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

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‘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 of the three, 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. Explanatory accounts focusing on white support/resentment or state internal resources including formal enforcement powers, large budgets, established bureaucratic infrastructure 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: differences in the success of federal equal employment opportunity, voting rights and fair housing legislation can be explained by the extent to which each incorporated a “group-centered effects test.” The effects test provides a sociologically-driven legal and cultural framework 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 group results rather than formal procedural justice for individual victims or alleged wrongdoers.

Introduction

Between 1964 and 1968, the United States Congress enacted 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 black voters), and the Fair Housing Act of 1968 (FHA, banning race, religious and national origin discrimination in the sale and rental of housing). Evidence suggests that, of the three, 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. Drawing on political sociology, one argument suggests that civil rights policy success is conditioned on state-internal resources including formal enforcement powers large budgets, established bureaucratic infrastructure, and aggressive policy entrepreneurs. Another argument ties civil rights policy success to the degree of white support or resentment. Each of these arguments helps us interpret and explain outcomes of particular civil rights policies, but none can explain fully the observed differences across all three cases. We offer an alternative that can do so.

Drawing on sociology of law, we argue that divergent outcomes of U.S. voting, employment, and housing legislation can be explained by *the extent to which each incorporated what we call the "group-centered effects test."* The effects test provides a *sociologically-driven* legal and cultural framework 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 *group results* rather than formal procedural justice for individual victims or alleged wrongdoers.

Why Voting, Employment and Housing are 'Comparable'

Case selection must be carefully considered and justified. 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) and by a democratic-controlled Congress and President amidst a national 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. Other civil rights laws too are important.[1] But 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 in political contexts with important similarities.

Defining 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 (see Stryker 2007). Yet how does one define more vs. less effective civil rights legislation?

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[1]When discussing enacted civil rights legislation, we use the terms law and policy interchangeably, given that political sociologists typically use the term "policy" while legal sociologists typically use the term "law." We discuss federal law combating racial segregation in schools briefly in our conclusion, noting key evidence that further supports the import of our group-centered effects test. We forego detailed analysis of anti-discrimination in education for two reasons. First, we must keep to reasonable length. Second, litigation and precedents established in public school cases starting with *Brown I* and *II* in 1954-55 focused on interpretation of the Constitution, not legislation (Chesler, Sanders and Kalmuss 1988; Sutton 2001).

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 (e.g., 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 1995, 2005). Alternatively, one might evaluate legislative effectiveness by measuring impact, especially the extent to which legislation transforms resource distributions between the majority and a disadvantaged minority (e.g., Rosenberg 1991).

Indeed, much recent sociological research has tried to assess the impact of federal equal employment law and organizational compliance with EEO law on workplace segregation by race and gender, or the presence of minorities and women in top management (Kalev and Dobbin 2006; Kalev, Dobbin and Kelly 2006; Hirsch 2009; Skaggs 2008, 2009; Tomaskovic-Devey and Stainback 2007). These studies advance knowledge of EEO law's "on the ground" impact, but do not compare global impact of laws *across policy domains*.

Cross case comparisons evoke an "apples and oranges" dilemma in that 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 educational, employment or income inequalities (Lempert and Sanders 1986, p. 398). 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). Similarly, the black-white gap in voter registration in Mississippi halved between March of 1965 and September of 1967.[2]

By contrast, a great many factors other than discrimination shape minority-white outcomes in labor and housing markets, so teasing out the impact of anti-discrimination law is harder and subject to more controversy (Smith and Welch 1984; Donohue and Heckman 1991; Holzer and Neumark 2000; Goering and Squires 1999; Ross and Galster 2005; Collins 2010). Parity is not the gold standard of effectiveness as it is in voting rights. Minority relative to white labor market outcomes *are* contingent on minority-white inequalities in education (Lempert and Sanders 1986). Housing market outcomes *are* contingent on racial and ethnic inequalities in occupation, income, and wealth (Islam and Asami 2009).

Under US anti-discrimination law, educational and economic inequalities do not "count" as part of labor market or housing discrimination, but they and many other factors, including all those shaping education, occupation and residence choices must be taken into account when measuring discrimination. There are many factors other than changing anti-discrimination law that help account for changing minority outcomes in labor and housing markets (Donohue and Heckman 1991; Denton 1999). There also are more potential metrics for evaluating success in employment and housing relative to voting rights. With respect to race discrimination in

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[2] The pre- and post-VRA percentage of whites registered in Mississippi went from 69.9% to 91.5%. Gains in black registration across the seven southern states of the old Confederacy in which pre-Act black voter registration was less that 50% ranged from a low of 4.5 percentage points in North Carolina (where pre-Act black registration was 46.8 percent) to a high of 53.1% in Mississippi. Across the region, black registration went from 29.3% to 52.1% and the black-white voter registration gap went from 44.1% in March of 1965 to 27.4% in September of 1967 (Grofman et al 1992, p. 23, Table 1). Meanwhile, total white voter registration across the region moved from 73.4 percent to 79.5 percent.

employment, we might consider minority-white representation ratios in any one or more of a set of job, occupation or industry categories, minority-white wage and salary gaps, and relative employment, unemployment or poverty rates (Donohue and Heckman 1991). With respect to housing, rental and ownership markets are relevant, as are mortgage-lending and public housing practices, property valuations, and desegregation measured by segregation and/or isolation indices especially at the neighborhood level (Denton 1999).

Despite controversies over defining, measuring and modeling the specific impacts of any one piece of legislation, comparative analyses are not precluded. At a more 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 (Ashenfelter and Heckman 1976; Leonard 1984, 1990; Donohue and Heckman 1991; Stryker 2001; Sutton 2001; Kalev and Dobbin 2006; Skaggs 2009; Hirsch 2009; Stainback, Robinson and Tomaskovic-Devey 2005). Scholars generally agree that federal equal employment law was *less* effective than was the VRA (Lempert and Sanders 1986; Sutton 2001).

Meanwhile, although it is possible that residential segregation would have remained still higher absent the FHA, "post-Act "Black-White segregation remain[ed] at a very high level and [was] changing only modestly…Segregation by race for African-Americans is higher than segregation by any other characteristic in United States cities and metropolitan areas" (Denton 1990, pp. 108-09). Evidence of decline in the average level of segregation in cities around 1970 is consistent with, but far from direct proof that the FHA may have had some positive impact (Collins 2010). But HUD-conducted nationally representative audit studies from the 1970s and 1980s show "there [was] still an enormous amount of discrimination in [the] housing market" (Denton 1999, p. 113; see also Yinger 1995).

Overall, there is virtual consensus that fair housing was a substantial failure (Staats 1978; Price 1990; Massey and Denton 1993; Denton 1999; Daye 2000; Yinger 1995, 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 more subtle "second generation," nature (e.g., Sturm 2001). In housing, however, newer, more subtle 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).[3]

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[3] Many concerned with housing discrimination take residential segregation levels and change as the key metric of fair housing success. But some argue not all minorities prefer to live in mixed-race neighborhoods. Integration sometimes is faulted for tokenism and destroying minority communities (see Johnson 1995). "The only urban areas where significant desegregation occurred during the 1970s were those where the black population was so small that integration could take place without threatening white preferences for limited contact with blacks" (Massey and Denton 1993, p. 11). When African-Americans did suburbanize, it often led to minority enclaves (Massey and Denton 1993). As Johnson (1995) argues, Massey and Denton favor programs like the Gautreaux demonstration project in Chicago that subsidized rents, moving blacks from exclusively low income and racially segregated public housing into mixed race or white neighborhoods. Research shows this program and others like it improved education, employment and income for blacks who moved relative to those who stayed behind (Johnson 1995, pp. 804-06). But because such "mobility programs are inherently tokenistic [in that] they limit the number of participants to avoid white resistance and flight," they yield pockets of success for participants, increasing race diversity in formerly all white neighborhoods while leaving most "American Apartheid" intact (Johnson

Consensual scholarly ordering of comparative effectiveness suggests the utility of further comparative analysis. Rather than trying to offer a universal concept of legal success/effectiveness, we avoid potential pitfalls by emphasizing the consensual global ordering rather than precise numerical estimates of relative impact. We conceive each case holistically as an instance of a more general process—civil rights policy development—allowing cross-case comparison notwithstanding that each case is unique. This is standard practice among case-oriented comparativists seeking causal explanations of similarity and difference in macro case outcomes (Skocpol 1979; Ragin 1987; Stryker 1996; Goldstone 1998; Pedriana 2005). 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 do discuss subsequent enforcement.

Voting rights, equal employment, and fair housing legislation all seek to *expand the resources and opportunities of disadvantaged groups* in a given societal sector; all presuppose one fundamental means to achieve that end is to *legally prohibit discrimination* on the basis of race or other protected classifications; and all include a *compliance structure* to enforce the law. We compare the three *with respect to each policy's particular mission and objectives*. Voting rights can be considered most effective *not* because empirical details of minority voting rights can be compared directly to those for employment or housing, but because voting rights, *within its policy domain,* translated the non-discrimination legal requirement into greater transformation in the political life of racial minorities than did equal employment or fair housing in minority economic or residential life.

In short, voting rights, equal employment, and fair housing law cover different practices but can be compared with respect to how each, within its own domain, enforced nondiscrimination in ways that achieved or not improvements in minority political, residential, and economic resources and opportunities. We now turn to creating a theoretical framework *explaining* how and why voting rights, fair housing, and equal employment law experienced divergent 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; 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.

> The act gave HUD merely the power of 'conference, conciliation, and persuasion' ...These weak enforcement provisions help to explain the Fair Housing Act's limited effect on housing discrimination in the United States (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.

Until the 1972 Equal Employment Opportunity Act gave the EEOC the power to prosecute, the EEOC could only investigate and engage in conciliation talks with employers. "Compliance was voluntary; if conciliation failed, the complainant could file a private lawsuit in

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1995, p. 811). Ironically many such programs came to be as remedies *after* litigation against local housing authorities *and* HUD.

federal court, but the EEOC's official role was over" (Pedriana and Stryker 2004, p. 712). Similarly, if HUD conciliation failed, individual private complainants could file lawsuits (Lee 1999).[4] Formal enforcement power alone, then, cannot explain the divergent early fates of Title VII and the FHA.

