From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation

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In 1964–68, the U.S. Congress enacted comprehensive legislation prohibiting discrimination in employment (1964 Civil Rights Act), voting (1965 Voting Rights Act), and housing (1968 Fair Housing Act). A half-century later, most scholars concur that voting rights was by far the most successful, fair housing was a general failure, and Title VII fell somewhere in between. Explanations of civil rights effectiveness in political sociology that emphasize state-internal resources and capacities, policy entrepreneurship, and/or the degree of white resentment cannot explain this specific outcome hierarchy. Pertinent to President Trump's policies, the authors propose an alternative hypothesis grounded in the sociology of law: *the comparative effectiveness of civil rights policies is best explained by the extent to which each policy incorporated a "group-centered effects" (GCE) statutory and enforcement framework*. Focusing on systemic group disadvantage rather than individual harm, discriminatory consequences rather than discriminatory intent, and substantive group results over individual justice, GCE offers an alternative theoretical framework for analyzing comparative civil rights outcomes.

INTRODUCTION

In June 2013 the U.S. Supreme Court struck down section 4 of the 1965 Voting Rights Act (*Shelby County v. Holder*, 133 S. Ct. 2612 [2013]). Also known

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as the statistical "trigger," section 4 was arguably the single greatest contributor to black enfranchisement over the last half century because it legislated a statistical formula automatically establishing liability for former states of the confederacy without the need for case-by-case litigation requiring proof of discriminatory intent. Many commentators and activists decried the ruling as an attack on long-standing voting protections. One activist summarized, "[in] 2013, we [now have] less voting rights than they had [in] 1965. . . . THIS . . . IS . . . OUR . . . SELMA . . . NOW!" (quoted in Rutenberg 2015, p. 48).

Two years later, the Supreme Court ruled that plaintiffs alleging housing discrimination could win their case by proving a discriminatory effect without having to prove discriminatory intent (*Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 [2015]). The *New York Times* said this ruling "forcefully reminded state and local governments that the Fair Housing Act of 1968 forbids them from spending federal housing money in ways that perpetuate segregation" and should help prevent "affordable housing policies [from making] racial isolation worse" (Editorial Board 2015, p. A18).

Both rulings—and the responses to them—signal that the efficacy of U.S. civil rights policies rests in part on judicial construction and interpretation of legal doctrine. This is especially important given that, under appointees made by President Donald Trump, executive agencies and the Supreme Court likely will move further away from aggressive civil rights law enforcement. From a sociological perspective, the rulings invoke more general theoretical and empirical questions: what factors best explain the strength/weakness of civil rights policies, and why have some U.S. civil rights laws been more successful than others since their legislative enactments in the mid-to-late 1960s? We address these questions through historical-comparative analysis of three potentially transformative civil rights laws: Title VII of the 1964 Civil Rights Act (prohibiting employment discrimination based on race,

ciety, Berkeley, March 2016; Sciences-Po, Centre de sociologie des organisations, June 2015; New Legal Realism 10th Anniversary Conference: New Directions in Legal Empiricism, University of California, Irvine, August 2014; the Society for the Advancement of Socio-Economics, Milan, June 2013; Rights and Their Translation into Practice: Toward a Synthetic Framework, Rogers College of Law, Tucson, November 2012; and L'État des droits: Practiques des droits dans l'action publique, Université de Paris, June 25, 2012. We greatly appreciate feedback received in those venues and from multiple *AJS* reviewers. The authors contributed equally to this article. A National Science Foundation grant to Pedriana (SES-0963418, 2010–11) and a University of Arizona Social and Behavioral Sciences Research Professorship (2011–12) and a fellowship from the Center for Advanced Study in the Behavioral Sciences at Stanford University (2016–17) to Stryker supported this research. We thank those who agreed to be interviewed. Views expressed are ours alone. Direct correspondence to Robin Stryker, Social Sciences Building, Room 400, 1145 East South Campus Drive, Tucson, Arizona 85721. E-mail: rstryker@email.arizona.edu

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

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

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

VOTING, EMPLOYMENT, AND HOUSING: BUILDING A COMPARATIVE DESIGN

Case-oriented comparative methods are appropriate to explain divergent outcomes in U.S. civil rights policy. However, improving on existing explanations must be done in careful dialogue with preexisting theoretical knowledge and empirical research. This requires attending systematically to empirical and theoretical justification for case selection and "comparability": conceptualizing case outcomes, considering why prior theories are inadequate or incomplete, and creating an alternative explanation that can account for the range of observed outcomes. The following sections tackle these issues as we build our research design and conceptual framework.

