9 percent of state house members in the South in 1970; in 1985, the figures were 7.2 percent and 10.8 percent respectively (Sutton 2001, p. 171). Meanwhile, by 1990, the black-white registration gap among eligible voters nationwide itself had shrunk to 5 percent, with 59% of eligible black Americans and 64% of eligible white Americans registered (Toledano 2011, p. 396).

Since *Allen*, and until very recently, much VRA politics and litigation involved race-conscious redistricting, including creating "safe" districts for minority candidates (Grofman, Handley and Niemi 1992). For jurisdictions not covered by pre-clearance, voting rights plaintiffs had to litigate to prove a VRA violation. The 1982 VRA amendments responded to a 1980 Supreme Court ruling that seemed to interpret liability for vote dilution under VRA Section 2 to require proving intent. The 1982 Act made clear that vote dilution allegations under Section 2 also would be evaluated by effects, *not* intent (p. 39). More, "the extent to which members of a protected class have been elected to office… [was] one circumstance that [might] be considered in establishing *the impact* of altered election procedures (p. 39) quoting 1982 amendments, emphasis ours).[10]

In sum, the general success of the Voting Rights Act can be attributed to the extremely aggressive GCE framework it embodied both in its text and in its enforcement. And this is

[10] The 1982 amendments made clear, however, that there was no right to have protected-class members elect representatives in proportion to their population numbers. For judicial interpretation of the 1982 VRA amendments governing vote dilution and for the relationship between the VRA and constitutional, equal-protection jurisprudence, see Grofman et al 1992.

precisely why voting rights advocates were so alarmed by the Supreme Court's 2013 ruling abolishing the statistical trigger, and thus abolishing the effects-based statutory presumption of violation that automatically invoked federal preclearance for covered jurisdictions.

Prior to the 2013 ruling, voter ID, polling time, early voting, absentee ballot, and other voting rules that disproportionately disadvantaged blacks and Latinos already were an issue. But the DoJ could – and did—use Section 5 to prevent jurisdictions governed by pre-clearance from adopting many such rules. Meanwhile, whereas pre-clearance covered jurisdictions could not change their voting rules without first proving the proposed changes would *not* have adverse effects on minorities in non-covered jurisdictions (such adverse effects on minorities are called "disparate impact"), voting rights plaintiffs contesting voting rules with likely disparate impact on minorities had to bear the burden of proving that impact in court (Weiser and Norden 2011).

Additional restrictive voting rules were adopted in the wake of the 2013 Supreme Court decision (Toobin 2014; Weiser and Opsal 2014). The VRA still prohibits practices with a disparate impact on minority voters, but now *no* jurisdiction is automatically set on the defensive, by having to prove its rule changes will *not* have disparate impact before it can enact them. Instead, voting rights *plaintiffs* in *all* jurisdictions, including those previously covered by pre-clearance, must first *prove* the illegal disparate impact in court. This is a dramatic shift.

The Obama Justice Department made it a priority to mitigate the damage voting rights advocates attributed to *Shelby County*, initiating multiple lawsuits alleging VRA violations under Section 2 (Toobin 2014). However, these "after-the-fact" lawsuits can be time-consuming and expensive. In ongoing lawsuits in Texas and North Carolina, the DoJ also is attempting to mobilize a little used VRA provision: Section 3 authorizing judges to require remedial federal oversight – a so-called "bail-in" reinstating pre-clearance for a jurisdiction first proven in court

to have *intentionally* violated the VRA. Achieving case-by case remedial "bail ins" will be extremely difficult, given bail ins are only authorized in cases of proven intentional discrimination (Eckholm 2015). So while voting rights plaintiffs, including the DoJ, are currently making the most of VRA Sections 2 and 3—and while overall, the VRA embodied GCE far more than Title VII or the FHA—today's VRA is likely to be less effective than was the pre-2013 VRA with its *effects-based statutory statistical trigger* automatically invoking federal pre-clearance for a large section of the country.

Equal Employment

This section shows the limited degree and tools through which Title VII—despite its decidedly non-GCE text—nonetheless embodied a GCE enforcement strategy. This limited embodiment—far less than the VRA but a bit more than fair housing—placed equal employment between the VRA and FHA in policy effectiveness. Co-variation in effectiveness with the extent of GCE *within* Title VII enforcement also supports our explanatory framework.

<u>Genesis and Limits of Disparate Impact</u> When Title VII went into effect, it and the EEOC were ill equipped to attack systemic discrimination. Staff highlighted limits in early internal memoranda and commissioners lamented limitations in early staff meetings (Pedriana and Stryker 2004). But what if—despite Title VII's emphasis on complaint processing for individuals and apparent requirement of discriminatory intent—the statute's class action tool could be used to litigate routine employment practices that disproportionately screened out racial minorities, regardless of employer's motive? Making Title VII more effective likely would

require moving partly toward a GCE enforcement framework (Cooper and Sobel 1969; Blumrosen 1972).[11]

Use of cognitive tests to screen applicants for blue and white-collar jobs increased in Title VII's wake. On their face, cognitive tests were "color-blind," so apparently complied with Title VII. But because blacks historically had been denied equal educational opportunities, whites, on average, outscored blacks by a significant margin. Consequently, whites received a highly disproportionate share of better jobs and blacks remained locked out of the workplace or into very menial, low-paying jobs. Even when tests lacked discriminatory motive or intent, blacks were disproportionately disadvantaged, evidenced by comparative group statistics. There was widespread concern among industrial psychologists about "dangers to equal opportunity if tests were used absent appropriate validation—assessment of whether and the degree to which tests reflected real differences in capacity to do the jobs for which employers hired" (Stryker, Docka-Filipek, and Wald 2012, p. 786). In the mid-1960s, few employers validated tests. In 1970, the EEOC issued its *Testing Guidelines* (EEOC 1970) stating that any employment tests that disproportionately screened out black workers violated Title VII *unless* the employer could validate the test as an accurate predictor of job performance.

Testing was the issue in 15-20% of early Title VII cases and the fundamental question was whether complainants could prove unlawful discrimination based largely on group statistical distributions, in the absence of proving discriminatory intent with respect to particular individuals. Had Title VII been written just like the VRA, this issue would not have come up: the fact that *at the time Title VII passed*, a covered employer had black-white representation rates

[11] Unless otherwise noted, discussion of early Title VII enforcement in the next six paragraphs and associated notes relies on Pedriana and Stryker (2004), Stryker, Docka-Filipek and Wald (2012) and primary documents cited and discussed therein.

in specific workplaces or jobs below some acceptable pre-Act threshold set by Congress would have been enough to trigger liability and move to remedy. Nothing like this was ever considered nor could it have been reached by Title VII by *any* interpretive stretch. What could be—and was—reached, was the "disparate impact" (also known as adverse effects) liability standard that the 1971 Supreme Court established in the class action litigation, *Griggs v. Duke Power Company*.[12] The *Griggs* court looked beyond Title VII's language of individual non-discrimination: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices" (401 US 424 [1971], p. 430).

Because Title VII stated explicitly that "professionally developed" tests did not violate Title VII as long as they were not used to discriminate, litigation addressed the meaning of "professionally developed." Consistent with the EEOC *Testing Guidelines* and testimony of their industrial psychologist expert, plaintiffs interpreted "professionally developed" to mean job-related. If a test had disparate impact on minorities, and employers could not show it was job-related, the test was discriminatory. The Supreme Court agreed, applying job-relatedness broadly to all employment practices. The Court also agreed that establishing liability for violating Title VII should *not* be restricted to methods requiring proof of discriminatory intent.[13]

A few years later in *Albemarle v. Moody* (1975), the Court clarified and expanded the Griggs doctrine, equating job-relatedness of tests with using stringent standards for test validation. In 1978, four agencies, including the EEOC, the DoJ, the Labor Department, and the Civil Service Commission (later renamed the Office of Personnel Management), jointly adopted

[12] Filed under Title VII's class action provisions, the case was nonetheless a small collective litigation: 14 of 95 employees at the workplace in question were black; 13 of these were named plaintiffs.
[13] Title VII enforcement also includes two intent-based proof models. For details, and comparison of these with the disparate impact proof model in testing and non-testing cases, see Stryker 2001.

even more elaborated and extremely stringent guidelines covering tests and other selection procedures: *The Uniform Guidelines on Employee Selection Practices* (1978). Despite much employer dissatisfaction, the *Uniform Guidelines* remain in force today (Stryker, Docka-Filipek, and Wald 2012).