Bureaucratic Infrastructure

Well-established bureaucratic infrastructure (vs. lack thereof) is another explanation for divergent outcomes (Bonastia 2000; Amenta 1998; Skocopl and Finegold 1982; Skocopl 1985). Bonastia (2000, 2006) concluded that Title VII fared better than fair housing because HUD, unlike the EEOC, was situated within a disadvantaged "institutional home." Bonastia correctly observed that fair housing was buried within a confused, disjointed 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's one mission was to implement Title VII; it could focus on that without bureaucratic confusions and distractions.

Yet Bonastia's (2000, 2006) argument is incomplete. Most accounts agree that the EEOC's initial institutional home was *not* "advantaged" in any sense (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, citation omitted) noted: "[T]here was no established equal employment 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 potential remedial leverage came from the multiple programs it administered (Johnson 2011).

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 (see Amenta 1998; Heclo 1974; Skocpol 1992). This also cannot fully explain the divergent success of the three cases. Of the three, *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). But his efforts were unsuccessful.

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[4] Both 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).

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 including EEOC Chief of Conciliations Alfred Blumrosen, 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 consistent with consensual ordering of efficacy, 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 theVRA, they initially counseled President Johnson and civil rights activists—both of whom favored the most aggressive enforcement possible—that such a broad vision might be *too* aggressive in ways that breached constitutional boundaries (Garrow 1978; 1986; 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 gave explicit authority to do so. DoJ lawyers generally 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 infrastructures, and policy entrepreneurship—all help explain civil rights law outcomes. From a comparative standpoint, however, none can adequately explain why voting rights did so much better than both equal employment and fair housing policy, 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 success of voting rights law 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).[5] Consistent with emphasizing *government* enforcement, the DoJ could initiate lawsuits supporting minority voting rights (Sutton 2001); neither the EEOC nor HUD could initiate lawsuits (Pedriana and Stryker 2004; Lamb 2005). Still, both Title VII and the FHA allowed the *Attorney General* 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 some aspects of government enforcement into our group-centered effects test. But we argue that *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 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

[5] 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.

2005). White voters resented some civil rights laws, particularly those perceived to threaten their immediate economic interests or cultural preferences. Theoretically, 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… One person may enjoy the right to vote without *noticeably* diminishing the similar enjoyment of others" (Lempert and Sanders 1986, p. 361, emphasis in original). 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).

Though the Nixon/white resentment thesis carries significant weight, it is more tailored to explain collapse of aggressive fair housing than it is to explain comparative civil rights policy outcomes. 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 outcomes. Lamb's (2005) persuasive case 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). Apparently white southerners *did* try to resist the VRA, and well they might given that 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. 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 much black enfranchisement in the South, especially in states where white resistance to black voting had been especially high.

In sum, enforcement power, bureaucratic structures, and policy entrepreneurship, in conjunction with the Nixon/white resentment thesis all contributed to policy outcomes in voting rights, equal employment, and fair housing. But none of these factors can explain adequately, *from a comparative standpoint*, the specific hierarchy of success observed across the three cases. We now turn to an alternative law-centered explanation that *can* explain this.

Explaining Comparative Civil Rights Outcomes: The Group-Centered 'Effects' Test

Max Weber (1978) distinguished between formal and substantive law, suggesting that 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 or effects (Lempert and Sanders 1986; Stryker 1989, Sutton 2001).

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 et al 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) Using comparative evidence on voting rights, equal employment and fair housing law to ground our argument empirically, *we hypothesize that among legislation providing benefits to the disadvantaged, effectiveness is positively associated with the degree to which legislative, administrative and judicial actors construe the meaning of the law to embody a group-centered effects test.* Our hypothesis occupies middle ground between the optimism of civil rights lawyers who assumed a straightforward positive relationship between enactment of civil rights laws and progressive social change, and the pessimism of scholars concluding that civil rights litigation has been largely ineffective in producing meaningful social reform (Stryker 2007).

Pessimists 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" litigating one time only to try and vindicate their rights (Galanter 1974). A single civil rights plaintiff is the paradigmatic one shot player, and also typically is economically, socially or politically marginalized (Lempert 1999; Nielson, Nelson and Lancaster 2010). 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; Nielson, Nelson and Lancaster 2010). Edelman et al's (2011) recent research shows an increasing tendency for judges in Title VII cases to defer to now-institutionalized practices that employers adopted over time to comply with equal employment law. While Kalev, Dobbin and Kelly (2006) show that some of these strategies improve minority and female outcomes, Edelman et al (2011) argue that the most deferred to

practices emphasize symbolism over substance.

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; Pedriana and Stryker 2004; Hull 2006; Kalev and Dobbin 2006; Stryker 2007; Skaggs 2008, 2009; Hirsch 2009; Dobbin 2009; Stryker et al 2012). This tradition posits direct and indirect legal mechanisms of social change, emphasizes that litigation is a central but not exclusive legal tactic, that litigation has effects in dynamic interaction with broader political and cultural forces, and that the cultural or "constitutive" power of law can enable or constrain change agents in- and outside the state (McCann 1994; Hull 2006; Edelman and Stryker 2005; Pedriana 2006; Stryker 2007). Legal victories in and out of court provide powerful legitimating resources and leverage for ongoing political struggle (McCann 1994).

We build especially on Pedriana and Stryker's (2004) analysis of early Title VII and also on literature emphasizing *substantive law's* promise to promote economic, social and political equality (Lempert and Sanders 1986; Sutton 2001; Stryker 2007; Stryker et al 2012). Substantive law does *not* invariably promote equality; such legislation in capitalism routinely enacts benefits (e.g., subsidies and tax breaks) for elites. *We narrow the intended scope of our argument to those laws (including but not restricted to civil rights laws) that increase the legal resources of disadvantaged or marginalized classes and groups* (Stryker 2007).

Despite a weak statute and even weaker enforcement agency, broad, creative legal construction of Title VII's text partly transformed discrimination's legal definition (Pedriana and Stryker 2004). Novel legal theory called adverse or disparate impact (also known as the "effects test") was central to that transformation. Unlike a narrower understanding of discrimination requiring proof of employer's *intent* to discriminate, the *effects* test located discrimination in the statistically disproportionate *group impact* of systemic and institutionalized employment practices, many of which were facially neutral, devoid of overt discriminatory purpose.

In a decision surprising many, the 1971 Supreme Court unanimously endorsed disparate impact as a way of proving unlawful employment discrimination by private employers, expanding Title VII's reach. But because their study was not comparative, Pedriana and Stryker (2004) could not show the role legal interpretation played in other rights policy development.

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 would be more effective than laws relying on criminal liability 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.[6] 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).[7] "Critical legal scholarship" laments U.S. courts'

[6] 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 reslies on strict liability as do some types of product liability (Lempert and Sanders 1986).

[7] Among intent-based proof standards, a criminal law notion of intent, relying on *mens rea,* requires proof of whether actors alleged to violate the law knew what they were doing was wrong/illegal/harmful and

refusal to *expand* strict liability in civil rights law beyond a few beachheads, charging this promotes *in*effectiveness (Kairys 1998; Freeman 1990). Acknowledging much truth in such critiques, Pedriana and Stryker (2004, p. 709) proposed that Title VII has been a "moving target," in which enforcers' willingness to mobilize disparate impact methods to prove discrimination ebbs and flows over time. *We incorporate different concepts of liability and also other aspects of legal interpretation and enforcement into a broader frame of reference capturing more vs. less substantive orientation to civil rights law*.

The Effects Test and Comparative Analysis

Our group-centered effects test is a *sociological* framework for defining, proving and remedying discrimination across civil rights policy arenas. Whether dealing with voting, equal employment, or fair housing (or any other civil rights issue), the group-centered effects test has 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 rather than intent. Third, the effects test 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).[8] This is contrasted 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 representation, the group-centered effects test is conducive to *class actions*, whether public or private. Class actions are a form of collective action consolidating many similar claims into one lawsuit usually involving large stakes in financial awards and/or legal precedent (Stryker 2007).

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intended to do it. This is the hardest liability standard to meet because it is not possible to use behavioral evidence to prove what was or was not in someone's mind (Sutton 2001). Sutton (2001) and Blumrosen (1972) argue that a negligence standard of liability is part way between criminal intent and strict liability in ease or difficulty of proof. Negligence is based on failure to adhere to "reasonable person" standards of care. Thus, acting—or failing to act—in ways that a reasonable person would know or should have known would cause harm is negligence. A negligence standard does not dispense entirely with proving intent, but modifies intent in ways that make it easier to prove. *Compared to criminal liability*, negligence also is somewhat more substantive because evidence related to *generally known typical effect*s of types of action or structures becomes relevant.

[8] The group-centered effects test provides conceptual foundation for "affirmative action" (Belton 1981; Belz 1991; Skrentny 1996). But the former is not equivalent to the latter. Affirmative action now conjures an array of practices and policies across social sectors and government branches. The effects test informs many but not all of these (Reskin 1998; Stryker 2001). In this sense, affirmative action is broader than the effects test. In another sense, however, affirmative action is narrower, pertaining to *remedies* but not liability for discrimination—except of course when affirmative action is argued to constitute "reverse discrimination" (Stryker 2001). There are similarities between our group-centered effects test and cultural resonance of the term affirmative action, but the effects test and its four core principles provide a more precise analytic framework. We discuss affirmative action more in connection with Title VII.

Many socio-legal scholars treat treats class actions similarly to government enforcement or to enforcement by public interest law firms seeking new precedent as potential avenues of effectiveness (Galanter 1974; Chesler, Sanders and Kalmuss 1988; Burstein 1991; Epp 1998; Sutton 2001). All these strategies provide plaintiffs who otherwise would be proto-typical one shot players in litigation with resources typically possessed by repeat players (Galanter 1974). But while all these strategies may increase chances that civil rights plaintiffs win their legal cases (Stryker 2007), neither "playing for rules" (that is, for judicial precedent governing the future of the legal field), nor government or public interest enforcement *in themselves* are likely to translate these victories into substantially more equality. Instead, 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 group-centered effects-test.