Important similarities across voting, employment, and housing "cases" make them appropriate for comparison and set the delimited context for our own empirically grounded theory building. Each policy was enacted by federal legislation within the same short time span (1964–68) by a Democratic-

controlled Congress and president amid a movement—albeit at different stages—for black civil rights.[2] Later implementation of 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. Comparing voting, employment, and housing allows us to explore diverse outcomes among three civil rights policies enacted in similar (not identical) ways, at similar times, and within similar political contexts.[3]

Defining and Comparing Case Outcomes

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

One approach defines success as creating formal legal rights against discrimination accompanied by an official enforcement structure. To the extent legislation does this, it might be considered effective (Belz 1991). This is problematic, however, because formal legal rights "on the books" do not translate automatically into use of law in practice, even when enforcement structures are created (Friedman 2005). Alternatively, one might evaluate effectiveness by measuring impact, especially the extent to which legislation transforms resource distributions between the majority and a disadvantaged minority (Rosenberg 1991). Recent sociological research on equal employment opportunity (EEO) law attempts to do just this (Kalev and Dobbin 2006; Kalev, Dobbin, and Kelly 2006; Skaggs 2008, 2009; Hirsch 2009; Stainback and Tomaskovic-Devey 2012).

However, cross-case comparison of civil rights laws evokes an "apples and oranges" dilemma; laws prohibiting discrimination in voting, employment, and housing involve different institutions and practices. Voting rights success indicators including registration rates and voter turnout are rela-

[2] We use the terms law and policy interchangeably to refer to civil rights legislation.

[3] We do not include desegregation of public schools. Although Title VI of the 1964 Civil Rights Act authorized cutting off federal funds to school districts engaged in race discrimination, school desegregation policy initially was established a decade earlier, on constitutional grounds, by Supreme Court rulings in *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483 (1954), and *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294 (1955); see Sutton (2001). Central litigation in public school cases has proceeded on constitutional grounds. For all these reasons, education is not strictly comparable to voting, employment, and housing. However, our discussion section provides some ancillary evidence from federal school desegregation policy that also supports our GCE framework.

tively easy to measure, and most scholars agree that these are key indicators of success for that domain (Lempert and Sanders 1986; Grofman, Handley, and Niemi 1992; Sutton 2001). Once poll tax and literacy test barriers are removed, voting inequalities are not contingent on other inequalities (Lempert and Sanders 1986). Thus, if black voter registration rates skyrocket as they did in Mississippi from 6.7% in March 1965 to 59.6% in September 1967, it is reasonable to attribute a substantial part of this jump to the August 1965 VRA (Grofman et al. 1992, p. 23).

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

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

There is virtual consensus that fair housing was a substantial failure (Staats 1978; Massey and Denton 1993; Denton 1999; Bonastia 2000, 2006; Daye 2000; Yinger 2001; Johnson 2011; Ackerman 2014). 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 more subtle (Sturm 2001). In contrast, in housing, newer, subtler forms of discrimination were accompanied by "the stickiness of quite ordinary forms of discrimination: refusal to rent, sell or make properties available to blacks on the same terms as whites" (Johnson 2011, p. 1191).

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

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

ALTERNATIVE EXPLANATIONS FOR CIVIL RIGHTS POLICY OUTCOMES

This section discusses prior explanations for civil rights policy outcomes, showing how and why these explanations are inadequate. Table 1 summarizes our arguments.

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 (Garrow 1978, 1986; Lawson 1985; Davidson and Grofman 1994; Thernstrom 2009; Light 2010). Fair housing research links failure to the Department of Housing and Urban Development's (HUD's) near complete lack of formal powers (Denton 1999; Lee 1999; Lamb 2005, p. 22).