In sum, *Griggs* endorsed a GCE approach to Title VII liability. But, unlike the automatic statistical trigger for jurisdictions covered by VRA pre-clearance, Title VII plaintiffs mobilizing disparate impact had to establish the adverse impact of specific selection devices used by employers *in every case*. Effects are more easily established than intent, but case-by-case proof of disparate impact creates factual issues often requiring time-consuming, expensive litigation—something voting rights advocates also feared in the wake of the Supreme Court decision in *Shelby County* (Stryker, Docka-Filipek, and Wald 2012). Because of this—and because disparate impact originally had no explicit statutory basis, but rather was a *judicial construction* fairly easily eroded over time,[14] Title VII embodies the GCE framework in a much weaker form than the VRA (see Pedriana and Stryker 2004). This is consistent with consensus that equal employment law produced far fewer benefits for African-Americans than did the VRA.

Still, the conservative Reagan Administration mounted a concerted attack on disparate impact (US Department of Justice Office of Legal Policy 1987). The Administration also supported private employers who tried to undermine disparate impact in court. Ironically, however, the DoJ continued to use disparate impact to prosecute race discrimination in state and local government employment (US Commission on Civil Rights 1987; Ugelow 2005).[15]

[14] Indeed, in 1977, the Supreme Court ruled that effects-based liability did not extend to seniority systems alleged to be discriminatory under Title VII.

[15] The Equal Employment Opportunity Amendments of 1972 gave the EEOC power to prosecute employment discrimination in the private sector, and extended Title VII to states and local government, for which the DoJ has prosecuting power (Ugelow 2005).

Meanwhile, once Clarence Thomas became EEOC Chair in 1982, the EEOC de-emphasized systemic enforcement, highlighting need to resolve individual complaints and "make whole" identified *individual* victims (US House 1985a; Golub 2005, p. 28). Thomas found statistical proof of adverse impact flawed and was suspicious of statistics and any type of group orientation to liability and remedies. He reduced but did not eliminate completely EEOC prosecution of class actions relying on statistics (US House 1985a; US House 1985b; US Commission on Civil Rights 1987; Golub 2005; Rosenblum 2008). In 1989, when an increasingly conservative Supreme Court re-interpreted the disparate impact proof model so as to weaken its effectiveness against employers, Congress was able to partially—but not fully—restore the earlier punch, by amending Title VII (see Stryker et al 2012; Stryker, Scarpellino and Holtzman for details).

Other Group-Centered Aspects of Early Title Enforcement Voluntary and court-ordered remedial affirmative action plans also bear imprints of a group-centered effects approach. Affirmative action as part of Title VII enforcement was made possible by the EEOC's very early policy mandating standardized employer reporting of race, ethnic (and gender) composition of major job categories; these are known as the EEO-1 reports (Graham 1990, pp. 190-201; Skrentny 1996).[16] In 1979, the EEOC published affirmative action guidelines to help ensure *all* employers knew that Title VII supported voluntary affirmative action. The Supreme Court later upheld these guidelines (*United Steelworkers v. Weber* [1979]). In *Weber*, a white worker denied admission to a company training program argued that, in trying to remedy its own prior discriminatory action by adopting an affirmative action program, the company had engaged in "reverse discrimination" against whites, because it explicitly had taken race into account.

[16] With specific respect to EEO reporting requirements, staff person Alfred Blumrosen, who was Chief of Conciliation from 1965-67, did act as a policy entrepreneur. But Unlike HUD Secretary Romney, Blumrosen was not in charge of his agency, and his views faced substantial internal resistance.

However, the Supreme Court ruled that, so long as race-based affirmative action quotas in employment training programs designed to yield local labor force-based percentage hiring goals were temporary, voluntary and put in place to remedy an employer's self-recognized past exclusion of blacks, Title VII was not violated.[17] *Weber* represents a high water mark for the judicial acceptability of a GCE approach to voluntary affirmative action, especially given the Court essentially endorsed the EEOC's *Affirmative Action Guidelines* and these allowed numerical goals and timetables (Stryker 2001).

Backed by the Supreme Court, the EEOC thus incentivized employers to adopt voluntary affirmative action, including effects-based minority hiring goals and timetables. Empirical research shows that affirmative action programs spread quickly in public and private sector employment, so that by the late 1980s, affirmative action was widespread in the American workplace (Edelman 1992; Reskin 1998; Stryker 2001, Dobbin 2009). The EEOC's *Affirmative Action Guidelines* remain in force today, though both Reagan Administration Assistant Attorney General for Civil Rights, William Bradford Reynolds, and EEOC Chair Clarence Thomas strongly disliked remedial goals and timetables (US Commission on Civil Rights 1987; Blumrosen 2008). Two 1980s Supreme Court decisions also made clear that *judges* could order remedial 'goal and time-table' affirmative action in cases where they found "widespread, systematic and egregious" employment discrimination (Player 1988, p. 312).

Title VII: Between Civil Rights Policy Success and Failure   Early Title VII enforcement moved a surprising distance toward a group-centered effects approach, but it embodied a far weaker variant of this approach than the VRA. Evidence suggests that Title VII had a *small*

[17]Title VII states it is *not* intended to *require* preferential treatment to counter racial imbalance. The Weber court held that employers nonetheless are *permitted* to use voluntary remedial affirmative action to counter their own prior discrimination.

positive impact on minority and female labor market outcomes, and that the greatest positive effects on workplace integration, employment and earnings for African-Americans occurred coterminous with the enforcement most embodying GCE.

Stronger, longer lasting and more frequent reliance on effects-based liability could have made Title VII *more* effective, especially if accompanied by a fully effects-based interpretation of remedial affirmative action. Donohue and Heckman's (1991) review of civil rights law's impact on black-white labor market inequalities among men found the *greatest* impact occurred in 1965-1975, when EEO law most emphasized a GCE approach to liability. Black men benefitted from rising education in this period, but this "[did] not cancel out direct effects of federal policy" (Sutton 2001, p. 203). Likewise, Stainback, Robinson and Tomaskovic-Devey (2005) found that, controlling for various other factors, federal equal employment pressures reduced racial segregation in US workplaces especially from 1966-1972 and somewhat from 1973-1980, when the entire federal government favored aggressive affirmative action. Later periods saw minimal or no gains. Other research also shows the greatest benefits of equal employment policy for blacks in the early enforcement period (Leonard 1984; Smith and Welch 1984). Kalev and Dobbin (2006, p. 225) found that compliance reviews in the 1970s were more effective than such reviews in the 1980s.

Clearly, the early impact of federal EEO law could have been greater still and would likely have been so had affirmative action goals and timetables been hard quotas, as their critics charged they were (Leonard 1990, p. 54; Burstein 1993; Stryker 2001). *That impact was greatest, yet still modest, in the early enforcement period is consistent with our hypothesis emphasizing the role of the GCE framework.* Also consistent, Kellough's (1989) study of two government agencies found increasing emphasis on affirmative action goals and timetables—a

relatively effects-based orientation—enhanced minority employment. Reviewing research on affirmative action, Reskin (1998) likewise argued that goals and timetables, along with monitoring and rewarding results, increased effectiveness. Kalev, Dobbin and Kelly (2006) showed that private sector affirmative action increased representation of blacks and women in top management.

But what about evidence pertaining to disparate impact, especially given that even in *Griggs'* immediate aftermath, disparate impact accounted for just nine percent of all employment discrimination cases filed, and by the late 1980s, just five percent (Stryker 2001, p. 23)?

First, Burstein and Pitchford's analysis (1990) of Title VII appellate cases, 1965-1985, supports our claim that plaintiffs more easily win disparate impact cases than cases requiring proof of intent. Plaintiffs won full or partial victory in 77% of *disparate impact* cases that also involved testing, substantially greater than the 58% win rate for plaintiffs in testing cases alleging *disparate treatment,* requiring proof of intent (Burstein and Pitchford 1990, p. 252, Table 2, supplemented by author calculations). Second, despite their small numbers, disparate impact lawsuits targeted "large, industry leading firms" (Stryker 2001, p. 24). This, combined with its effects-based nature, gave disparate impact doctrine high visibility in the personnel management and business press, convincing employers that the threat of time consuming, costly litigation, bad publicity and adjudicated liability was real (Pedriana and Stryker 2004; Dobbin 2009). This in turn encouraged employers to change their practices to pre-empt litigation.