The effects test is not a discreet, "either/or" characteristic present or absent in each case. *We instead imagine it along an ideal-type continuum within each domain*. At one end is a pure, group-centered effects test; at the other an enforcement model confined to individual plaintiffs, requiring proof of discriminatory intent, ignoring statistical patterns produced by institutional-ized practices, and eschewing results-oriented remedies in favor of procedural and compensatory remedies for individual victims of discrimination. In between are many legal nuances representing gradations in a group-centered effects approach. We examine *the extent to which* each civil rights policy "on the books" and "in action" incorporated such an approach.

The Legislative Context and Statutory Language of Voting Rights, Equal Employment Opportunity, and Fair Housing Law

In terms of social and political context for enactment, Title VII and the VRA were more similar than either was to fair housing. Both were 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. The general northern public, Congress, and the President reacted, generally supporting new civil rights legislation (Burstein 1985). Still, it took President Kennedy's death and President Johnson's subsequent leadership to fully galvanize Congress (Graham 1990, p. 135).[9]

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).

Ghetto riots "cut both ways" (Graham 1990, p. 272). Summer, 1967 saw rioting in over 100 US cities. "Some Senators and Representatives publicly stated they would not be intimidated or rushed into legislating because of the disturbances," but "Congress was under growing pressure to do something about the growing rage of Black Americans" (Mathias and Morris 1999, p. 24, 26). On March 1, 1968, the National Advisory Commission on Civil Disorders (the Kerner Commission) released a report concluding: "Our Nation is moving toward two societies, one Black and one White—separate and unequal" (Denton 1999, p. 107, quoting report; Mathias

[9] Anthony Chen (2009) argues that outer limits for fair employment legislation were established by conservative northern Republicans representing business and rural interests.

and Morris 1999, p. 25).

In a surprising turnaround in 1968, and 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). Enactment also required a change of mind by Senate Minority Leader Everett Dirksen, who insisted on weaker enforcement in return for his support (Mathias and Morris 1999, p. 25).[10]

In short, Title VII and the VRA were created during *northern* consensus favoring relatively bold new civil rights protections. By contrast, 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. There the similarities between Title VII and the VRA end. Shifting attention to each statute's *text,* Title VII and the FHA are in many ways almost identical. Neither resembles the language or requirements of the VRA. Dirksen's bottom line for supporting both Title VII *and* fair housing was similar weakening of HUD and the EEOC to remove prosecuting and cease and desist powers, leaving only complaint processing and conciliation (Graham 1990, p. 147-48; Morris 1999, p. 25).

Written in the legal vernacular of individual nondiscrimination, Title VII required proof of discriminatory *intent* to establish unlawful 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. Then the agency would investigate, and if it found the complaint to have merit, 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 core language and enforcement structure were almost indistinguishable from Title VII (82 Stat 81 [1968]). Key FHA provisions were written in 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 sum, but for pattern or practice provisions implicitly recognizing the possibilities of systemic discrimination and provisions allowing private class actions, Title VII and the FHA reflected the ideal-typical *antithesis* of our group-centered effects test. In contrast, the 1965 VRA fully embodied the group-centered effects text. This was unlike the 1957 VRA, requiring that lawsuits be filed on behalf of individually named plaintiffs, and unlike the 1960 VRA, allowing the DoJ to file pattern or practice lawsuits against entire counties, but requiring proof that election officials *intentionally* rejected black registrants while accepting comparable whites,

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[10] Escalating racial turmoil in part prompted Dirksen's switch (Graham 1990, p. 273; Mathias and Morris 1999, p. 25). Reflecting contradictory impulses responding to the riots, the 1968 Civil Rights Bill included fair housing and protections for civil rights workers, but also punished those who rioted (Graham 1990, p. 272).

First, the 1965 VRA used an effects-test and statistical "trigger" to *legally define* violation. 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). Congress "target[ed] southern states with a history of racial discrimination in the election process…The areas initially captured by this 'triggering mechanism' were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina" (Grofman et al 1992, p. 17).[11]

Second, 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 et al 1992, p. 17).[12] 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).

In sum, already as law "on the books," the VRA unambiguously incorporated a group-centered effects test. Both 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 statistical trigger made it easy to show violation, and made clear that the violation was structural and systemic. Covered jurisdictions could *not* invoke form over substance to get out of violator status and need for pre-clearance.

Thus, voting rights had a massive head start on equal employment and fair housing. The federal government could attack systemic discrimination through statistical indicators (as opposed to individual complaints) and target the discriminatory *results* (as opposed to discriminatory intent) of state voting requirements. Meanwhile, Title VII and the FHA were saddled with intent-centered liability and case-by-case, individual victim-focused complaint processing ill suited to attack broader discriminatory patterns. Any movement toward a group centered effects test 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

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

[11] Ratification of the 24th Amendment (1964) had banned poll taxes in federal elections.

[12] Section 4(a) of the 1965 VRA suspended for five years all "tests and devices," including educational requirements, literacy tests and character tests, in all jurisdictions covered by the triggering mechanism (Grofman et al 1992, p. 17, 39 n. 14, 15).

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, the DoJ's *remedial pre-clearance* embodied a group-centered effects test 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 been meaningless without the group-centered effects test of 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—the group-centered effects test—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 so quickly and easily able to translate pre-clearance into far-reaching *group results.*

President Nixon tried to weaken enforcement but the 1970 VRA amendments continued suspension of literacy testing. The amendments likewise 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 captured Manhattan, Brooklyn and the Bronx (Grofman, Handley and Niemi 1992, p. 19).

Since 1970, Congress re-authorized pre-clearance three *more* times, in 1975 (for five years), in 1982 (for 25 years) and in 2006 (for another 25 years) (Grofman, Handley and Niemi 1992, p. 39; Toledano 2011, p. 397.[13] The 1975 amendments also expanded VRA protections to language minorities (Grofman et al 1992, pp. 20-21).

By 1990, the black-white gap registration gap among eligible voters nationwide had shrunk to 5 percent, with 59% of eligible black Americans and 64% of eligible white Americans registered (Toledano 2011, p. 396). There is room for improvement, especially given that Congress amassed evidence of continued discrimination to support its 2006 reauthorization of preclearance.[14] Questions of ballot access arise today with respect to felon disfranchisement,

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[13]The 1982 and 2006 re-authorizations met with substantial, but unsuccessful, southern resistance (Toledano 2011, p. 396)

[14] In two cases, one in 2009, the other in 2012, a majority of the Supreme Court indicated skepticism about the continued constitutionality of Section 5 pre-clearance, but also avoided ruling on this question (Toledano 2011, p. 421-22). In the most recent direct pronouncement on the constitutionality of the 2006 extension of Section 5 pre-clearance, *Shelby County, Alabama v. Holder* (2012), the United States Court of Appeals for the District of Columbia held that Congress' judgment about the continued need for pre-clearance was supported by the weight of the evidence and entitled to judicial deference (*New York Times Sunday Review*, May 20, 2012, p. 10).

which has disproportionate negative effects on blacks (Manza and Uggen 2006), and with current state voter-ID, polling time and absentee voter laws that disproportionately disfranchise blacks. But much post-1975 VRA litigation is predicated on the Act's prior *effectiveness* in registering disfranchised southern blacks.

Because it was written in group-centered effects language, the VRA was well positioned to expand this logic beyond registration to address whether the right to vote free of discrimination included the right not just to cast a ballot, but also to give minority groups a reasonable opportunity to *elect* their preferred candidates? If blacks no longer could be denied the right to register and vote, perhaps those votes could be *diluted*—thus rendered meaningless—by new changes in election procedures that minimized minority voting's impact (Grofman, Handley and Niemi 1992, p. 29).

In *Allen v. State Board of Elections* (1969), the Supreme Court confronted changes to election procedures in Mississippi and Virginia, e.g., Mississippi in 1966 changed its method for electing county boards of supervisors from district to at-large voting. Did this constitute a "'voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting' within the meaning of [VRA] section 5" requiring pre-clearance? Mississippi argued that Section 5 covered only changes in registration procedures or ballot access. The Court disagreed:

> We must reject a narrow construction [of] Section 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the *effect* of denying citizens their right to vote because of their race… the Act gives a broad interpretation to the right to vote, recognizing that voting includes "*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 (pp. 565-66, 569, emphases added).

The Supreme Court thus broadly interpreted the VRA to cover not just registration and voting *procedures*—which were themselves subject to a group-centered effects test—but also a key aspect of electoral *results*. 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 much of this growth came from change in the type of election. Handley and Grofman's (1994) similar analysis of African-American gains in state legislative elections suggests 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).

Since *Allen*, much VRA politics and litigation involve race-conscious redistricting, including creating "safe" districts for minority candidates (Grofman et al 1992). The 1982 VRA amendments responded to a 1980 Supreme Court ruling apparently interpreting the VRA's Section 2 governing vote dilution to require proving intent. The 1982 Act made clear that vote dilution allegations too would be evaluated by effects, *not* intent (Grofman et al 1992, 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 (Grofman et al 1992, p. 39 quoting 1982 amendments, emphasis ours).[15]

Equal Employment

This section shows the limited degree and tools through which Title VII embodied a group-centered effects test. 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; far less effective than the VRA, but a bit more effective than fair housing. Co-variation in effectiveness with the extent of the group-centered effects tests *within* Title VII enforcement also supports our explanatory framework.

Genesis and Limits of Disparate Impact When Title VII went into effect, the EEOC had not hired key staff, established basic administrative procedures or interpreted Title VII's core provisions. Ready or not, the Commission was bombarded with discrimination complaints. Finding workable, effective enforcement proceeded somewhat haphazardly along with attempts to process the ever-expanding number of complaints (Graham 1990; Pedriana and Stryker 2004).