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 almost identical

TABLE 1
Presence/Absence of Conventional Factors Explaining Extent of Civil Rights Policy Effectiveness for 1965 VRA, Title VII of 1964 CRA, and 1968 FHA

		Bureaucratic Capacities			
Legislation	Strong Enforcement Powers	Conventional Arguments	Single Mission Agencies Argument	Aggressive Policy Entrepreneur in Charge	Significant White Resistance
Voting rights	Present	Present	Absent	Absent	Present
EEO	Absent	Absent	Present	Absent	Absent
Fair housing	Absent	Present	Absent	Present	Present

Note.—Prior arguments presume that the presence of white resistance is associated with less policy effectiveness and that the presence of all the other factors is associated with more policy effectiveness. Yet the 1965 VRA was by far the most effective of the three statutes, the 1968 FHA was a general failure, and Title VII was in between, achieving more than the FHA but far less than the VRA.

to that of HUD. Both were allowed only to conciliate and persuade. If conciliation failed, individual private plaintiffs had to file lawsuits in federal court (Lee 1999; Pedriana and Stryker 2004).[4] Formal enforcement power alone, then, cannot explain the divergent early fates of Title VII and the FHA.

Policy Entrepreneurs

A second 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 (Heclo 1974; Skocpol 1992; Amenta 1998). This also cannot fully explain observed comparative outcomes. Of the three cases, fair housing is 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, including appropriately conditioned funding grants and cutoffs to encourage compliance and punish noncompliance as well as carrot and stick approaches toward local communities and the banking industry (Lamb 2005; Ackerman 2014). But his efforts were unsuccessful.

[4] 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 statutes (Lee 1999; Pedriana and Stryker 2004).

By contrast, the EEOC never produced a Romney-like far-sighted leader. The EEOC's first chairman, Franklin Delano Roosevelt Jr., showed little commitment to strong Title VII enforcement, was routinely absent during congressional appropriations hearings, and resigned within a year. His successors did little better. Nor, with a few key exceptions, did senior staff show major commitment to the agency during its formative years (Graham 1990; Skrentny 1996; Pedriana and Stryker 2004; Stryker, Docka-Filipek, and Wald 2012). In its first five years, the EEOC had 11 different commissioners, four chairpersons, six general counsels, six executive directors, and seven compliance directors (Hill 1977). Yet the EEOC achieved more in curtailing discriminatory employment than did HUD in curtailing housing discrimination.

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

Bureaucratic Capacities

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

Bonastia (2000, 2006) offered an alternative bureaucratic capacity argument in his comparative analysis of Title VII and fair housing, concluding that Title VII fared better than fair housing because HUD, unlike the EEOC, was situated within a disadvantaged "institutional home." Fair housing enforcement was buried within a large HUD bureaucracy and hampered by competition for scarce HUD resources already spread thin among other missions, including construction of subsidized public housing, mortgage and loan assistance, and community relations. By contrast, the EEOC was a "sin-

gle mission" agency whose only job was to enforce Title VII; it could thus more effectively enforce the law with less bureaucratic confusion, rivalry, and red tape (see Bonastia 2000, 2006).

We take special note of Bonastia's arguments for two reasons. First, Bonastia's is one of the few explicitly comparative studies of civil rights outcomes (employment and housing in Bonastia [2000], housing with some comparison to employment and education in Bonastia [2006]). Second, although we agree with some of Bonastia's claims, we disagree with others. In providing our alternative explanation, we retain insights from Bonastia while specifying our disagreements and clarifying the concept of "institutional home."

We and Bonastia consider seriously many of the same potential explanatory factors, including internal bureaucratic resources and infrastructure and policy entrepreneurs. As do we, Bonastia (2006, p. 10) concludes that the policy entrepreneur argument fails. We also agree with Bonastia that, although HUD had "substantial leverage" and "was on its way to spearheading a sustained attack on racial and economic exclusion," "these efforts came unhinged" (pp. 4–5).

Still we are not convinced that equal employment fared better than fair housing because it had a more "advantaged" institutional home. Although HUD's bloated bureaucracy with multiple overlapping departments sometimes worked at cross-purposes to constrain fair housing, the EEOC was in many ways equally "disadvantaged"—albeit for different reasons. Virtually all Title VII analysts concur that, although a single mission agency, the EEOC cannot plausibly be considered "advantaged" (e.g., Graham 1990; Blumrosen 1993; Sutton 2001; Pedriana and Stryker 2004). According to Skrentny (1996, p. 122), "the circumstances of its [the EEOC's] beginnings . . . could fairly be described as a fiasco. . . . The first years of the EEOC were characterized by disorganization." Pedriana and Stryker (2004, p. 713) wrote of the EEOC's absence of "bureaucratic machinery to smoothly set Title VII into motion. The Commission lacked any semblance of a coherent organization. The agency had no official organizational structure, virtually no staff, and no office headquarters." Given such disadvantages, it seems sensible to move beyond "advantaged institutional home" to explain the EEOC's moderate success vis-à-vis HUD. At the least, we must distinguish between various aspects of potential institutional advantage and disadvantage, of which single versus multiple missions is only one.