In 1973, a prominent organization of large employers, the Conference Board, noted that following *Griggs*, "leading companies have reported that the central thrust of the court decisions dealing with non-discrimination have become sufficiently clear to serve them as a reliable guide to action," that courts were imposing "broad penalties and stringent controls" and "saying that it

is the *results* of an employer's actions, and not his intentions that determine whether he is discriminating;" consequently "rapid changes" would be needed for companies to "avoid serious legal problems" (Pedriana and Stryker 2004, p. 745, quoting Schaeffer 1973). Prominent business publications in the 1970s indicated that employer "testing" could be construed broadly such that many employer practices might require formal validation; these also emphasized how hard it was for employers to win disparate impact litigation (see Pedriana and Stryker 2004; Farrell 1978). Large companies including Exxon, Bell Atlantic and GTE created programs to develop and validate their selection tools and to develop alternative hiring and promotion procedures selecting qualified applicants while minimizing adverse impact (Dobbin 2009; Goldstein 2010, p. 261). African-American mayors also used "disparate impact challenges to testing" to promote minority hires in city employment (Goldstein 2010, p. 257). Empirical analysts Burstein and Edwards (1994) conclude that disparate impact, along with class actions, positively affected blacks' earnings in the 1960s and 1970s.

In sum, consistent with our explanatory framework, Title VII was far less successful than the VRA in benefitting African-Americans. Documented variation in effectiveness *between* Title VII and the VRA, supplemented by documented variation in effectiveness over time and between types of lawsuits *within* Title VII, suggests strongly that Title VII's limited success can be accounted for by our explanatory hypothesis emphasizing the degree of policy consistency with the GCE framework.

Fair Housing

Even though the FHA's text and enforcement structure paralleled Title VII, and even if fair housing threatened whites more than did Title VII or the VRA, HUD was initially in a

stronger position than the EEOC to build GCE-based enforcement. For a few years HUD boldly, but somewhat secretly, *considered* enforcement more aggressive in vision and anticipated results than anything the EEOC achieved.

HUD secretary George Romney, a policy entrepreneur committed to maximizing the FHA's impact, pushed to promote race and economic integration of cities *and* their suburbs (Lamb 2005). Because HUD constructed and administered federally subsidized housing, it could deny new grants or cut off funds from state and local recipients if it found grantees violated FHA prohibitions on discrimination.[18] *Depending on how HUD defined discrimination* under the FHA, its fund cut-off authority might become powerful: the federal purse might have been to the FHA what pre-clearance was to the VRA.

Too, where both the VRA and Title VII benefitted from favorable judicial rulings *after* passage, the Supreme Court significantly expanded equal housing rights *before* the FHA's enactment. As Congress debated the FHA, the Supreme Court handed down *Jones v. Mayer* (1968), a landmark ruling resurrecting a Reconstruction-era statute barring race discrimination in housing sales and rentals and clarifying that it applied to housing discrimination by private actors as well as government. *Jones* made no reference to group-centered effects issues. But in conjunction with a visionary policy entrepreneur and HUD's fund cut-off authority, it seemed that legislative, administrative, and judicial efforts all were pushing aggressive fair housing. By 1968-69, HUD also could look for inspiration to EEOC creativity and VRA success.

Why did the promise of the first few years, when Romney stated that HUD's mission was to "pursue policies directed not only at *nondiscrimination* but at the elimination of *segregation* as

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[18] HUD's primary tool for fund cut-off came from Title VI of the 1964 Civil Rights Act. Title VI barred any recipient of federal funds from discriminating on the basis of race, religion, color, or national origin. Sex would later be added to Title VI's (and the FHA's) protections.

well" come to so little (HUD Papers 1969a, p. 1, emphases added)? It is easy to see why the FHA would have been far less effective than the VRA, even had Romney's vision not given way to run-of-the-mill complaint processing on behalf of individual victims (Schwemm 1988; Selmi 1998). In 1966, an inter-agency task force deliberating options for fair housing legislation *considered* a proposal containing a VRA-like trigger leading to remedial action where Congress found serious housing discrimination to exist. But the task force could not identify any "feasible formula" for the trigger and the proposal died (Graham 1990, p. 265). Unlike overt, race-based denials of voting rights, overt housing discrimination plagued the entire country, including especially northern cities, making a statistical trigger policy politically thorny (Lamb 2005; Denton 1999).

But why should fair housing have been even less effective than equal employment? White resistance provides part of the answer, but it does so *because* white resistance promoted retreat from GCE-based enforcement.

Where the early EEOC moved quickly to generate employer record keeping and reporting on which it based targeted enforcement, publicity efforts, and voluntary affirmative action, the early HUD wrote *no* administrative rules or interpretive guidelines articulating or promoting effects-based enforcement (Johnson 2011). Neither did the early HUD engage in networking, information sharing or informal enforcement collaboration with private advocacy groups (such as the LDF) that characterized early Title VII enforcement (Johnson 1995, 2011). Notwithstanding lower court rulings adopting disparate impact as an adjunct to intent-based fair housing enforcement, the Supreme Court failed to endorse disparate impact in housing until July, 2015 (Schwemm 1988; Schwemm and Taren 2010; Seicshnaydre 2013; *Texas Dept. of Housing v. Inclusive Communities* [2015]). An innovative fair housing analogue to aggregate goals and

timetables- affirmative action in employment came *very* late to FHA enforcement, though it could have been practiced much earlier. Finally, where large, industry-leading private employers offered institutional leverage for results-based EEO enforcement, early FHA enforcement had no such leverage point. Real estate agents were locally-based and dispersed; both homeowners and landlords typically dealt with one or a small number of units (Schwemm 1988; Johnson 2011).

Had early fair housing enforcement exploited institutional links among federal, state and local government policies and race discrimination and segregation in private housing markets, FHA enforcement *could* have included more and larger class actions mobilizing statistical evidence similar to that relied on to enforce Title VII. Likewise, early FHA enforcement *might* have brought more substantial "affirmative integration," leveraging social change. Minority mobility projects produced pockets of effectiveness (Massey and Denton 1993), and the recent aggressive Obama administration stance on FHA enforcement, coupled with data-driven industry-and nationwide class actions, including disparate impact lawsuits, suggests pockets of increased effectiveness (Ropiequet 2012; Seichsnaydre 2013; Kinney 2015). The rest of this section shows how fair housing—in comparison with Title VII and the VRA and with respect to variation within FHA enforcement —supports our GCE hypothesis.

<u>Early HUD Initiatives</u> In 1969, HUD launched "Open Communities" and "Operation Breakthrough" (Lamb 2005). Both were bold initiatives for suburban and racial *integration*. As one HUD official summarized: "[t]he problem of achieving open communities is a problem of metropolitan areas. The solution requires the provision of housing for blacks in the practically all-white suburbs surrounding the central city to which most of the blacks are restricted" (HUD Papers 1969b, p. 1). A confidential draft of HUD's proposed Open Communities policy in late 1969 concurred with Daniel Patrick Moynihan's advice that "'[t]he poverty and social isolation

of minority groups in central cities is the single most serious problem of the American city today.' Improvement in the ghetto must be equally accompanied by 'efforts to enable the slum population to disperse throughout the metropolitan area,' and this calls for the 'active intervention of government'" (HUD Papers 1969c, p. 3).

This was not the language of passive nondiscrimination and individual complaint processing; it called for nothing less than a full-on GCE approach. *How* to achieve that goal was complicated and controversial. Housing integration meant that federal officials might set numerical targets for minority composition of certain communities and neighborhoods as a condition for federal housing funds. These were precisely the types of results-driven remedies that brought strong white opposition to busing and other [perceived] coerced school integration efforts. HUD was keenly aware of potential fallout and kept early deliberations under the radar, hidden from Nixon and the general public (Lamb 2005). One internal HUD memorandum reminded Secretary Romney, "[t]he major emerging policy question is not whether we should work toward open communities, but how explicit we should be in announcing our goals. There seems to be a developing consensus in favor of a relatively subtle approach—which avoids the rhetoric of confrontation" (HUD Papers 1969d, p. 1).

Nor was it clear HUD had authority to preempt state and local housing policy when deciding whether to provide or cut off federal housing grants to suburbs. Local zoning ordinances limiting or prohibiting construction of low cost housing were among the most used means by which suburbs preempted racial or economic integration. HUD and Romney viewed such restrictions as the major threat to HUD objectives (HUD Papers 1970; Shipler 1970). In 1969-70, Romney and senior staff considered good-cop/bad-cop strategies to woo progressive-minded cities and threaten holdouts. Meanwhile, the federal courts were dealing with

fundamental questions involving fair housing generally and the scope of federal power over historically autonomous state and local housing laws, specifically.

As the courts were trying to sort things out, the public got wind of HUD's plans. Outraged responses from politicians and citizens alike quickly found their way to the White House (*New York Times* 1970, p. 153). At that point, the politics of white resentment took over and more or less ended whatever HUD momentum had existed for an aggressive GCE approach (Herbers 1970; *CQ Almanac* 1970; Lamb 2005). Still, if Romney's grand designs for residential integration proved politically unrealistic, perhaps a more limited GCE approach similar to that endorsed for Title VII by *Griggs* could be reached. Like the EEOC, HUD could issue interpretive guidelines, but unlike the EEOC, HUD provided *no* early guidelines defining or promoting effects-based liability for the FHA (Johnson 2011). Even so, discriminatory housing practices were also challenged through private lawsuits and through the mid-1970s, federal courts were generally as friendly to housing discrimination plaintiffs as they were to employment discrimination plaintiffs. Collectively, the courts seemed to be hinting at an expanded, effects-based concept of FHA liability (Schwemm 1988; Lamb 2005; Seicshnaydre 2013).