Its backlog forced the EEOC to rethink assumptions about employment discrimination and how to combat it. Staff saw that discrimination was not limited to isolated acts of racial animus against individuals. Discrimination was a *systemic* problem, built into routine employer practices disadvantaging minority *groups,* regardless of presence or absence of overt discriminatory intent (see Pedriana and Stryker 2004; Stryker et al 2012 for details). As in voting rights, this required identifying, altering, and preempting institutionalized practices that systemically affected minority groups adversely (Pedriana and Stryker 2004; Stryker et al 2012)

However, Title VII and the EEOC seemed ill equipped to attack systemic discrimination. Staff highlighted limits in early internal memoranda, and commissioners lamented limitations in early staff meetings (e.g., EEOC 1965, 1966a, 1966b). *But what if—despite Title VII's emphasis on complaint processing for individuals—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 toward a group-centered effects approach (Cooper and Sobel 1969; Blumrosen 1972).

In the late 1960s, a small group of EEOC lawyers, plaintiffs' attorneys, legal scholars and psychologists of testing laid the groundwork for such movement. Pedriana and Stryker (2004) and Stryker et al (2012) show how early Title VII enforcement created and the Supreme Court ratified a partial effects-test for establishing liability. We provide highlights only, linking these

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[15] The 1982 amendments made clear, however, that there was no right to have protected class members elect representatives in proportion to their population numbers. Section 5 also can be used to protect against vote dilution (for example by redistricting), but only in jurisdictions subject to pre-clearance. Already in *Allen*, the Supreme Court had ruled that private parties could challenge un-submitted electoral changes in covered jurisdictions. 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. Where blacks may file a VRA lawsuit to challenge vote dilution, blacks *and* whites may challenge electoral rules or (re)districting under equal protection ("Supreme Court Redraws Political Battleground with Broad Attack on Race-Based House Districts" *Wall Street Journal*, June 30, 1995, p. A 18). In voting, as in education and employment, an increasingly conservative Supreme Court is suspicious of remedial race-conscious action. In *Miller v. Johnson* (1995) Justice Kennedy, writing for a 5 member majority, chastised the DoJ for using the VRA to demand that Georgia engage in "presumptively unconstitutional race-based districting." *Miller* thus attacked aggressive VRA enforcement to enhance electability of minority candidates.

to our explanatory framework.[16] Enforcement tools included EEOC interpretive guidelines, especially the 1966 and 1970 *Testing Guidelines,* private litigation in federal court, including that undertaken on behalf of black plaintiffs by the NAACP Legal Defense Fund (LDF), EEOC amicus briefs submitted in litigation, and coordination between EEOC lawyers and plaintiffs' lawyers (Stryker et al 2012).

Among practices targeted by EEOC interpretive guidelines and LDF strategic litigation, employment testing loomed large. Illustrating how facially neutral selection criteria could have substantial discriminatory consequences, testing was at issue in 15-20 percent of cases in Title VII's first five years,

Use of cognitive tests to screen job 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 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 et al, p. 10). In the mid-1960s, few employers validated tests.

The fundamental question, therefore, 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 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, albeit after an uphill battle to what was viewed as a very unlikely result, was the disparate impact liability standard that the 1971 Supreme Court established in the class action litigation, *Griggs v. Duke Power Company*.[17]

Armed with EEOC's *Testing Guidelines* and then widespread consensus among psychologists that discrimination in education and other group disadvantage accounted for the disproportionate negative results of cognitive testing on blacks, the *Griggs* court looked beyond Title VII's language of individual non-discrimination. Griggs endorsed a group-centered effects approach to Title VII, complementing the intent-oriented approach (Stryker 2001).[18]

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

[17] 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.

[18] Post *Griggs* Supreme Court Title VII interpretation institutionalized two intent-oriented methods of proving discrimination to complement the effects-oriented method represented by disparate impact. One—individual disparate treatment—pertained to cases in which individuals alleged race discrimination. The other—pattern or practice disparate treatment—pertained to systemic lawsuits, typically class actions, undertaken by the government or private plaintiffs (Stryker 2001).

Prior to Title VII, Duke Power had a segregated workplace. After Title VII passed, the company required *all* employees seeking jobs outside its "general labor" department to have a high school degree or receive a passing score on a general intelligence test. The company argued that because these requirements applied neutrally to blacks and whites, they did not discriminate. On plaintiffs' behalf, the LDF gave evidence of the disproportionate impact of the test and the education requirement and argued that these violated Title VII, given that North Carolina had an egregious history of race discrimination in education and that Duke Power had *not* shown the tests were related to the requirements of doing the at-issue blue collar jobs.

Job-relatedness was crucial. Because Title VII stated explicitly that "professionally developed" ability tests did not violate Title VII as long as they were not used to discriminate, litigants 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. The Supreme Court agreed. The Court also agreed that establishing liability for violating Title VII should *not* be restricted to methods requiring proof of discriminatory intent.

Instead, "[i]n *Griggs,* a case its LDF litigators put on par in importance with *Brown v. Board of Education,* the Supreme Court unequivocally provided effects-based interpretation of Title VII, endorsed the job-relatedness concept of 'professionally developed tests,' and applied job-relatedness broadly to all employment practices," including but not restricted to testing.[19] In 1975, in another LDF-litigated class action (*Albemarle v. Moody*), the Supreme Court equated tests' job-relatedness with following the extremely stringent standards for test validation that the EEOC adopted in its 1966 and 1970 *Testing Guidelines*. The *Guidelines* reflected consensual, expert standards arrived at jointly by the American Psychological Association, The American Educational Research Association and the Council of Measurement in Education (APA 1966). 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 more elaborated but equally 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 et al 2012).

In sum, *Griggs* provided a group-centered effects test for 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 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 (Stryker et al 2012).[20] Because of this—and because disparate impact is a

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[19] Stryker et al 2012, p. 14. The Supreme Court also deferred to the EEOC *Testing Guidelines* and decoupled disparate impact the "present effects of past discrimination" theory. 'Present effects' was a variant of the group-centered effects approach and had been used successfully in federal district court to attack seniority systems perpetuating disadvantaged treatment of blacks shut out of white lines of job progression because of *pre*-Title VII discrimination. In 1977, the Supreme Court *rejected* present effects theory for evaluating seniority systems' legality under Title VII. By this time, however, the Court had endorsed the broader effects-based approach to liability called disparate impact.

[20] Case law establishes how much impact is required to make out a prima facie disparate impact case and on what this depends. In large class actions involving testing, both sides typically employ expert witnesses. The standard proof model requires plaintiff to bear the burden of proving disparate impact; this creates a prima facie showing of liability. Defendant can rebut by showing the selection device

judicial construction fairly easily eroded over time, Title VII embodies the group-centered effects test much more weakly 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.

Establishing a prima-facie case of disparate impact liability does not end the matter. But because the employer's rebuttal burden in *all* disparate impact cases (not just those involving testing) is harder to meet than is the rebuttal burden in cases requiring plaintiffs to establish discriminatory intent, 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).[21]

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, 2008; Rosenblum 2008).

In 1977, "the Supreme Court issued three decisions that limited the availability of broad Title VII class actions, eliminated seniority systems from the reach of the disparate-impact standard and increased the complexity and difficulty of proving statistical disparities" (Goldstein 2010, pp. 765-57, citations omitted). In 1976, the Supreme Court refused to extend disparate impact to cases proceeding under the constitution rather than Title VII (Pedriana and Stryker 2004). In 1989, an increasingly conservative Supreme Court vitiated disparate impact by weakening the employer's burden to rebut plaintiffs' prima facie case. Congress enacted the Civil Rights Act of 1991 in large part to restore the group-centered effects test adopted in *Griggs* and *Albemarle* (see Stryker et al 2012, Stryker, Scarpellino and Holtzman 1999, 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 test, as does the pattern or practice disparate treatment method of proving employment discrimination. All are far weaker than the VRA's statutory approach and pattern or practice doctrine is weaker than disparate impact. Affirmative action as part of Title VII enforcement was made possible by EEOC policy mandating standardized employer reporting of race, ethnic (and gender) composition of major job categories (Graham 1990, pp. 190-201; Skrentny 1996).[22]

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causing the disparate impact was a "business necessity." In testing cases, a test that has been validated meets business necessity and will not be ruled discriminatory even if it causes disparate impact. If the defendant shows business necessity, plaintiff still can win by showing a "lesser discriminatory alternative" (Stryker et al 2012).

[21] 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).

[22] Graham (1990) and Skrentny (1996) argue that the EEOC's National Reporting System signaled "creative administration" (Graham 1990, p. 193). Establishing the System was fraught with potential roadblocks from Title VII's text and core constituencies. The NAACP's chief Washington lobbyist

Title VII lawsuits alleging *pattern or practice disparate treatment* must prove intent to discriminate. However, unlike what is known as *individual disparate treatment*, focusing on employer motive to discriminate against the particular individual filing suit, a pattern or practice case often is a class action on behalf of a large group of minority plaintiffs (Stryker 2001). Unlike individual disparate treatment lawsuits, pattern or practice lawsuits allow statistical proof.

> "In pattern or practice cases, once a *systematic* illegal motive is established, it creates an inference that each individual decision is illegally motivated. Statistical evidence cannot constitute the *sole* basis for an inference of *systematic* illegal motivation but [such evidence] provides pattern or practice plaintiffs with resources to help establish their prima facie case" (Stryker 2001, pp. 21-22, emphases ours).

When evaluated against our group-centered effects test, pattern or practice cases fall *between* pure intent-based and pure effect-based poles of the concept. Plaintiff-employees are precluded from making a prima facie case of discrimination based on statistics alone and it is far easier for employers to rebut plaintiffs' prima facie case in pattern or practice lawsuits than in disparate impact lawsuits (Stryker 2001). Still, pattern or practice cases attack institutionalized practices affecting minority groups, and they can produce group-oriented remedies, including judicial orders for effects-based affirmative action.