It also is likely that the same institutional aspects conferring disadvantage in some respects confer advantage in others. Bonastia himself (2006, pp. 4, 90) points to opportunities, as well as constraints, stemming from HUD's multiple missions: "Historically, the federal government has had an easier time securing regulatory compliance from private sector and from other government actors when the incentive of federal funding, or the threat

of withholding these funds, is present. Thus, the 1968 housing production legislation provided HUD with substantial leverage to carry out the antidiscrimination law. The unlikely passage of a fair housing law, coupled with an ambitious federal commitment to address the housing shortage, set the stage for HUD to act swiftly and boldly in the area of civil rights." In short, while civil rights enforcement could make HUD an adversary of developers and communities it needed as allies to address the housing shortage, subsidies offered by HUD development programs also were carrots to make these actors more amenable to meeting HUD's civil rights goals (Lamb 2005; Bonastia 2006). As we will show, some of HUD's greatest remedial leverage in civil rights came from the multiple programs it administered (Johnson 2011). Conversely, single mission agencies are not immune to debilitating internal conflicts over priorities and strategies that can decrease their effectiveness (Stryker 1989).

In voting rights, which Bonastia (2000, 2006) did not analyze, the DoJ was a multiple mission agency, yet it achieved far greater success than did the single mission EEOC. Also, DoJ, like HUD, was spread thin; it was responsible for all federal law enforcement, of which civil rights was a tiny part. For civil rights, the CRD got just 1% of the DoJ budget. Until its 1969 creation of functional subunits, the CRD dealt with all civil rights, not just voting (Graham 1990).[5] So the DoJ's CRD does not appear particularly "advantaged," yet voting rights enforcement was far more effective than both fair housing and equal employment.

We therefore conclude that Bonastia's (2000, 2006) specification of the institutional home argument does not adequately explain why Title VII did better than fair housing or why voting rights did so much better than both Title VII and fair housing. However, we would not jettison the institutional home argument as part of a complete explanation for comparative civil rights outcomes. On the contrary, a policy's institutional home would seem to have multiple dimensions and provide a mix of constraints and opportunities that can be specified further. We come back to this challenge in our discussion and conclusion, after elaborating our own argument and evidence for GCE's centrality to an adequate explanation.

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

Sociolegal scholars do make enforcement power arguments consistent with the success of voting rights contrasted with equal employment and fair hous-

[5] R. Stryker interview with David Rose, Washington, D.C., March 17, 2005.

ing. They 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).[6] Consistent with emphasizing government enforcement, the DoJ could initiate lawsuits supporting minority voting rights (Sutton 2001); neither the pre-1972 EEOC nor the pre-1988 HUD could initiate lawsuits (Pedriana and Stryker 2004; Lamb 2005). Still, both Title VII and the FHA allowed the DoJ to prosecute "patterns or practices" of discrimination (82 Stat 81 [1968]; 78 Stat 241 [1964]), so it is unclear why early EEO law should have been more effective than fair housing. It is equally unclear why both should have been so much less effective than voting rights law.

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

Nixon and White Resentment

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

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

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

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

cannot determine whether white resentment/presidential opposition also is applicable to other civil rights policies. We suggest caution.

Fair housing legislation was born in 1966, in conjunction with "a larger bill to protect civil rights workers, who were being intimidated, beaten, and even killed *as they attempted to organize and register Blacks to vote* throughout the South" (Mathias and Morris 1999, p. 22, emphasis ours). White southerners did try to resist the VRA, and well they might, since restricting voting to whites was a pillar of southern white supremacy. As we will show, this resistance did not derail use of the GCE approach in voting rights. As well, if voting rights did produce less resentment among whites than did equal employment or fair housing, we would also expect federal voting rights laws before 1965 to have been more successful than were fair housing and equal employment law. Evidence casts grave doubt on such a claim.

When the 1965 VRA was enacted, the right to vote free of discrimination already was guaranteed by the Constitution and two federal statutes. Southern whites resisted the 15th Amendment, and Reconstruction's end meant "the beginning of the movement to exclude blacks totally from the southern electorate" (Sutton 2001, p. 7). While the Voting Rights Acts of 1957 and 1960 also outlawed race discrimination in voting, scholars unanimously agree these laws did almost nothing to enfranchise southern blacks (Garrow 1978; Lempert and Sanders 1986, pp. 356–58; Branch 1988; Grofman et al. 1992, p. 15; Sutton 2001, p. 169; Thernstrom 2009; Light 2010). 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? We will argue this is explained by our GCE framework.