<u>Fair Housing in the Courts</u> Fair housing policy and HUD confronted an even greater number of entrenched actors and practices than did equal employment. These included private and public sellers, banks and mortgage lenders, realtors, government housing contractors, and state and local governments. Discriminatory housing practices included redlining, blockbusting, restrictive covenants, and local ordinances allegedly violating the FHA, the Equal Protection Clause of the U.S. Constitution, or both.[19]

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[19] Redlining involves refusal to make loans in minority areas comparable to loans made in white areas. Only decades later did targeting minorities and their neighborhoods for predatory loans, known as "reverse redlining," become an issue (Schwemm and Taren 2010).

Early on, a number of lower federal courts referred explicitly to discriminatory effects as *one* guiding principle in fair housing (Seicshnaydre 2013). Some early cases stated that HUD had an affirmative duty to assure nondiscrimination by considering the racial *effects* of housing practices (Schwemm 2012; Johnson 2011). From 1974-84, the Third, Fourth, Seventh and Eighth Circuits drew on *Griggs* to support a disparate impact method of proving housing discrimination; in the mid-1970s advocates for disparate impact liability under the FHA included the DoJ (Schwemm 1988; Seichsnaydre 2013). However, unlike the Supreme Court stance in Title VII, the 1970s Supreme Court never endorsed disparate impact in housing, leaving the ultimate judicial fate of the doctrine in housing, along with the specific proof standards that would govern it, in doubt.[20] By the 1980s, the Reagan Justice Department refused to undertake disparate impact housing cases.

Moreover, not only had HUD created no early guidelines defining or emphasizing effects-based liability under the FHA, it also failed to require race-based reporting from sellers or landlords. Had such a reporting system existed in early FHA enforcement, it could have been used—as was EEO reporting—to target publicity and enforcement more strategically and systemically. Where the early EEOC was networked tightly with the Legal Defense Fund's (LDF) strategic litigation campaign, early FHA enforcement lacked such networks (Johnson 2011). Although the LDF was "extensively involved in pre-FHA litigation," neither it nor other national civil rights groups were early on "major players in enforcing the FHA" (p. 1209). The number of reported court decisions in the first 20 years of FHA enforcement was five to ten

[20] Whereas under Title VII, the 1970s Supreme Court had made it very difficult for any employer whose selections standards had disparate impact on minorities to justify that impact consistent with job-relatedness and test validation standards, the legal standards for housing defendants to *avoid* disparate impact liability in housing were more variable, depending on the Circuit Court. In some Circuits, disparate impact housing defendants had an easier time avoiding liability than their counterparts in employment. (For a more technical discussion, see Schwemm and Taren 1988).

times *less* than in the analogous period for the EEOC, and the Supreme Court decided only four fair housing cases (Schwemm 1988, p. 381). Though Douglas Massey and Nancy Denton's (1993) influential book, *American Apartheid*, recommended that HUD fund data gathering and enforcement by private fair housing advocacy groups, HUD began to do so only in the late 1980s (Temkin, McCracken and Liban 2011).

Finally, class action lawsuits were more infrequent in early FHA enforcement than under early Title VII, and large FHA verdicts were almost non-existent. (Schwemm 1988, p. 381). Given the local nature of housing markets and the small or modest size of most (but not all) *private* sellers or landlords sued for refusal to sell or rent to African-Americans, FHA defendants between 1968 and 1988 made "far less lucrative targets than the defendants sued in employment cases" (p. 381).

In short, despite Romney's early plans to substantially lessen racial segregation in housing, his bold GCE-informed proposals died early on the vine, done in by white backlash and Nixon's refusal to interfere in state and local zoning law or promote integration using the federal purse. There was no EEO-1 type reporting system for housing, and HUD issued no analogue to the EEOC *Testing Guidelines* promoting effects-based liability for housing discrimination. Early FHA enforcement had far less systemic, institutional leverage than did early Title VII enforcement and disparate impact had not been endorsed by the Supreme Court. Correspondingly, evidence from paired testing studies through the early 2000s suggests that racial discrimination remains higher in housing sale and rental markets than it does in employment (Johnson 2011).

<u>Policy Initiatives toward Effectiveness?</u> Consistent with our GCE hypothesis, two recent initiatives by government and private advocacy groups show some promise to provide additional

pockets of effectiveness. Undertaken under the 1988 FHA amendments enacted to lower the burden and costs for victims to pursue their claims, one *could have been* done under the original FHA and was consistent with Romney's initial vision. The other involves discrimination implicating increasingly sophisticated mortgage risk management that did not exist until more recently.[21] Both innovations have born some fruit, though recent Supreme Court limits on class actions under the *Federal Rules of Civil Procedure* have partially stymied the second (Ropiequet 2012; Ropiequet and Naveja 2013). Similarly, though the Supreme Court's recent decision finally endorsing disparate impact under the FHA retains an enforcement strategy that is more effective than intent-based methods for establishing liability (*Texas Department of Housing v. Inclusive Communities* [2015]), that decision also limits the practical reach of effects-based housing enforcement and came 40+ years too late to transform the overall history of fair housing from failure to success.

The first recent initiative that may provide at least small pockets of greater effectiveness centers on the FHA requirement that HUD (and other executive departments and agencies) administer "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of fair housing (AFFH) (42 US Code Section 3608(d), 3608(e)(5)). In the early years of FHA enforcement, the promise of AFFH was left to languish because Nixon opposed using the federal purse to achieve integration. Recent AFFH initiatives combine innovative litigation strategies pursued by private fair housing advocacy groups with HUDs power of the purse. In 2006, pressured by civil rights and fair housing groups, HUD finally enacted regulations defining AFFH and giving race composition requirements for public

[21]Because the 1988 FHA amendments granted HUD cease and desist powers, these amendments went further than the 1972 Title VII amendments in increasing formal enforcement power. However, enforcement agency cease and desist power—*no*t an element of GCE—is irrelevant to both recent initiatives.

housing. Several threatened fund withholdings by HUD have led county grantees to change local rules impeding fair housing and in 2009, HUD withheld *1.7 billion* in Community Development Block Grant funds to Texas because as a federal grantee, Texas failed to adhere to AFFH (Johnson 2011).

With fair housing advocacy groups continuing to pressure HUD to provide "clearer and more rigorous metrics for advancing fair housing" (Johnson, 2011, n. 160, p. 1233), the agency promulgated a new AFFH regulation in July of 2015. Under the new rule, HUD will provide maps and data on historical segregation that municipalities then *must* use to assess their progress in "reducing (racial) segregation, increasing housing choice and promoting inclusivity" (Kinney 2015). Reminding the nation that the FHA was supposed to promote racially integrated housing as well as non-discrimination, and requiring that "cities and localities account for how they will use federal housing funds to reduce racial disparities or face penalties if they fail," the new rule strongly embodies a GCE-based approach and harks back to policy entrepreneur Romney's initial vision (see Davis and Applebaum 2015, p. A1).

A second recent FHA initiative invoking effects-based liability as well as the group-centered aspect of GCE is the nation-wide filing of class action lawsuits attacking discretionary pricing as a means of housing discrimination by race and national origin. In the 1990s-2000s, growing use of automated credit scoring facilitated the rise of "'risk-based pricing" in which borrowing costs varied with individuated risk profiles. Borrowers below a credit-risk cut-off point that denied them a loan under traditional underwriting now could get a loan if they were willing to pay more for it. The problem came when lenders marketed these loans under a discretionary pricing system in which *subjective* factors were used together with *objective*, risk-related information. A 2006 study that combined data collected pursuant to the 1989 Home

Mortgage Disclosure Act (HMDA) with a data set including borrower credit scores and other risk-related factors found "large and statistically significant" race differences in loan rates, with Blacks and Latinos paying more, controlling for the independent variables related to risk (Bocian, Ernst and Lee 2006, p. 3).

Beginning in 2007, so called "reverse redlining" lawsuits based solely on the disparate impact of discretionary pricing involving hundreds of thousands of loans were filed in federal courts around the country and sought injunctive and monetary relief from many of the largest mortgage lenders, including Wells Fargo and Countrywide. In 2013, HUD issued a formal administrative rule endorsing disparate impact liability for housing discrimination.[22] The Obama Administration DoJ created a dedicated Fair Lending Unit in its housing litigation section, and has pursued reverse redlining cases aggressively in situations where statistical evidence shows that loan officers given unsupervised discretion to set interest rates and loan terms, set them so as to disproportionately disfavor minorities (Ropiequet 2012; Ropiequet and Naveja 2013). DoJ class action mortgage lending lawsuits have led to consent decrees involving massive monetary payouts (Ropeiequet 2012). If such GCE-based litigation victories can be sustained, this could portend policy effectiveness evidenced by social impact.