While Executive Order 11246 mandating affirmative action for federal contractors is one important source of private employers' affirmative action efforts, Title VII is another (Stryker 2001; Reskin 1998). The 1970s EEOC argued that Congress intended Title VII to encourage voluntary affirmative action to make up for past discrimination *without* need for litigation. At the same time, the EEOC knew voluntary affirmative action was being challenged under Title VII as illegal preferential treatment for minorities (Stryker 2001). Well before its decision in the famous *Weber* case, the Supreme Court ruled that Title VII protected whites as well as minorities (*McDonald v. Santa Fe Trail Transportation Co*. 1976).

In early so-called reverse discrimination cases, *both* the reverse discrimination claim and the voluntary affirmative action defense were based on Title VII (Stryker 2001). Federal courts already had ruled that Title VII did not prohibit the government from requiring employers (under EO 11246) to make good faith efforts to meet specified minority hiring goals and timetables. In 1979, the EEOC published affirmative action guidelines to help ensure *all* employers knew that Title VII supported voluntary affirmative action.

EEOC *Affirmative Action Guidelines* stated than employers whose affirmative action plans were challenged as reverse discrimination had a "good faith reliance defense" because the EEOC now explicitly encouraged voluntary affirmative action "when an employer's mandated 'self analyses' showed practices tending to result in disparate treatment or disparate impact and also when it appeared that the effects of prior discrimination had *not* been corrected. Affirmative action employers were not required to admit past Title VII violations, but they had to document under-representation due to past discrimination" (Stryker 2001, p. 28, citations omitted).

In *Weber v. Kaiser Aluminum* (1980) 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

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Clarence Mitchell argued strongly against racial reporting, insisting this promoted discrimination (Graham 1990, p. 199).

employer's self-recognized past exclusion of blacks, Title VII was not violated (Stryker 2001).[23] *Weber* represents a high water mark for judicial acceptability of a group-centered effects 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 *Affirmative Action Guidelines* remain in force today. However, while the federal government uniformly supported voluntary affirmative action until the advent of the Reagan Administration, Reagan's DoJ changed course (Blumrosen 2008; Stryker et al 2012; US Department of Justice 1987; US Commission on Civil Rights 1987). Both Reagan Assistant Attorney General for Civil Rights William Bradford Reynolds, and EEOC Chair Clarence Thomas objected strongly to using remedial goals and timetables to remedy past discrimination (US Civil Rights Commission 1987; Blumrosen 2008).

With respect to court-ordered remedy, the term affirmative action was boilerplate language modeled on federal collective bargaining law. Title VII states that once a court has established liability, "[t]he court may enjoin the respondent from engaging in [the unlawful discrimination] and may order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back-pay" (Pedriana and Stryker 1997, p. 646). The full meaning of this awaited judicial construction.

By the late 1980s, two Supreme Court opinions, *Sheet Metal Workers v. EEOC* (1986) and *U.S. v Paradise* (1987), clarified that "trial courts could order numerical goals and timetables where they found 'widespread, systematic and egregious [Title VII] violations,' as long as goals and timetables did not compel hiring unqualified employees or 'unnecessarily' infringe upon the interests of white employees" (Stryker 2001, p. 27 quoting Player [1988, p. 312]). "Mere illegal conduct or "statistical imbalance between employer's work force and the area population" did not warrant court-ordered affirmative action under Title VII or equal protection jurisprudence (Player 1988, p. 312). The Reagan Administration presumed that even cases of egregious discrimination did not warrant consent decrees or court orders using effects-based numerical goals and timetables (US Civil Rights Commission 1987; Blumrosen 2008).[24]

Title VII: Between Civil Rights Policy Success and Failure

Given its authorizing statute, early Title VII enforcement moved a surprising distance toward a group-centered effects test. But Title VII embodied a far weaker variant of this approach than the VRA. Evidence suggests that Title VII when packaged together with

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[23]Title VII states it is *not* intended to *require* preferential treatment to counter racial imbalance (Pedriana and Stryker 1997). The Weber court held that employers nonetheless are *permitted* to use voluntary remedial affirmative action to counter their own prior discrimination (Stryker 2001).

[24]The US Commission on Civil Rights (1987) reported that after Reagan took office, the Justice Department announced it no longer supported minority goals and timetables to remedy past discrimination. Reagan's Assistant Attorney General for Civil Rights, William Bradford Reynolds "undertook right away to undo consent decrees that the Justice Department had entered into, which agreed to changes in seniority systems in fire and police departments around the South. And that would have undone years of work…." (Blumrosen 2008, p. 2).

affirmative action contract compliance under Executive Order 11246 had a *small* 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 enforcement most embodying the group-centered effects test. There is evidence that, while disparate impact doctrine made Title VII more effective than it would have been absent disparate impact, 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 the group-centered effects test for 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 (Ashenfelter and Heckman 1976; Heckman and Wolpin 1976; 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.[25] *That impact was greatest, yet still modest, in the early enforcement period is consistent with our group-centered effects test 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.

What about evidence pertaining to disparate impact? As Goldstein (2010, p. 756) pointed out, "the social science literature has not produced a precise measure of the influence of the disparate impact standard that teases out the effects of disparate treatment law" and all other factors that plausibly can account for labor market progress of minorities and women since Title VII's advent. Even in 1972-1973, in Griggs' immediate aftermath, disparate impact cases accounted for just nine percent of all employment discrimination cases filed. By the late 1980s, they accounted for less than five percent (Stryker 2001, p. 23).

Examining Title VII appellate cases, 1965-1985, Burstein and Pitchford (1990) support our claim that typically it is easier for plaintiffs to win disparate impact lawsuits than to win cases requiring proof of intent. They found that plaintiffs successfully established their prima facie case in 66 (82%) of cases *alleging disparate impact and also focused on testing*. Illustrative of employer's difficult rebuttal burden, plaintiffs also won full or partial victory in 77% of these cases, substantially greater than the 58% win rate for plaintiffs in testing cases alleging *disparate treatment* (Burstein and Pitchford 1990, p. 252, Table 2, supplemented by

[25] Leonard (1990, p. 54) argued that documented gains would have been greater had affirmative action goals and timetables been—as their critics charged—just "expedient and polite word[s] for inflexible quota[s]." Burstein (1993) and Stryker (2001) made much the same point.

author calculations).[26] Burstein (1991) showed that bringing a lawsuit as a class action significantly increased plaintiffs' odds of victory in appellate cases from 1965-1985, when 45% of such cases were class actions.[27] Though we do not know *which* of these class actions also alleged disparate impact, this finding accords with emphasizing a group-centered approach to litigation. Even in 1988-2003, when collective legal mobilization in EEO litigation is especially rare, it had a powerful positive effect on plaintiffs' outcomes (Nielson, Nelson and Lancaster 2010).[28] But after the mid-1970s, the number of class action lawsuits declined sharply (Sutton 2001, p. 204).[29]

There is good reason to believe that despite the small number of disparate impact lawsuits, disparate impact *did* positively affect black employment immediately following *Griggs*. Disparate impact lawsuits were "targeted to large, industry-leading firms, precisely to have maximum impact" (Stryker 2001, p. 24). Such targeting, combined with the effects-based nature of disparate impact, gave the doctrine much visibility in personnel management journals and the business press. This convinced employers that the threat of time-consuming, costly litigation, bad publicity and adjudicated liability was real (Stryker 2001, Pedriana and Stryker 2004; Dobbin 2009). Donohue and Heckman (1991) emphasized that research assessing the labor market impact of Title VII litigation by examining co-variation between incidence of lawsuits and minority outcomes will *under-estimate Title VII's positive effects*, because employers change their practices to *pre-empt* litigation.

Post-*Griggs* business publications showed employers took the threat of disparate impact seriously. In 1973, a prominent non-profit business organization, 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 Shaeffer 1973). In 1975, the Conference Board again highlighted disparate impact, warning that if employers' "performance appraisal system" had an adverse effect on minorities, courts might well consider it to be "tests needing validation" (Pedriana and Stryker 2004, p. 746, quoting Shaeffer 1975).

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[26] Plaintiffs won more than 50% of *all* disparate impact cases only prior to 1975 and in 1977.

[27] Appellate cases are extremely important as legal precedent and in their capacity to signal litigation threat. But they are a very small percentage of total cases filed (Siegelman and Donohue 1990; Nielson, Nelson and Lancaster 2010).

[28] Nielsen et al (2010) examined all lawsuits filed in federal court during the relevant time period. Of these, only 9 percent involved any hint of a group-centered effects approach as evidenced by collective legal mobilization, including multiple plaintiffs, certified class actions, the EEOC as a party or public interest law firm representation of plaintiffs. The modal outcome for the full database was settlement—at 58 percent, with the median settlement just $30,000. Only 6 percent of cases proceeded to trial and plaintiffs won but a third of these.

[29] This is consistent with the Reagan administration's move away from the group-centered effects approach and also with Donohue and Siegelman (1991). The latter found that whereas late 1960s cases mostly involving hiring discrimination, by 1985, cases alleging discriminatory firing—almost always involving individuals—were six times as frequent as hiring cases. Likewise, early Title VII enforcement focused almost exclusively on race, but by 1994, race-focused complaints had declined precipitously as a percentage of total EEOC complaints (Wakefield and Uggen 2004).

Business publications of the 1970s also emphasized how hard it was for employers to rebut the prima facie disparate impact case. One 1978 article stated:

> The shifting of the burden made it easy for the EEOC and private plaintiffs to win class action Title VII suits. As a direct result, many employers found themselves losing Title VII cases and being saddled with huge back-pay awards in cases based strictly on statistics. Plaintiffs' lawyers were finding it easy and lucrative to file and settle Title VII suits. The situation for many employers was aptly described by a company attorney who said: "It's not a question of whether you're going to win or lose your Title VII suit, the question is how badly you're going to lose" (Farrell 1978, p. 56).

Thus, while *plaintiffs*' lawyers understood that winning class actions was not easy even in the 1970s, employers perceived things differently. Dobbin (2009) emphasized that initial legal uncertainty combined with early aggressive enforcement and key plaintiff victories, especially *Griggs*, caused US employers to perceive substantial litigation threat and to fear bad publicity if they failed to diversify their workforces. This opened the way for workplace restructuring consistent with fears raised and advice offered by the personnel profession. Many companies took affirmative action and 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 used "disparate impact challenges to testing" strategically to promote minority hires in city employment (Goldstein 2010, p. 257).