Nixon's early record on voting rights also partly undermines the white resentment thesis. During Congress's 1970 debates on extending the VRA, Nixon sought to placate resentful white southerners—an electoral constituency he coveted (Graham 1990, pp. 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 preclearance by the DoJ for any proposed change in voting procedures 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, he did not succeed, and the 1965 VRA—unlike its predecessors—produced significant black enfran-

chisement in the South, especially in states where white resistance to black voting had been especially high (Grofman et al. 1992).

In sum, enforcement power, bureaucratic infrastructure and capacities, and policy entrepreneurship, in conjunction with the Nixon/white resentment thesis, all contributed to voting rights, equal employment, and fair housing outcomes. But none of these can explain adequately, from a comparative standpoint, the hierarchy of outcomes across the three cases.[7] On the basis of prior arguments, voting rights should not have been as effective as it was, equal employment opportunity should have been less effective than it was, and fair housing should have been more effective than it was. We now turn to our law-centered explanation that can explain the observed variability across all three cases.

EXPLAINING COMPARATIVE CIVIL RIGHTS OUTCOMES: THE GROUP-CENTERED EFFECTS (GCE) FRAMEWORK

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 applicable to all lawsuits, and reasoning within an internal referential system strictly separated from considering social context or impact. Substantive law and justice were oriented to achieving economic, social, and political goals. Contemporary sociolegal 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).

Pessimists critical of law's capacity to produce social change are right that lawsuits are tedious, expensive, and typically won by "repeat players" (usually corporate defendants) that litigate similar cases routinely and have large legal and financial resource advantages over individual plaintiffs who are "one shot players" (Galanter 1974). Civil rights statutes often are ambiguous and provide for weak enforcement (Edelman 1992; Dobbin and Sutton 1998; Sutton 2001; Dobbin 2009). Courts cannot enforce their own rulings (Rosenberg 1991). Judicial remedies usually are reactive, tailored to redress injuries suffered by individual complainants rather than operating proactively to change institutionalized behaviors (Chesler, Sanders, and Kalmuss 1988; Edelman 1992; Nielsen, Nelson, and Lancaster 2010; Ackerman 2014).

[7] One reviewer wondered whether differences in success could be explained by whether state or private actors are the main targets of the policy. Our three-case comparative design suggests this is an inadequate explanation because, at their outset, Title VII and the FHA both regulated private rather than state actors, yet Title VII was more effective.

Judges in Title VII cases increasingly defer to practices employers have adopted to comply (Edelman et al. 2011). Some of these strategies improve minority and female outcomes, but other deferred-to practices do not (Kalev et al. 2006; Edelman et al. 2011).

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 resources for progressive social change, enhancing economic resources, political empowerment, or positive identity change for the disadvantaged (Lempert and Sanders 1986; Burstein 1991; McCann 1994; Sturm 2001; Sutton 2001; Pedriana and Stryker 2004; Scheingold 2004; Hull 2006; Kalev and Dobbin 2006; Stryker 2007; Skaggs 2008, 2009; Dobbin 2009; Hirsch 2009; Stryker et al. 2012; Ackerman 2014). While emphasizing the import of substantive law, our argument pertains only to laws that increase the legal resources of disadvantaged and marginalized classes and groups.

Comparing voting rights to equal employment and school desegregation, Lempert and Sanders (1986, p. 390) suggested that, among other factors shaping efficacy, civil rights laws relying for enforcement on methods of proof emphasizing strict liability (i.e., discriminatory effects) would be more effective than laws relying on a criminal law concept of liability (i.e., the strongest version of discriminatory intent) because "the need to show intentionality gets in the way of enforcement." Sutton (2001) showed that strict liability is the most substantive method of legal proof because it establishes liability based purely on social impact/results, rather than on any concept of intent.[8] For Sutton, too, strict liability influences civil rights enforcement success because it typically is harder to show actors' intent than to show the effects of actions or structures (see also Stryker 2001; Ackerman 2014). "Critical legal scholarship" laments U.S. courts' refusal to expand strict liability in civil rights law beyond a few beachheads, charging this promotes ineffectiveness (Freeman 1990; Kairys 1998). Pedriana and Stryker (2004, p. 709) suggested that Title VII was differentially effective over time because it was a "moving target," in which enforcers' willingness to use substantive, effects-based legal interpretation to prove discrimination ebbed and flowed over time. We incorporate different legal concepts of liability and other aspects of law into a broader sociological frame of reference capturing more versus less substantive orientation to civil rights law. We call this the GCE frame-