However, at this time, there is no research directly linking reduced discrimination or racial segregation directly to recent fair lending enforcement. As well, the Supreme Court's 2011 ruling refusing to uphold class certification in the mega-class action employment discrimination lawsuit against Wal-Mart stores nationwide may nip the effectiveness of new housing policy in the bud. *Wal-Mart* evidenced serious Supreme Court concern about class

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[22] In 1994, HUD had gone only so far as to join the DoJ and other federal agencies in issuing a policy statement noting that disparate impact proof of discriminatory lending was available (Schwemm and Taren 2010).

action over-reach under the *Federal Rules of Civil Procedure* governing all federal civil rights class actions (Stryker, Docka-Filipek, and Wald 2012). In *Wal-Mart*, the Supreme Court refused to find discretionary decision-making a common corporate policy that could become the basis for a class action based on aggregate statistics showing inferior pay and promotion outcomes for women, relative to men, across *Wal-Mart* stores nationwide.

In addition to diminishing the degree to which contemporary Title VII enforcement embodies the GCE framework, Wal-Mart "seriously undermined the legal basis for several pending fair lending class actions which were similarly based upon the independent exercise of discretion by hundreds of thousands of loan originators scattered across the country that were aggregated into a single set of statistics and allegedly demonstrated a disparate impact on minority borrowers" (Ropiequet and Naveja 2013, p. 1). Post *Wal-Mart*, courts are rejecting class certification in private fair lending cases, and these are consequently drying up. Somewhat inexplicably, *Wal-Mart* has not (yet) substantially undermined DoJ capacity to obtain favorable settlements in its own class action fair lending enforcement (Ropiequet 2012; Ropiequet and Naveja 2013).

Discussion and Conclusion

Grounded in substantial evidence derived from our analyses of Title VII, the 1965 VRA and the 1968 FHA, we suggested the extent to which each law incorporated a GCE statutory and enforcement strategy as an alternative explanatory hypothesis for the hierarchy of civil rights policy success achieved among federal equal employment, voting rights and fair housing law. Our primary goal was to solve a particular theoretical and empirical puzzle through careful analytic comparisons, and in ways that we hope will stimulate future case-oriented comparative as well as hypothesis-testing research on civil rights effectiveness.

Our analyses are timely and important from a policy standpoint. The Supreme Court's 2013 *Shelby County* ruling abolished preclearance, so now the greatest hurdle to enacting voting law changes that work to suppress minority turnout in state and federal elections no longer exists. Notwithstanding the Supreme Court's endorsement of a limited form of disparate impact under the FHA, some Supreme Court justices have indicated that disparate impact methods of proving discrimination under Title VII may be in peril of elimination or substantial cut back (see Justice Scalia's concurring opinion in *Ricci v. DeStefano*, 2009). Certification of class actions for large, systemic cases, whether based on intent or effects-oriented proof of liability, has become more difficult (see *Wal-Mart v. Dukes* [2011], Ropiequet, Naveja and Noonan 2013). The question of the constitutionality of affirmative action in higher education will once again be heard by the Supreme Court in 2016.[23]

We did not propose our GCE hypothesis as a new single factor explanation. We argued first, that the degree to which civil rights legislation and its enforcement are consistent with our ideal-typical GCE framework is more important than is government or public interest group law enforcement itself. Second, while extant arguments focused on state administrative capacities, policy entrepreneurship and the Nixon/white resistance thesis must be part of a total explanation for civil rights policy success, no prior hypothesis can explain the hierarchy of success among voting rights, equal employment and fair housing. We claim that our alternative GCE hypothesis can do so. We acknowledge the important role of white resistance, but specify that white resistance impeded FHA—but not VRA—policy success because, in the case of the FHA,

[23] On June, 29, 2015, the Supreme Court granted certiorari to revisit the constitutionality of affirmative action in higher education in *Fisher v. University of Texas*. A 2013 Supreme Court ruling had sent the case back to the Fifth Circuit Court of Appeals, and in 2014, the Circuit Court again affirmed race as a factor that could be considered to diversify the student body (See Supreme Court of the United States blog at http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/).

resistance included northern, as well as southern, whites. In addition, we specify more precisely the explanatory role of white resistance in the FHA case: white resistance was consequential because, notwithstanding that early FHA enforcement benefitted from an aggressive policy entrepreneur, white resistance derailed the GCE enforcement approach that fair housing's policy entrepreneur favored.

Additional support for our GCE hypothesis comes from research assessing litigation promoting school desegregation. Chesler et al (1988) and Sutton (2001) note that school litigation was substantially less successful than the 1965 VRA. Still, when judges actively monitored implementation of court decisions or consent decrees with an eye to achieving results, racial *desegregation* increased (Chesler et al 1988). Sutton (2001) compared trends in school desegregation in different time periods and in the northern vs. southern United States to show that partial moves toward substantive (i.e., effects-based) interpretations of remedy and liability in education cases were associated with greater desegregation. Retreats from substantive legal principles likewise were associated with diminished impact.

Our analyses confirm that scholars criticizing liberal legalism (e.g., Kairys 1998) are correct to presume that little social change will be promoted by a civil rights enforcement paradigm modeled on individualism and the need to prove intent. Scholars emphasizing need for a social support structure for litigation (Epp 1998) and strategies to give one shot players some of the benefits that repeat players normally enjoy in litigation (Galanter 1974), are on the right track. Our group-centered effects hypothesis builds on their work, and on distinctions between formal and substantive law, and between intent and effects-based liability. Given dominant institutionalized traditions in legal and political culture, it is highly unlikely that legislation and enforcement of *any* US civil rights law would achieve complete consistency with our ideal-

typical GCE framework. We do not argue feasibility. Indeed our analysis has emphasized many moments of political and legal backlash against effects-based enforcement, including, but not restricted to the Supreme Court's 2013 abolition of pre-clearance in voting rights, the Supreme Court's 2011 scaling back of civil rights class actions under the Federal Rules of Civil Procedure, and the current precariousness or limited Supreme Court endorsement of disparate impact in equal employment opportunity and fair housing. We *do* claim, however, that, to the degree legislation and its enforcement incorporate GCE, laws designed to benefit the disadvantaged in capitalist democracies will be more likely to promote equality and progressive social change.

Prior research showed that incorporating elements of GCE makes it more likely that law enforcement will draw on sociological expertise (Stryker 2001). There is strong "elective affinity" between moving toward a group-centered effects approach and mobilizing more general social science knowledge for law and policy making and enforcement. This is a promising area for future research.

Even more fundamental, our analyses of Title VII, the VRA and the FHA suggest that systematic data production is necessary for development and application of GCE. Such data production and availability to researchers also is needed to diagnose structural/institutional aspects of social problems and their solutions. Thus, government initiatives to shut down data collection, whether for cost-savings or partisan political advantage, are dangerous.

Consistent with Stryker et al's findings (2012), our research shows that public-private networks for advocacy, data gathering and transmission are important. Our research confirms earlier arguments that social movement pressure from below promotes substantive, effects-based civil rights law enforcement (Pedriana and Stryker 2004). Consistent with findings of Stainback

et al (2005), Stainback and Tomaskovic-Devey (2012), Skaggs (2009), and Hirsch (2009), our research suggests an important role for media publicity and for interaction effects between litigation and various aspects of political advocacy or the political environment. All these too are promising areas for further research.

Finally, knowledge from sociology and other social and behavioral sciences is key to understanding the major ills that civil rights laws are designed to fight and what law enforcement strategies are more vs. less likely to be effective. We do not presume that our empirical research can generate values or normative consensus. Our research does, however, show that a GCE-based statutory and enforcement approach is relatively effective in meeting broadly acknowledged substantive goals of 1960s US voting rights, equal employment opportunity, and fair housing legislation.

REFERENCES

Ackerman, Bruce. 2014. *We the People Vol. 3: The Civil Rights Revolution*. Belknap Press.

Amenta, Edwin. 1998. *Bold Relief: Institutional Politics and the Origins of Modern American Social Policy*: Princeton, NJ: Princeton University Press.

Belton, Robert and Steven Wasby. 2014. *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story*. University Press of Kansas.

Belz, Hermann. 1991. *Equality Transformed: A Quarter Century of Affirmative Action*. Transaction Publishers.