In sum, and consistent with our explanatory framework, Title VII was far less successful with respect to benefitting African-Americans than was the VRA. At the same time, 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 group-centered effects test.

Fair Housing

Initially HUD was in stronger position than the EEOC to build some semblance of an effects-based enforcement approach. This is so even though the FHA's text and enforcement structure paralleled Title VII, and even if fair housing was a greater threat to whites than was Title VII or the VRA. For a few years, HUD boldly, but somewhat secretly, *considered* enforcement more aggressive in vision and anticipated results than anything the EEOC achieved.

Several factors explain the FHA's early leg up. First, HUD secretary George Romney was a quintessential policy entrepreneur. Committed to maximizing FHA impact on racial housing patterns, Romney pushed the FHA to promote race and economic integration of cities *and* their suburbs (Lamb 2005). Second, HUD had partial control of the federal housing purse. 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 prohibition on discrimination.[30] *Depending on how HUD defined such discrimination* under the FHA, its fund cut-off authority might become a powerful weapon to attack discriminatory housing: the federal purse might have been to the FHA what pre-clearance was to the VRA.

Third, where both the VRA and Title VII benefitted from highly favorable judicial rulings *after* passage, the Supreme Court significantly expanded the right to equal housing opportunity *before* the FHA's enactment. As Congress debated the FHA, the Supreme Court

[30] 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.

handed down *Jones v. Mayer* (1968), a landmark ruling resurrecting a Reconstruction-era statute barring race discrimination in housing sales and rentals. For nearly a century, most courts assumed this statute—Section 1982—applied only to housing discrimination by the government, but not by private actors. But the Supreme Court ruled that Section 1982 prohibited *all* housing discrimination. *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 to EEOC creativity and VRA success for inspiration.

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 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 *considered* a proposal modeled on the VRA; it would have contained a VRA-like trigger leading to remedial action where Congress found conditions of serious housing discrimination to exist (Graham 1990, p. 265). The task force, however, could not identify any "feasible formula" for the trigger and the proposal died (Graham 1990, p. 265). It could not have escaped the task force that unlike overt, race-based denials of voting rights, overt housing discrimination plagued the entire country, including especially northern cities (Lamb 2005; Denton 1999).

Beyond this however, why should fair housing have been even less effective than equal employment? *White resistance provides part of the answer, but does so in conjunction with—and in part because white resistance promoted—substantial retreat from a paradigmatic group-centered effects test in enforcement.*

Where the early EEOC moved quickly to generate employer record keeping and reporting requirements 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 HUD engage in the networking, information sharing and 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 *never* endorsed disparate impact in housing (Schwemm 1988; Schwemm and Taren 2010). An innovative fair housing analogue to aggregate goals and timetables-type affirmative action in employment came *very* late to FHA enforcement, though it could have been practiced much earlier (Johnson 2011). Finally, where large, industry-leading private employers offered institutional leverage for results-based EEO enforcement, "first generation" housing discrimination enforcement had no such leverage point (Johnson 2011). 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 in Title VII enforcement. Likewise, early FHA enforcement *might* have brought far more substantial "affirmative integration" and provided more effective institutional leverage for social change. Very recent examples of such highly visible, data-driven, industry-and nation-wide class action enforcement, including disparate impact

enforcement, in fair housing may, in fact, yield pockets of greater policy effectiveness (Johnson 1995, 2011; Schwemm and Taren 2010). Similarly, the minority mobility projects touted by Massey and Denton (1993) and others produced pockets of greater effectiveness in the past. 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 itself—supports our group-centered effects test.

Early HUD Initiatives In 1969, HUD launched two major initiatives called "Open Communities" and "Operation Breakthrough" (see, generally, Lamb 2005, ch.3). HUD's internal documents reveal that both were bold proposals for racial and economic *integration* of the suburbs. As summarized by one HUD official, "[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 cited and 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 language of passive nondiscrimination and individual complaint processing; it called for a wholesale, group-centered approach to housing discrimination. *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 the potential fallout and kept early meetings and deliberations under the radar, hidden from both 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, underlining in original).

Nor was it clear that HUD had authority to preempt state and local housing policy when deciding whether to provide, or, in some instances, 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 suburban communities preempted racial or economic integration. HUD and Romney viewed such restrictive ordinances as the major threat to HUD's bold objectives ((HUD Papers 1970; Shipler 1970). Throughout 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. Immediate, vocal criticism followed. 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 threatened whatever HUD momentum had existed towards an aggressive, group-centered approach (Herbers 1970; *CQ Almanac* 1970; Lamb 2005).

In late 1970-early 1971, Nixon mounted an offensive against Romney's integration plans (Lamb 2005). Nixon adamantly opposed using HUD and federal housing funds to compel

suburban integration, nor would he pressure the suburbs to integrate. Though he conceded race discrimination in housing was illegal, land use laws belonged to the states and localities. The federal government had no business interfering with these policies—on their face race-neutral—even if it meant that low income (and disproportionately black) people could live only in certain areas (Lamb 2005, Semple 1971). Nixon's vocal opposition to results-based remedies in housing contrasted starkly with his support for affirmative action in employment including numerical goals and timetables for government contractors (Pedriana and Stryker 1997).[31]

Still, if Romney's grand designs for residential integration proved politically unrealistic, perhaps a more limited group-centered effects test similar to that endorsed for Title VII by *Griggs* could be reached. Like the EEOC, HUD could issue interpretive regulations to guide investigation/conciliation and the federal courts. Unlike the EEOC, HUD provided *no* early interpretive guidelines defining or promoting effects-based liability for the FHA (Johnson 2011). Still, discriminatory practices that HUD confronted with its Open Community/Operation Breakthrough initiatives were concurrently the subject of private lawsuits. Through the mid-1970s, the 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).

Fair Housing in the Courts Fair housing policy and HUD confronted an even greater number of entrenched actors and practices than did equal employment. HUD confronted private and public sellers, banks and mortgage lenders, realtors, government housing contractors, and state and local governments. HUD also confronted well-known discriminatory practices including, but not limited to redlining, blockbusting, restrictive covenants, and local ordinances that allegedly violated the FHA, the Equal Protection Clause of the U.S. Constitution, or both.[32]

Given this complicated morass and a volatile political environment, one might reasonably conclude that assembling coherent enforcement even partially embodying the group-centered effects test was implausible. Still a number of lower federal courts penned rulings referring explicitly to discriminatory effects as *one* guiding principle in fair housing cases. As early as 1970-71, some district courts stated that an FHA violation could be proven by showing discriminatory intent *or* effect,[33] and some early cases stated that HUD had an affirmative duty to assure nondiscrimination by considering the racial *effects* of housing practices.[34]

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

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[31]With his backstage support for affirmative action in employment —initially devised for the construction industry through the Labor Department's 'Philadelphia Plan'— Nixon hoped to drive a wedge between civil rights advocates and the labor movement even as he appeared front stage courting working class whites by opposing busing for school desegregation and undercutting Romney's fair housing plans (Pedriana and Stryker 1997; Graham 1990).

[32] 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).

[33] *Kennedy Park Homes v. Lackawanna* 318 F. Supp. 669 (WD NY, 1970) aff'd 436 F.2d 108; *Blackshear Residents v. Housing Authority* 347 F. Supp. 1138 (WD TX, 1971).

[34] *Shannon v. H.U.D.* 305 F. Supp. 205 (ED PA 1969) vacated on other grounds, 436 F.2d 809 (1971); *Concerned Citizens v. Romney* 335 F. Supp. 1251 (ED PA, 1971). In addition, lower federal courts ruled that the FHA prohibited steering, exclusionary zoning and redlining, and that housing display advertisements with only white models could violate the FHA's ban on discriminatory advertising (Schwemm 1988).

disparate impact liability under the FHA included the DoJ.[35] But the Supreme Court *never*--much less unanimously as in *Griggs* -- endorsed disparate impact under the FHA. By the 1980s, the Reagan Justice Department refused to undertake disparate impact cases as a matter of policy (Schwemm and Taren 2010).[36]

As well, we have shown that a key part of disparate impact liability for employment testing under *Griggs-Albemarle* was the difficult burden put on employers to rebut the prima-facie effect-based showing of liability. Appellate courts differed on whether an effects test for FHA liability should incorporate this tough a rebuttal burden. Rather than rely on the "business necessity" language of *Griggs-Albemarle*, some circuits adopted less stringent language for housing; a defendant's "legitimate business justification" would suffice to rebut plaintiff's prima facie case of disparate impact (Schwemm and Taren 2010; see also n. 20 above). This moved FHA enforcement even farther away from a VRA-type statistical trigger for remedial action than was Title VII enforcement.

Another aspect of FHA enforcement moved it farther away from a paradigmatic group-centered effects test: class actions were even more infrequent in early FHA enforcement than under early Title VII. Large FHA verdicts were almost non-existent (Schwemm 1988, p. 381). As we have shown, at least some leading private companies were sued under Title VII disparate impact or pattern or practice disparate treatment discrimination for refusing to hire African-Americans. 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" (Schwemm 1988, p. 381).

Not only had HUD created no guidelines defining or emphasizing effect-based liability under the FHA, it also failed to require race-based reporting from sellers or landlords (Johnson 2011). 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 (Johnson 2011).[37] Where the EEOC was networked tightly with the LDF strategic litigation

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[35] *Betsey v. Turtle Creek Associates*, 736 F. 2d 983, at 986-988 (4th Circuit, 1984); *Resident Advisory Board v. Rizzo*, 564 F. 2d 126, at 146-148 (3rd Cir. 1977), cert. den. 435 U.S. 908 (1978); *Metropolitan Housing Development Corporation* v. *Village of Arlington Heights*, 558 F. 2d 1293, at 1287-1290 (7th Circuit 1977), cert den. 98 S. Ct. 752(1978); *US v. City of Black Jack*, 508 F 2d 1179, 1185-1185 (8th Cir. 1974), cert den. 422 US 1042 (1975).