[8] 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 and some types of product liability rely on strict liability (Lempert and Sanders 1986). Negligence standards for proving liability in tort law do not dispense with proof of intent but do modify proof standards so that the negligence version of "intent" is easier to prove than the criminal law version (e.g., Blumrosen 1972).

work. In building our explanation for how legal doctrine contributes to civil rights policy success, we are indebted to Sutton (2001), who also argued that the formal-substantive law distinction could help account for civil rights law effectiveness.

The GCE Framework and Comparative Analysis

The GCE framework includes four core principles. Although often interrelated empirically, they are analytically distinct elements of a substantive orientation to law. First, discrimination is understood to be a routine feature of social life systematically disadvantaging minority groups, not an isolated act of malice against certain individuals. Second, the 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 or current practices that may or may not be intentional. Liability for discrimination is established by consequences (i.e., "effects") rather than intent.[9]

Third, GCE 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 (Stryker 2001; Sutton 2001; Pedriana and Stryker 2004).[10] This contrasts with passive nondiscrimination or formal procedural justice focused on complaint processing and grievance mechanisms or narrowly tailored compensation for individual victims.

Fourth, consistent with evaluating civil rights policies in terms of their results for minority groups, and with establishing liability and remedies based on patterns of group representation, GCE is conducive to *class actions*, whether public or private. These are a form of collective legal mobilization

[9] Proving the discrimination establishes liability. Those familiar with U.S. civil rights litigation will know that in that context, the term disparate or adverse impact is used to denote methods of proving liability relying mostly on showing effects. However, it is the principle and extent of effects-based proof of liability in law that is pertinent to our broader and sociological concept of GCE, whatever legal term of art is used to signal effects-based liability. Disparate impact should thus not be confused or equated with other aspects of law that we incorporate into our GCE framework.

[10] The GCE framework provides a conceptual foundation for remedial affirmative action in the United States (Belz 1991; Skrentny 1996; Belton and Wasby 2014) but is broader than affirmative action. Except when affirmative action is argued to constitute reverse discrimination against whites because it takes race into account, it pertains to remedies but not to liability for discrimination (Stryker 2001). See our discussion of Title VII for more information on results-based remedies and reverse discrimination challenges to them.

consolidating many similar claims into one lawsuit usually involving large stakes in financial awards or legal precedent (Stryker 2007).[11]

The GCE framework is not a discreet "either/or" characteristic present or absent in each case. We instead imagine it along an ideal-type continuum in each domain. At one end is a pure GCE approach; at the other, a statutory and enforcement model confined to individual plaintiffs, requiring proof of discriminatory intent, ignoring statistical patterns produced by institutionalized practices, and forgoing results-oriented remedies in favor of procedural and compensatory remedies for individual victims of discrimination. In between are many legal nuances and gradations. We examine the extent to which and how each civil rights policy "on the books" and "in action" incorporated such an approach, and from this we extract our central hypothesis: *civil rights policy effectiveness varies by the degree to which civil rights law embodies the GCE statutory and enforcement framework*. Our GCE hypothesis presumes that voting rights was most successful because it embodied the strongest GCE approach, fair housing was the least successful because it embodied the weakest GCE approach, and equal employment fell somewhere in between because it incorporated a moderate GCE approach.[12]

Immediate Causes versus Historical Process

That comparative civil rights outcomes can be explained by our GCE framework is an argument about causes most proximate in time to those outcomes. Such an "immediate" cause in turn results from historical pathways operating as more distal causes. Although the comparative historical sequences

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

[12] Our GCE framework complements Ackerman's (2014) emphasis on effects-based liability and remedies in describing recent developments in U.S. constitutional order. We extend Ackerman (2014) by incorporating variable legal approaches to liability and remedy into an explicit systematic sociological framework aimed at explaining civil rights policy success. Sutton (2001) directly prefigures the first two elements of our GCE framework but does not signal the potential import of class actions or specify a general analytic notion of results-oriented remedies (although he does discuss affirmative action in Title VII). Nor does Sutton analyze fair housing, which in its contrast with equal employment allows us to understand why two statutes that provided identical individual- and intent-based concepts of discrimination were differentially effective.

through which each of our cases arrived at greater or lesser commitment to GCE warrant analysis, such a full process tracing is beyond this article's scope. We do provide sufficient process tracing to make plausible suggestions for how and why GCE in fair housing was nipped in the bud while Title VII enforcement incorporated GCE to a limited degree.