Blumrosen, Alfred. 1972. "Strangers in Paradise: *Griggs v. Duke Power Co*. and the Concept of Employment Discrimination." *University of Michigan Law Review* 71: 59-110.

-----. 1993. "*Modern Law: The Law Transmission System and Equal Employment Opportunity*. Madison, WI: University of Wisconsin Press

-----. 2008. R. Stryker Interview with Alfred Blumrosen, New York, NY, June 5, 2008.

Bocian, Debbie Gruenstein, Keith S. Ernst, and Wei Lei. 2006. "Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgage," http://www.responsiblelending.org/mortgage-lending/tools-resources/rr011-Unfair_Lending-0506.pdf Washington DC: Center for Responsible Lending.

Bonastia, Christopher. 2000. "Why Did Affirmative Action in Housing Fail during the Nixon Era? Exploring the "Institutional Homes" of Social Policies." *Social Problems* 47:523-42.

-----. 2006. *Knocking on the Door: The Federal Government's Attempt to Desegregate the Suburbs: Princeton, Princeton University Press.*

Branch, Taylor. 1988. *Parting the Waters: America in the King Years, 1954-1963*. New York: Simon & Schuster.

-----. 2006. *At Canaan's Edge: America in the King Years, 1965-1968*. New York: Simon & Schuster.

Burstein, Paul. 1991. "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity." *American Journal of Sociology* 96: 1201-1225.

-----. 1993. "Affirmative Action, Jobs and American Democracy: What Has Happened to the Quest for Equal Opportunity? *Law & Society Review* 26:601-922.

Burstein, Paul and Mark Evan Edwards 1994. The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues." *Law & Society Review* 28(1): 79-112.

Burstein, Paul, and Susan Pitchford. 1990. "Social-Scientific and Legal Challenges to Education and Test Requirements in Employment." *Social Problems* 37: 243-257.

Chen, Anthony. 2009. *The Fifth Freedom: Law, Politics and Civil Rights in the United States*.

1941-1972. Princeton: Princeton University Press.

Chesler, Mark A, Joseph Sanders and Deborah S. Kalmuss. 1988. *Social Science in Court: Mobilizing Experts in* the *School Desegregation Cases*. Madison, WI: University of Wisconsin Press.

Collins, William. 2008. "Fair Housing Laws." EH.Net Encyclopedia, edited by Robert Whaples, February 10, 2008 (available at http://eh/net/encyclopedia/article/collins/fair.housing)

Cooper, George, and Richard B. Sobel. 1969. "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion." *Harvard Law Review* 82: 1598-1679.

Congressional Quarterly. 1970. *Almanac*. Washington DC: CQ Press.

Davidson, Chandler, and Bernard Grofman (editors). 1994. *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*. Princeton, N.J.: Princeton University Press.

Davis, Julie Hirschfeld Davis and Binyamin Applebaum 2015. "Obama Unveils Stricter Rules on Fair Housing." *New York Times*, July 9, 2015, pp. A1, A16.

Daye, Charles E. 2000. "Whither Fair Housing: Mediations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal." *Housing and Community Development* 3: 24-294.

Denton, Nancy. 1999. "Half Empty or Hall Full: Segregation and Segregated Neighborhoods 30 Years after the Fair Housing Act." *Cityscape: A Journal of Policy Development and Research* 4: 107-122).

Dobbin, Frank. 2009. *Inventing Equal Opportunity*. Princeton NJ: Princeton University Press.

Dobbin, Frank, and John Sutton. 1998. "The Strength of a Weak State: The Rights Revolution and Rise of Human Resource Management Divisions." *American Journal of Sociology* 104: 441-476.

Donohue, John J. III, and James Heckman. 1991. "Continuous vs. Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks" *Journal of Economic Literature* 29: 1603-1643.

Eckholm, Erik, 2015. "A Voting Rights Legacy of 1960s Heads to Court." *New York Times*, July 12, 2015, pp. A1, 3.

Edelman, Lauren. 1992. "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law." *American Journal of Sociology* 97: 1531-76.

Edelman, Lauren B, Linda Hamilton Krieger, Scott R. Eliason, Katherine T. Albiston, and Virginia Mellema. 2011. "When Organizations Rule: Judicial Deference to Institutionalized Employment Structures." *American Journal of Sociology 117:* 888-954.

Edsall, Thomas B., and Mary D. Edsall. 1991. *Chain Reaction: The Impact of Race, Rights and Taxes on the American State*. New York: Norton.

Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Equal Employment Opportunity Commission (EEOC). 1970. *EEOC Testing Guideline*s, 35 *Federal Register*, August 1, 1970.

Farrell, Michael. 1978. "Proposed EEOC Regulations." Personnel Administrator, November, pp. 51-60.

Freeman, Alan. 1990. "Antidiscrimination Law: The View from 1989." *Tulane Law Review* 64: 1407-1441.

Friedman, Lawrence M. 2005. "Coming of Age: Law & Society Enters an Exclusive Club." *Annual Review of Law & Social Science* 1:1-16.

Galanter, Marc. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal

Change." *Law & Society Review* 9: 95-160.

Garrow, David J. 1978. *Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965.* New Haven, CT: Yale University Press.

----1986. *Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference.* New York: William Morrow & Company.

Goldstein, Barry. 2010. "*Ricci v. DeStefano*: Does it Herald an Evil Day, or does it Lack Staying Power? *University of Memphis Law Review* 40: 705-795.

Golub, Al. 2005. R. Stryker Interview with Al Golub, March 18, 2005, Silver Spring, MD.

-----. 2008. R. Stryker Interview with Al Golub, June 8, 2008, Washington DC.

Graham, Hugh Davis. 1990*. The Civil Rights Era: Origins and Development of National Policy, 960-1972*. Oxford: Oxford University Press.

Greenberg, Jack. 1994. Crusaders in the Court: *How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*. New York: Basic.

Grofman, Bernard, and Chandler Davidson. 1994. "The Effect of Municipal Election Structure on Black Representation in Eight Southern States." Pp. 301-344 in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, ed. C. Davison and B. Grofman. Princeton, NJ: Princeton University Press.

Grofman, Bernard, Lisa Handley, and Richard G. Niemi. 1992. *Minority Representation and the Quest for Voting Equality*: Cambridge: Cambridge University Press.

Handley, Lisa, and Bernard Grofman. 1994. "The Impact of the Voting Rights Act on Minority Representation: Black Office-holding in Southern State Legislatures and Congressional Delegations." Pp. 335-350 in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, ed. C. Davison, and B. Grofman. Princeton, NJ: Princeton University Press.

Heclo, Hugh. 1974. *Modern Social Politics in Britain and Sweden: From Relief to Income Maintenance*. New Haven: Yale University.

Herbers, John. 1970. "Paradox of Big Cities: Houses are abandoned despite Shortage." *New York Times* (9 February), p. 35.

-----. 1970. "Romney Seeks Clear Path for Housing for Poor." *New York Times* (7 June), p. 153.

Hill, Herbert. 1977. "The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law." *Industrial Relations Law Journal* 2: 1-96.

Hirsch, C. Elizabeth. 2009. "The Strength of Weak Enforcement: The Impact of Discrimination Charges, Legal Environments, and Organizational Conditions on Workplace Segregation." *American Sociological Review* 74: 245-271.

Holzer, Harry, and David Neumark. 2000. *Assessing Affirmative Action: Journal of Economic Literature* 38: 483-568.

Hull, Kathleen. 2006. *Same Sex Marriage: The Cultural Politics of Love and Law*. Cambridge: Cambridge University Press.

HUD Papers. See United States Department of Housing and Urban Development.

Islam, Kazi Saiful, and Yasushi Asami. 2009. "Housing Market Segmentation: A Review." *Review of Urban and Regional Development Studies* 21(2-3) 93-109.

Johnson, Olatunde. 1995. "Integrating the "Underclass": Confronting America's Enduring Apartheid." *Stanford Law Review* 47: 787-818.

-----. 2011. "The Last Plank: Rethinking Public and Private Power to Advance Fair Housing." *University of Pennsylvania Journal of Constitutional Law* 13: 1191-1233

Kairys, David. The Politics of Law: A Progressive Critique. Basic Books.

Kalev, Alexandra, and Frank Dobbin. 2006. "Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits over Time." *Law & Social Inquiry* 31: 855-903.

Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. "Best Practices or Best Guesses: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies." *American Sociological Review* 71: 589-617.

Kellough, J. Edward. 1989. *Federal Equal Employment Opportunity and Numerical Goals and Timetables: An Impact Assessment.* New York: Praeger.

Kinney, Jen. 2015. "HUD: Cities Now Must 'Show their Work' on Fair Housing*." Next City: Inspiring Better Cities*, July 8, 2015, available at https://nextcity.org/daily/entry/new-hud-rule-combats-housing-segregation-with-data, last accessed September 9, 2011.