[36] In 1981, Senator Orrin Hatch (R-UT) introduced a bill that would have required courts to use an intent test to determine whether fair housing violations occurred. That the bill failed stands as additional indication that Congress was satisfied that both intent and effects-based methods of proving housing discrimination were appropriate under the FHA (Mathias and Morris 1999; Aoki 1989). In 1994, the Justice Department, HUD and ten other regulatory agencies came together to state that lending producing disparate impact *could* violate the FHA as amended in 1988 (Schwemm and Taren 2010). By this time however, the crucial early enforcement period was long over.

[37] Schwemm (1988, p. 381) shows that the number of court cases filed under early FHA enforcement was less than under Title VII. By 1988, there were about 400 reported federal court opinions, working out to an average of about 20 reported cases a year, whereas "[t]he number of reported employment discrimination decisions runs five to ten times that amount." Between 1968 and 1988, the Supreme Court decided just four fair housing cases (Schwemm 1988). This is despite the fact that in the first of such cases, a unanimous Supreme Court, upheld two plaintiffs' (one black and one white) standing to sue under the FHA for loss of the benefits of an integrated community, finding that the FHA's language was "broad and inclusive" in carrying out a national policy "that Congress considered to be of the highest

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 "major players in enforcing the FHA" (Johnson 2011, p. 1209).[38] In their influential book *American Apartheid*, Douglas Massey and Nancy Denton (1993) recommended that HUD fund data gathering and enforcement by private fair housing advocacy groups. HUD began to do this only in the late 1980s (Temkin, McCracken and Liban 2011).

In short, despite Romney's early plans to substantially lessen patterns of racial segregation in housing, his bold group-centered effects approach 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. While the lower federal courts endorsed an effects-based theory of liability under the FHA, its 'burden of proof' standards seemed even farther away from a wholesale VRA-type statistical trigger than was Title VII disparate impact. The Supreme Court never endorsed effects-based liability under the FHA, and early FHA enforcement had far less systemic, institutional leverage than did early Title VII enforcement.

Policy Initiatives Toward Effectiveness?

Two recent initiatives by government and private advocacy groups do show some promise for effective enforcement consistent with our group-centered effects test. Undertaken under the 1988 FHA amendments,[39] one *could have been* done under the original FHA and was consistent with Romney's initial vision. The other involves more subtle, "second generation" discrimination involving increasingly sophisticated mortgage risk management. The first innovation has born some fruit, but the second may yet be nipped in the bud.

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priority" (Mathias and Morris 1999, p. 26, quoting *Trafficante v. Metropolitan Life Insurance Co*. 409 US 205 (1972). Once the Home Mortgage Disclosure Act (HMDA) of 1975 mandated collection of race-based loan data from financial institutions, those data were used to publicize housing discrimination and—eventually—to target systemic enforcement (Schwemm and Taren 2010). We discuss this further in the next subsection.

[38] Since 1977, HUD *has* done periodic comprehensive housing audits using matched white and minority testers posing as would-be home buyers or renters to assess discrimination in various US housing markets. Private fair housing groups, which are active in some cities and states but not others—have used these to target their own research and enforcement (Johnson 2011). The activity of such groups has increased in recent years, and most recently, they have participated in innovative litigation making use of a historically under-utilized tool to promote racial integration in housing—a provision that requires federal agencies to "affirmatively further" fair housing (AFFH) We discuss AFFH in the next subsection.

[39] These amendments gave individuals victimized by housing discrimination the opportunity to have complaints adjudicated by HUD Administrative Law Judges, who were empowered to issue cease and desist orders and award damages. The 1988 amendments also lengthened the statute of limitations for private complaints and allowed attorney fees and punitive damages in private lawsuits. The new administrative enforcement system, intended to lower the burden and costs for victims to pursue their claims, gave HUD more formal power than the EEOC, even after the 1972 Equal Opportunity Act gave the latter the power to prosecute claims in federal court. But the 1988 amendments did not banish delay and problems of administrative staffing. The HUD administrative system remains "vastly underutilized" and monetary penalties awarded by HUD Administrative Law Judges "remain low compared to private lawsuits" (Johnson 2011, p. 1208). The 1988 Act did lead to an increased number of fair housing lawsuits filed in federal court by HUD and the DoJ (Johnson 2011).

The first recent initiative 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" (42 US Code Section 3608(d), 3608(e)(5)). This affirmative duty also is required of federal grantees (42 US Code 5309(b)) and is somewhat analogous to federal contractors' affirmative action duties under Executive Order 11248 [40] Olatunde Johnson (2011) makes clear that exploiting AFFH required a new, more *substantive* legal and political cultural frame acknowledging how federal, state and local government together shaped private housing markets to produce and reproduce very high levels of race based residential segregation (see Massey and Denton 1993; Denton 1999; Johnson 2011 for details). The new frame also required the federal government to take responsibility and work proactively to achieve FHA racial integration goals (Johnson 2011).

Notwithstanding an early FHA case taking an expansive view of AFFH, Nixon's opposition to using the federal purse to achieve integration meant that AFFH was left to languish, and did so for many years. The recent AFFH initiative draws on the unfulfilled promise of *Shannon v. HUD* (1970) and also of *NAACP v. HUD* (1987). In *Shannon*, the Third Circuit found HUD liable for violating AFFH because HUD constructed low income subsidized housing in an area with an already high concentration of minority poor. In *NAACP*, the First Circuit held that AFFH required HUD to go beyond nondiscrimination to use seed grants to help end discrimination and segregation so "the supply of genuinely open housing increases" (817 F. 2d 149, p. 155). The *NAACP* Court also reminded HUD that AFFH required it to attend to the effect of its housing programs (Johnson 2011).[41] These cases gave teeth to the FHA's AFFH provisions, but the teeth remained retracted until the 2000s (Johnson 2011).

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, and building on *Shannon* and *Gautreaux*, HUD finally enacted regulations defining AFFH and giving race composition requirements for public housing. One advocacy group, the Anti-Discrimination Center, then filed suit in federal court against Westchester County, New York, claiming that because Westchester had *not* complied with HUD's AFFH regulations, it defrauded the federal government under the False Claims Act.

After the court granted summary judgment to ADC on its claim that Westchester had failed to comply with AFFH and therefore had defrauded the government, but before a trial could be held on whether the county *knowingly* committed fraud—a requirement for *False Claims Act* liability—the newly installed Obama Administration brokered a settlement. The settlement

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[40] As Johnson (2011, p. 1225) explains, "AFFH.. is primarily a directive to a federal agency [and] mobilizes public power to shape the activities of federal agencies as well as grantee requirements. ..the specific duty of AFFH is open-ended in many ways and is formed through court and agency action as well as through definition by governments and stakeholders at the state and local levels…the significance here is that AFFH allows federal agencies to place a set of duties on grantees [who] have tremendous power to shape housing markets through the decisions they make in selecting sites for the development of subsidized housing, and through the steps they take to address public and private barriers to fair housing…."

[41] In *Hills v. Gautreaux*, a case that began in 1966, *prior* to the FHA, the Seventh Circuit found both HUD and the Chicago Housing Authority liable under Title VI of the 1964 Civil Rights Act, for discriminatory housing site selection and other practices creating segregation. The Court ordered HUD to devise a metropolitan wide remedy for segregation and the Supreme Court affirmed (Johnson 2011; Polikoff 2006). *Gautreaux* led to the Gautreaux demonstration project discussed earlier in the text.

made Westchester pay 30 million to the federal government, of which 21.6 million was deposited in Westchester's HUD account to develop integrated housing. Westchester also had to set aside an additional 30 million dollars to build or acquire 750 units of affordable housing in areas with low minority populations. The settlement did not require race-conscious *allocation* of these units, but it did require that Westchester "affirmatively market units to nonwhite populations in the county" (Johnson 2011, p. 1218).

A key settlement condition was that Westchester "submit implementation plans outlining timetables, specific benchmarks, and including a 'model ordinance' to be submitted to the municipalities in the County… to promote fair housing" (Johnson 2011, p. 1218). The County also had to pay a court-appointed Monitor to oversee implementation. After twice rejecting Westchester's proposed plan for insufficient specificity, much of the plan was approved in late 2010. Although the ultimate upshot remains unclear given "doctrinal and institutional reform" issues raised by implementation (Johnson 2011, p. 1218), the Westchester litigation pressured HUD finally to use its power to cut off funding to increase racial integration in housing.[42]

For example, 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. Other recent *threatened* fund withholding by HUD has led county grantees to change local rules impeding fair housing (Johnson 2011). Current (as yet uncompleted) HUD efforts to reformulate regulatory guidelines governing AFFH also were promoted in part by pressures on HUD from fair housing advocacy groups to provide "clearer and more rigorous metrics for advancing fair housing, and to better monitor federal grantees (Johnson 2011, n. 160, p. 1233).

It remains unclear whether the litigation model suggested by the Westchester case can be applied broadly. The district court ruling in that case may have been influenced by the fact that the program at issue—the Community Development Block Grant Program—has more detailed requirements on the type of fair housing analyses and actions satisfying AFFH than do other programs (Johnson 2011). Still, the "Westchester case puts states and local grantees regulated by HUD on notice to take more concrete and substantive action to enforce AFFH" (Johnon 2011, p. 1222). Stimulated by the case and by funds HUD now provides to fair housing groups through its Federal Housing Initiative Policy, private advocacy groups may become more active (Temkin, McCracken and Liban 2011).

A second recent FHA initiative embodying elements of a group-centered effects approach is the nation-wide filing of class action lawsuits attacking discretionary pricing as a key means of race and national origin discrimination in housing. In discretionary pricing, "lenders allow their loan officers and brokers to increase borrower costs from an objectively determined base rate" (Schwemm and Taren 2010, p. 375). Loan officers and brokers are incentivized to increase rates where they can do so because this increases loan profits. This promotes a classic case of disparate impact; an apparently neutral policy has "cost minority homeowners billions of dollars in extra payments [relative to whites], which…has led these minorities to suffer higher foreclosure rates than whites" (Schwemm and Taren 2010, p. 375).