To prefigure, one reason why fair housing never pursued aggressive GCE may be because there was so much white resentment to integrated housing. Similarly, one reason why equal employment wound up with moderate GCE may be because Title VII was weak and the agency enforcing it had little formal power, yet pressure from civil rights constituencies promoted creative enforcement providing courts with the opportunity to construct some effects-based methods of proving and remedying employment discrimination (Pedriana and Stryker 2004). These ideas are especially useful to investigate in future research because they partly reconcile our core argument with prior explanations and specify a more complete theory.

Here, however, having shown that prior explanations are inadequate, our objective is to show that the comparative effectiveness we observe across our three cases is consistent with a proximate explanation centered on GCE. We return to issues of generalizability, the possibility of multiple or conjunctural causation (Ragin 1987), and theorizing potential causal chains that include further specification of white resentment in our discussion and conclusion. But first we investigate whether the variable effectiveness we observe in our cases is consistent with expectations generated by our GCE framework. In so doing, we maximize analytic leverage by not only comparing across policy domains but also exploiting a "cases within cases" design (Ragin 1992) to identify and analyze variability in GCE within policy arenas across time periods and doctrinal areas. We first compare the legislative context and statutory language of voting rights, equal employment, and fair housing legislation. We then move to enforcement.

Judicial enforcement and argumentation frameworks established early on have more influence on the effectiveness and impact of regulatory statutes because U.S. judicial enforcement is precedent based and backward looking (Stryker et al. 2012). Thus, we focus especially on the pre-1985 period but also provide a brief analysis of continuities and change within each domain after the mid-1980s, concentrating especially on breaks with earlier path dependencies.

THE LEGISLATIVE CONTEXT AND STATUTORY LANGUAGE OF VOTING RIGHTS, EQUAL EMPLOYMENT OPPORTUNITY, AND FAIR HOUSING LAW

Debated and passed amid a mostly peaceful civil rights movement in which nonviolent protest exposed Jim Crow's hypocrisy and brutality by generat-

ing violent white southern repression, Title VII and the VRA were more similar in context for enactment than either was to fair housing. The general northern public, Congress, and the president supported Title VII and the VRA (Burstein 1985). Still, it took President Kennedy's death and President Johnson's subsequent leadership to fully galvanize Congress (Graham 1990, p. 135).

By 1968, the northern interracial 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. 255–73). In 1966–67, President Johnson sent Congress a bold civil rights bill including a fair housing section. Congress refused (Graham 1990; Mathias and Morris 1999). Finally, in the wake of Martin Luther King Jr.'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. 270–73; Mathias and Morris 1999).

Thus, Title VII and the VRA were enacted during northern consensus favoring relatively bold new civil rights protections. Fair housing was enacted when that consensus had begun eroding but Congress had not yet abandoned pro–civil rights impulses and President Johnson remained firmly in support. But when we turn attention to each statute's text, the similarities between Title VII and the VRA end, and Title VII's similarities with the FHA begin. Title VII and the FHA's language and requirements are almost identical, and neither resembles that of the VRA. Table 2 summarizes our comparative discussion of the text of the three statutes.

TABLE 2
Enactment (Text of Legislation)

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

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

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

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

Once section 4 triggered a violation, sections 4(a) and 5 suspended literacy tests (or their equivalent) and required that the attorney general "preclear" any future change to any voting requirement in an offending jurisdiction (Graham 1990, p. 174; Grofman et al. 1992, p. 17). This was unprecedented expansion of federal authority over state voting criteria. Under section 5 preclearance, 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, emphasis ours).

Thus, the VRA's statutory text unambiguously incorporated an aggressive GCE framework for voting rights enforcement. The definition of liability and the remedy—abolition of all literacy tests, whether or not their intent had been to discriminate, and preclearance explicitly focused on results of

proposed rule changes—hinged on effects. The statutory statistical trigger made it easy to show violation and made clear that the violation in covered jurisdictions was structural and systemic. Covered jurisdictions could not invoke form over substance to get out of violator status and need for preclearance.