Lamb, Charles. 2005. *Housing Segregation in Suburban America since 1960.* Cambridge: Cambridge University Press.

Lawson, Steven R. 1976. Black Ballots: *Voting Rights in the South, 1944-1969*. New York: Columbia University Press.

-----. 1985. *In Pursuit of Power: Southern Blacks and Electoral Politics 1965-1982*. New York: Columbia University Press.

Lee, Bill Lann. 1999. "An Issue of Public Importance: The Justice Department's Enforcement of the Fair Housing Act." *Cityscape: A Journal of Policy Development and Research* 4: 35-56.

Lempert, Richard, and Joseph Sanders. 1986. *An Invitation to Law and Social Science: Desert, Disputes and Distribution.* New York & London: Longman.

Leonard, Jonathan S. 1984. "The Impact of Affirmative Action on Employment." *Journal of Labor Economics* 2: 439-463.

-----. 1990. "The Impact of Affirmative Action Regulation and Equal Employment Opportunity Law on Black Employment." *Journal of Economic Perspectives* 4: 47-63.

Light, Steven Andrew. 2010. *The Law is Good: The Voting Rights Act, Redistricting, and Black Regime Politics*. Carolina Academic Press.

Massey, Douglas S., and Nancy A. Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, MA: Harvard University Press.

McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

Mathias, Jr. Charles, and Marion Morris. 1999. "Fair Housing Legislation: Not an Easy Row to Hoe." *Cityscape: A Journal of Policy Development and Research* 4: 21-33.

_____. 2015. "Affordable Housing, Racial Isolation," (29 June), p. A18. Available at http://www.nytimes.com/2015/06/29/opinion/affordable-housing-racial-isolation.html

Nielsen, Laura Beth, Robert Nelson, and Ryan Lancaster. 2010. "Individual Justice or Collective Legal Mobilization: Employment Discrimination in the Post-Civil Rights United States." *Journal of Empirical Legal Studies* 7: 175-201.

Pedriana, Nicholas. 2005. "Rational Choice, Structural Context and Increasing Returns: A Strategy for Analytic Narrative in Historical Sociology," *Sociological Methods and Research* 33: 348-82.

Pedriana, Nicholas, and Robin Stryker. 1997. "Political Culture Wars 1960s Style: Equal Employment Opportunity-Affirmative Action Law and the Philadelphia Plan." *American Journal of Sociology* 103: 633-691.

-----. 2004. "The Strength of a Weak Agency: Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971." *American Journal of Sociology* 110: 709-760.

Price, David W. 1990. “Causation of Public Housing Segregation: HUD Authorization of Applicant Choice in Tenant Selection and Assignment Plans.” *Boston College Third World Law Journal* 10: 121-164.

Ragin, Charles. 1987. *The Comparative Method*: *Moving Beyond Qualitative and Quantitative Strategies*. Berkeley, CA: University of California Press.

Reskin, Barbara. 1998. *The Realities of Affirmative Action*. Washington DC, American Sociological Association.

Rose, David. 2005. Author Interview with David Rose. Washington DC, March 17, 2005.

Ropiequet, John L. 2012. “Assessing the Impact of *Wal-Mart Stores, Inc. v. Dukes* on Fair Lending Litigation.” *Journal of Affordable Housing* 21: 195-232.

Robiequet, John L. and Christopher S. Naveja. 2013. “A Curious Dichotomy: Fair Lending Litigation and Enforcement Actions Following Wal-Mart Stores, Inc. V. Dukes.” *Banking and Financial Services Policy Report*, January, 2013, pp. 1-16.

Robiequet, John L., Christopher S. Naveja and L. Jean Noonan. 2013. “Fair Lending Developments: Enforcement Intensifies: Class Actions Diminish.” *The Business Lawyer* 68 (Feb.): 637-648.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring about Social Change: Chicago: University of Chicago Press.*

Rosenblum, Mark. R. Stryker Interview with Mark Rosenblum, June 4, 2008. Washington DC.

Ross, Stephen and George C. Galster. 2005. “Fair Housing Enforcement and Changes in Discrimination between 1989 and 2000: An Exploratory Study.*”* *Economic Working Papers*, Paper 200516, available at http://digitalcommons.uconn.edu/econ-wpapers/200516.

Rutenberg, Jim. 2015. “A Dream Undone: Inside the 50-year campaign to roll back the Voting

Rights Act." *New York Times Magazine* (29 July).

Savelsberg, Joachim J. 1992. "Law that Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law." *American Journal of Sociology* 97: 1346-1381

Scheingold, Stuart. 2004. *The Politics of Rights: Lawyers, Public Policy and Political Change*. Ann Arbor: University of Michigan Press. 2nd Ed.

Schwemm, Robert G. 1988. "Private Enforcement and the Fair Housing Act: The Fair Housing Act after Twenty Years" *Yale Law & Policy Review* 375-383.

Schwemm, Robert G. and Jeffrey L. Taren. 2010. "Discretionary Pricing, Mortgage Discrimination and the Fair Housing Act*." Harvard Civil Rights-Civil Liberties Law Review* 45: 375-432.

Seicshnaydre, Stacy E. 2013. "Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act." *American University Law Review* 63: 357-435.

Selmi, Michael, 1998. "Public vs. Private Enforcement of Civil Rights: The case of Housing and Employment. *UCLA Law Review* 45: 1401-1457.

Shipler, David. 1970. "U.S. Aide Attacks Suburban Zoning." *New York Times*, May 17, p. 58.

Skaggs, Sheryl. 2008. "Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management." *American Journal of Sociology* 113: 1148-1182.

-----. 2009. "Legal-Political Pressures and African-American Access to Managerial Jobs" *American Sociological Review* 74: 225-244.

Skocpol, Theda. 1985. "Bringing the State Back In: Strategies of Analysis in Current Research."

Pp. 3-43 in P.B. Evans, D. Rueschemeyer and T. Skocpol, eds., *Bringing the State Back In*. Cambridge, Cambridge University Press.

-----1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge: Harvard University Press.

Skocpol, Theda, and Kenneth Finegold. 1982. "State Capacity and Economic Intervention in the Early New Deal." *Political Science Quarterly* 97: 255-78.

Skrentny, John David. 1996*. The Ironies of Affirmative Action: Politics, Culture and Justice in America.* Chicago: University of Chicago Press.

Smith, James P., and Finis Welch. 1984. "Affirmative Action and Labor Markets." *Journal of Labor Economics* 2: 269-301.

Sovern, Michael. 1966. *Legal Restraints on Discrimination in Employment*. New York: Twentieth Century Fund.

Staats, Elmer 1978. *Stronger Federal Enforcements Needed to Uphold Fair Housing Laws: Report to the Congress by the Comptroller General of the United States*, CED 78-21, February 2, 1978.

Stainback, Kevin and Donald Tomaskovic-Devey. 2012. *Documenting Desegregation: Racial and Gender Segregation in Private-Sector Employment Since the Civil Rights Act.* New York, N.Y.: Russell Sage Foundation.

Stainback, Kevin, Corre L. Robinson, and Donald Tomaskovic-Devey. 2005. "Race and Workplace Integration: A Politically Mediated Process?" *American Behavioral Scientist* 48: 200-228.

Stryker, Robin. 1989. "Limits on Technocratization of the Law: The Elimination of the National Labor Relations Board's Division of Economic Research." *American Sociological Review*

54: 341-58.

-----. 1996. “Beyond History vs. Theory: Strategic Narrative and Sociological Explanation.” *Sociological Methods and Research* 24: 304-352.

-----. 2001. “Disparate Impact and the Quota Debates: Law, Labor Market Sociology and Equal Employment Policies.” *Sociological Quarterly* 42: 13-46.

-----.2007. “Half Empty, Half Full or Neither? Law, Inequality and Social Change in Capitalist Democracies.” *Annual Review of Law & Social Science* 3: 69-97.

Stryker, Robin, Danielle Docka-Filipek, and Pamela Wald. 2012. “Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science. *Law & Social Inquiry* 37 4: 777-814.

Sturm, Susan. 2001. “Second Generation Employment Discrimination: A Structural Approach.” *Columbia Law Review* 101: 456-568.

Sutton, John R. 2001. *Law/Society: Origins, Interactions and Change.* Thousand Oaks, California: Sage.

Temkin, Kenneth, Tracy McCracken, and Veralee Liban. 2011. *Study of the Fair Housing Initiatives Program*. Prepared for US Department of Housing and Urban Development, Office of Policy Development and Research, Silver Spring, MD: DB Consulting Group.

Thernstrom, Abigail. 2009. *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*. American Enterprise Institute Press.