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[42]Legislative hearings on earlier versions of the bill that became the 1968 FHA made clear that members of Congress understood the tight interconnection between federal government action or inaction, private housing markets and racially segregated housing. AFFH proponents anticipated the strength of a broad, substantive interpretation of this provision (Johnson 2011, *Shannon v. HUD*, 436 F. 2d 809). From the late 1960s through early 1980s, while "the executive branch was unwilling or ineffective at enforcing the AFFH provisions," a "handful" of fair housing groups brought lower court cases (such as *Shannon and NAACP* discussed in the text) involving urban renewal and public housing.

In the 1970s-80s, the DoJ did not file mortgage discrimination cases and few private cases were brought, largely because it was so hard to prove discrimination (Schwemm and Taren 2010). Since federal law prohibits misrepresenting data on mortgage applications, a proactive housing audit or testing procedure could not be used to uncover discriminatory behavior as it could with respect to housing sales and rentals. Even if minorities perceived they were treated badly by loan officers, unless they knew some comparable white who was treated better, there could be no case. Typically there was no way to get such "comparator" information.

In the 1990s, litigation increased because new, systemic lending data became available pursuant to the 1989 amendments to the Home Mortgage Disclosure Act (Schwemm and Taren 2010). These required financial institutions to report yearly on the number and dollar amount of mortgage applications and loans, by census tract, income level, race and gender. The data could not prove discrimination because indicators of credit worthiness (e.g., debt and loan history) were not included. But once it became clear that African-Americans and Hispanics had loan applications rejected at much higher rates than whites, the HMDA data as well as other data collected in the 1990s[43] promoted targeted lawsuits that used litigation discovery to develop further relevant data (Schweem and Taren 2010). Its attention drawn by the newly available data and publicity accorded it, the 1990s DoJ brought 16 pattern and practice cases, all settled by consent decree prior to trial.[44]

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 HMDA data 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, class action lawsuits based *solely* on the disparate impact of discretionary pricing were filed in federal courts around the country. These lawsuits seek injunctive and monetary relief, target many of the largest mortgage lenders, including Wells Fargo and Countrywide, and involve hundreds of thousands of loans (Schwemm and Taren 2010). In 1994, HUD, the DoJ and ten other federal agencies issued the *Interagency Policy Statement on Discrimination in Lending* (59 Federal Register 18266 (April 14, 1994)). The *Policy Statement* notes that disparate impact is recognized under both the FHA and Equal Credit Opportunity Act as a way to prove discriminatory lending (Schwemm and Taren 2010). As of

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[43] Especially important was a 1992 study by the Boston Federal Reserve Bank showing rejection rates for minorities were significantly higher than for whites even when all legitimate factors were held constant (Schwemm and Taren 2010). A1999 Urban Institute review of extant studies concluded there was clear evidence that minority homebuyers suffered mortgage discrimination. In the 2000s, more studies by government and private researchers found evidence of housing discrimination, including that minorities and their communities were significantly more likely to get sub-prime loans, even after controlling for loan applicants' incomes and other factors related to credit risk (Schwemm and Taren 2010, pp. 389-90).

[44] Some of the cases involved redlining. Others involved discrimination in underwriting, in which lenders applied tougher credit standards to minorities than whites. Yet others involved price discrimination, in which lenders allowed loan officers and brokers to charge discretionary rates that were higher for minorities than comparably credit worthy whites (Schwemm and Taren 2010).

2010, a number of trial courts, in denying lenders' motions to dismiss, re-affirmed disparate impact's viability as a cause of action for discriminatory lending. But no court had ruled on class certification (Schwemm and Taren 2010). Given other current developments, it is not clear this innovative attempt to resurrect an impact-oriented approach to FHA enforcement will survive.[45]

In sum, like Title VII enforcement, FHA enforcement remained far from the paradigmatic group-centered effects test and neither Title VII nor the FHA remotely approximated the VRA in incorporating this sociologically driven frame of reference. But while Title VII enforcement incorporated a surprisingly large effects test component early on, FHA enforcement initially looked promising but quickly fizzled. It did so given: 1) white backlash triggered when HUD secretary Romney's enforcement vision became widely known; and 2) President Nixon opposed using the federal purse to spur racial integration. Lower federal courts embraced an effects-based theory of liability under the FHA, but the Supreme Court failed to endorse it. While lower court receptiveness to disparate impact in housing created doctrine on which recent strategic litigation has built, partial effects-based liability in the FHA is weaker—and even farther from—a VRA-type statistical trigger mechanism than is Title VII.

Variation *within* FHA enforcement also helps us evaluate our group-centered effects test. Available evidence supports our approach, given the small positive impact of housing mobility programs, recent strategic litigation against discriminatory mortgage lending, and current FFHA initiatives including an analogue to remedial affirmative action.

Conclusion

Grounded in substantial evidence derived from our analyses of Title VII, the 1965 VRA and the 1968 FHA, we suggested a group-centered effects test as an alternative explanatory framework for the hierarchy of civil rights policy success achieved among federal equal employment, voting rights and fair housing law. Our research represents empirically grounded *theory construction*, so our task was not to test this hypothesis but to construct it and make it empirically plausible. We have done hoping to stimulate future hypothesis-testing research.

Our analyses are timely and important from a policy standpoint. Given many recently enacted voter-ID laws and other changes in voting rules that potentially can suppress minority turnout in state and federal elections, VRA pre-clearance has become a major resource barring or mitigating attempts to diminish minority voting in covered jurisdictions (Cohen 2012). Yet an increasingly conservative Supreme Court may soon decide to hear a case squarely requiring it to revisit the need for pre-clearance. As well, conservative Supreme Court justices have indicated that disparate impact methods of proving discrimination may be in peril, and the Court has just heard a case that could be used to prohibit affirmative action in higher education.[46]

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[45] The Supreme Court's 2011 ruling refusing to uphold class certification in the mega-class action disparate treatment gender discrimination case against Wal-Mart stores nationwide evidenced serious Court concerns about class action over-reach in civil rights cases (Stryker et al 2012). Meanwhile, the Court's ruling in another recent employment case—*Ricci v. DeStefano* (2009)—contained a forceful concurring opinion by Justice Scalia signaling that disparate impact itself could be in some jeopardy (Goldstein 2010). Even if the mortgage lending class actions are class-certified, it is not clear what standard—whether more or less stringent—would govern lenders' rebuttal burden to a prima facie showing of disparate impact.

[46] See Justice Scalia's concurring opinion in *Ricci v. DeStefano* (2009) for intimations that judicially constructed disparate impact doctrine may be precarious. See oral argument before the Supreme Court in *Fisher v. University of Texas* (2012) for clues to the pending Supreme Court ruling on affirmative action

We do not propose our group-centered effects test as a new single factor explanation. Rather we argue first, that the degree to which civil rights legislation and its enforcement are consistent with our ideal-typical group-centered effects test is more important than government or public interest group law enforcement itself. Second, while extant arguments, including especially those focused on policy entrepreneurship and the Nixon/white threat thesis must be part of a total explanatory framework for 1960s civil rights policy success, no prior hypothesis can explain the hierarchy of success among voting rights, equal employment and fair housing. Our alternative group-centered effects test, in conjunction with the policy entrepreneurship and white threat elements of prior arguments, *can* do so.

Additional support for our group-centered effects test comes from research assessing litigation promoting school desegregation. Both Chesler et al (1988) and Sutton (2001) argue that schooling litigation was substantially less successful than the 1965 VRA. Still, Chesler et al (1988) suggest that when judges actively monitored implementation of court decisions or consent decrees with an eye to achieving results, racial *desegregation* increased. Sutton (2001) compared trends in school desegregation in different time periods and in the northern vs. southern United States to argue 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 an enforcement paradigm for legislation intended to benefit the disadvantaged that is modeled on individualism and the need to prove intent will promote very little social change. Meanwhile, scholars emphasizing need for a social support structure for litigation (e.g., Epp 1998) and strategies to give one short players some of the benefits that repeat players normally enjoy in litigation (e.g., Galanter 1974) are on the right track. Our group-centered effects test hypothesis builds on their work, on distinctions between formal and substantive law, and on distinctions 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 group-centered effects test. We do not engage in arguments about feasibility. We do claim that to the degree legislative law and its enforcement incorporate a *sociological* group-centered effects test, laws designed to benefit the disadvantaged in capitalist democracies will be more likely to promote equality and progressive social change.

In turn, prior research has shown that incorporating key elements of the group-centered effects test makes it more likely that law enforcement will draw on sociological and other social science expertise (Stryker 2001; Stryker et al 2012). There is indeed a strong "elective affinity" between legal adoption of, or moves toward, the group centered effects-test and mobilizing social science knowledge for law and policy making and enforcement (Stryker 2007). This is a promising arena for future research.

Even more fundamental, our analyses of Title VII, the VRA and the FHA suggest that systematic data production is a *necessary* precursor for development and application of the group-centered effects test. Likewise, such data production and availability to researchers is needed to generate capacity for correct diagnoses of structural or institutional aspects of social

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in higher education. In its 2012-13 term, the Supreme Court may well hear *Shelby County Alabama v Holder* (DC Court of Appeals, May 18, 2012), a direct challenge to the continuing need for VRA pre-clearance provisions. As of October 15, 2012, the Court has not yet stated whether it will hear the case.

problems and their solutions. Thus, government initiatives to shut down systematic, recurrent data collection, whether for reasons of cost-savings or partisan political advantage are dangerous.

Consistent with the findings of Stryker et al (2012), our research shows the importance of public-private networks both for advocacy and for data gathering and transmission. Likewise, 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 recent quantitative findings by Stainback et al (2005), 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. This too is a promising arena 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. Like Weber (1946), we do not presume our empirical research generates values or normative consensus. Our research does, however, show that the group-centered effects test is a relatively effective means to meet broadly acknowledged substantive goals embodied in 1960s US voting rights, equal employment opportunity and fair housing legislation.

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