Toledano, Enbar. 2011. “Comment: Section 5 of the Voting Rights Act and its Place in ‘Post-Racial’ America.” *Emory Law Journal* 61: 389-434.

Toobin, Jeffrey. 2014. “Holder v. Roberts: The Attorney General Makes Voting Rights the Tests Case of His Tenure.” *New Yorker*, Annals of Law, Feb. 17, 2014 available at

http://www.newyorker.com/magazine/2014/02/17/holder-v-roberts

Tomaskovic-Devey, Donald, and Kevin Stainback. 2007. “Discrimination and Desegregation: Equal Opportunity Progress in Private Sector Workplaces since the Civil Rights Act*.” The Annals of the American Academy of Political and Social Science* 609: 49-84.

Ugelow, Richard. 2005. “I-O Psychology and the Department of Justice.” Pp. 463-490 in F. Landy, ed. *Employment Discrimination Litigation.* San Francisco: Jossey-Bass.

Uniform Guidelines on Employee Selection Procedures. 1978. *Federal Register* 43, pp. 38289-38315, August 25, 1978.

United States Commission on Civil Rights. 1970. *Federal Civil Rights Enforcement Effort: A Report.* Washington DC: Government Printing Office.

-----. 1987. *Federal Enforcement of Equal Employment Requirements.* Clearinghouse Publication 93, Washington DC.

United States Congress, House of Representatives. 1985a. Committee on Education and Labor, Subcommittee on Employment, *Oversight Hearings on the Equal Employment Opportunity Commission's Enforcement Policies*,” 99th Congress, 1st Sess. July 18, 1985. Washington DC: Government Printing Office.

-----. 1985b. Committee on Education and Labor, Subcommittee on Employment, *Oversight Hearings on EEOC's Proposed Modification of Enforcement Regulations, including Uniform Guidelines on Employee Selection,* 99th Cong. 1st Sess. Oct 2, 1985. Washington DC: Government Printing Office.

United States Department of Housing and Urban Development. 1969a. Romney to Sloane, Dec. 9. RG 207, REL 6-2, Box 68, folder “Sept. 9-Dec. 31 1969.

-----. 1969b. Schechter to Chapin, Aug. 7. RG 207, ADM-1, Subject Files of Richard C.

VanDusen, Box 10, folder "Open Communities."

-----. 1969c. "Draft for a HUD Policy on Open Communities," Sept. 22. RG 207, ADM-1, Subject Files of Richard C. Van Dusen, Box 10, folder "Open Communities."

-----. 1969d. Van Dusen to Romney, Aug. 15. RG 207, ADM-1, Subject Files of Richard C. Van Dusen, Box 10, folder "Open Communities."

-----. 1970. Van Dusen to Assistant Secretaries, Jan. 23. RG 207, ADM-1, Subject Files of Richard C. Van Dusen, Box 10, folder "Open Communities."

United States Department of Justice, Office of Legal Policy 1987. *Redefining Discrimination: "Disparate Impact" and the Institutionalization of Affirmative Action: Report to the Attorney General*. Washington DC: Government Printing Office.

Weber, Max. 1978. *Economy and Society: An Outline of Interpretive Sociology*, edited by Gunther Roth and Claus Wittich. Vols. 1 and 2. Berkeley: University of California Press.

Weiser, Wendy R. and Lawrence Norden. 2012. *Voting Law Changes in 2012.* Brennan Center for Justice, New York University. Available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf

Weiser, Wendy R. and Erik Opsal. 2014. *The State of Voting in 2014*. Brennan Center for Justice, New York University, available at http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf

Yinger, John. 2001. "Housing Discrimination and Residential Segregation as Causes of Poverty." In *Understanding Poverty,* edited by S.H. Danziger, and R. H. Haveman, 359-391, Cambridge MA: Harvard University Press.

Cases Cited

Albemarle Paper v. Moody 422 U.S. 405 (1975)

Allen v. State Board of Elections, 393 U.S. 544 (1969)

Fisher v. University of Texas, cert granted, 576 US____ (2015)

Griggs v. Duke Power Co., 401 U.S. 424 (1971)

Jones v. Mayer, 392 U.S. 409 (1968)

Ricci v. DeStefano, 557 U.S. 557 (2009)

Shelby County v. Holder, 133 S. Ct. 2612 (2013)

Texas Department of Housing v. Inclusive Communities, 135 S. Ct. 2507 (2015)

United Steelworkers v. Weber, 443 U.S. 193 (1979)

Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)

Table 1: Presence/Absence of Conventional Factors Explaining Extent of Civil Rights Policy Effectiveness for Voting Rights, Equal Employment, and Fair Housing Legislation

EXPLANATION

	STRONG ENFORCEMENT POWERS	BUREAUCRATIC CAPACITIES (CONVENTIONAL ARGUMENTS)	BUREAUCRATIC CAPACITIES ("SINGLE MISSION AGENCIES" ARGUMENT)	AGGRESSIVE POLICY ENTREPRENEUR IN CHARGE	SIGNIFICANT WHITE RESISTANCE*
LEGISLATION					
Voting Rights	PRESENT	PRESENT	ABSENT	ABSENT	PRESENT
Equal Employment	ABSENT	ABSENT	PRESENT	ABSENT	ABSENT
Fair Housing	ABSENT	PRESENT	ABSENT	PRESENT	PRESENT

*We note that the presence of white resistance is associated with *less* policy effectiveness, while the presence of all the other factors are associated with *more* policy effectiveness

TABLE 2: ENACTMENT (TEXT OF STATUTE)

VRA of 1965	Title VII of CRA of 1964	FHA of 1968
Section 4 – Effects-based Statistical Trigger – Any voting district using literacy tests or similar devices and having less than 50% registration or turnout rate in 1964 election automatically violates VRA Sections 4(a) and 5 – suspend literacy tests; require that Attorney General "pre-clear" any future change to any voting requirement	Written in language of individual non-discrimination EEOC has authority to investigate but no formal enforcement authority beyond promoting voluntary conciliation Complainants can file private civil actions in federal court if EEOC cannot secure an agreement Intent-based liability and case-by-case individual-focused complaint processing	Written in language of individual non-discrimination HUD has authority to investigate but no formal enforcement authority beyond promoting voluntary conciliation Complainants can file private civil actions in federal court if HUD cannot secure an agreement Intent-based liability and case-by-case individual-focused complaint processing

TABLE 3: ENFORCEMENT

VRA of 1965	Title VII of CRA of 1964	FHA of 1968
Expanded to cover any and all voting procedures --*Allen v. State Board of Elections*, 1969, Supreme Court says Section 5 effects-based standard covers dilution of minority votes, so that jurisdictions subject to pre-clearance must defend any change in voting procedures by proving the voting change does *not* dilute minority vote --1982 VRA amendments make clear that in jurisdictions not subject to pre-clearance, effects-based standards for liability are allowed; violation is proved under Section 2 if plaintiffs can prove voting procedure *does* dilute minority vote BUT 2013 rollback: Supreme Court in *Shelby County v. Holder* strikes down Section 4's statistical trigger for Section 5 pre-clearance	EEOC institutes requirement that employers keep records and submit to EEOC workforce distributions by race and other protected group classifications (1965-66) Supreme Court rules *in Griggs v. Duke Power* (1971), establishing disparate impact as an effects-based standard for plaintiffs to prove liability in Title VII lawsuits Numerous class actions with institutional and systemic focus, 1966-80 GCE-centered EEOC *Testing Guidelines* (1966, 1970) expanded into Uniform Guidelines on Employee Selection Procedures, promulgated in 1978. EEOC Affirmative Action Guidelines promulgated in 1979 BUT 2011 rollback: Supreme Court in *Wal-Mart v Dukes* restricts certification of large, systemic class actions (this ruling under the Federal Rules of Civil Procedure affects civil rights lawsuits across all domains of federally-provided civil rights)	No administrative requirement for housing sellers, renters, mortgage lenders, etc. to keep or submit records by race or other protected group classifications (1968-1989) No HUD administrative regulation issued to promote an effects-based standard to prove liability until 2013 (in 1994 HUD does join in inter-agency policy statement approving disparate impact proof methods) Lower federal courts do endorse disparate impact in 1974-84, but the proof standards are ambiguous and not as tough on discriminators as effects-based proof standards under Title VII. No Supreme Court endorsement of disparate impact proof of liability until 2015, in *Texas Department of Housing v. Inclusive Communities*; this endorsement many years too late, also leaves effects-based liability more limited under the FHA than under Title VII BUT: more recent GCE enforcement initiatives: "reverse redlining" lawsuits from 2007; HUD regulation defining "AFFH" and setting race composition requirements for public housing in 2006; more stringent AFFH regulation in 2015.