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

ENFORCING VOTING RIGHTS, EQUAL EMPLOYMENT OPPORTUNITY, AND FAIR HOUSING

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

Voting Rights

As discussed earlier, the Voting Rights Acts of 1957 and 1960 already were on the books when Congress enacted the Voting Rights Act of 1965, but consistent with what we would expect given our GCE framework, both had minimal impact on black voter registration in the South. The 1957 Act "required that suits be filed on behalf of individually named plaintiffs [against] individual voter registrars" (Sutton 2001, p. 168). Intent had to be proved, and "registrars [could] eliminate evidence of intent by destroying records [and they could] void suits entirely simply by resigning" (p. 168). While the 1960 statute did recognize the systemic nature of voting discrimination by allowing the DoJ to file suit against counties on behalf of all blacks denied the right to vote, discriminatory intent based on race still had to be proved, and even the most egregious racial imbalances could be defended against successfully by invoking grounds such as failure to pass literacy tests (Sutton 2001). In the

TABLE 3
ENFORCEMENT

VRA of 1965	Title VII of 1964 CRA	FHA of 1968
Expanded to cover any and all voting procedures	EEOC institutes requirement that employers keep records and submit to EEOC workforce distributions by race and other protected group classifications (1965–66)	No administrative requirement for housing sellers, renters, mortgage lenders, and so on, to keep or submit records by race or other protected group classifications (1968–89)
In *Allen v. State Board of Elections*, 1969, Supreme Court says section 5 effects-based standard covers dilution of minority votes, so that jurisdictions subject to preclearance must defend any change in voting procedures by proving the voting change does not dilute minority vote	Supreme Court rules in *Griggs v. Duke Power*, 1971, establishing disparate impact as an effects-based standard for plaintiffs to prove liability in Title VII lawsuits	No HUD administrative regulation issued to promote an effects-based standard to prove liability until 2013 (in 1994 HUD does join in interagency policy statement approving disparate impact proof methods)
1982 VRA amendments make clear that in jurisdictions not subject to preclearance, effects-based standards for liability are allowed; violation is proved under section 2 if plaintiffs can prove voting procedure does dilute minority vote	Numerous class actions with institutional and systemic focus, 1966–80	Lower federal courts do endorse disparate impact in 1974–84, but the proof standards are ambiguous and not as tough on discriminators as effects-based proof standards under Title VII
But 2013 rollback: Supreme Court in *Shelby County v. Holder* strikes down section 4's statistical trigger for section 5 preclearance	GCE-centered EEOC *Testing Guidelines* (1966, 1970) expanded into *Uniform Guidelines on Employee Selection Procedures*, promulgated in 1978	No Supreme Court endorsement of disparate impact proof of liability until 2015, in *Texas Department of Housing v. Inclusive Communities*; this endorsement, many years too late, also leaves effects-based liability more limited under the FHA than under Title VII
	EEOC *Affirmative Action Guidelines* promulgated in 1979	But more recent GCE enforcement initiatives: "reverse redlining" lawsuits from 2007, HUD regulation defining "AFFH" and setting race composition requirements for public housing in 2006, more stringent AFFH regulation in 2015
	But 2011 rollback: Supreme Court in *Wal-Mart v. Dukes* restricts certification of large, systemic class actions (this ruling under the Federal Rules of Civil Procedure affects civil rights lawsuits across all domains of federally provided civil rights)	

few instances of successful litigation, only black voters in that particular county could be registered.

By contrast, armed with an effects-based text creating automatic liability across entire southern states and massive expansion of federal authority, the 1965 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 1 million southern blacks had registered, "the vast majority under the supervision of the same local registrars who formerly prevented them doing so" (Light 2010, p. 64; see also U.S. Commission on Civil Rights 1970). By 1967, the black-white voter registration gap in covered jurisdictions had diminished from 44.1% in 1965, when the VRA passed, to 27.4% in September 1967 (Grofman et al. 1992, p. 23). By 1972, 57% of eligible blacks were registered in the seven originally covered states, reducing the black-white registration difference from 44% to 11% (Light 2010, pp. 64–65).

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

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

Although President Nixon tried to weaken VRA enforcement, the VRA amendments of 1970 further extended preclearance to include jurisdictions in which less than half the voting age population either was registered to vote or had voted in the 1968 presidential election. This extended preclearance to some jurisdictions in the North (Grofman et al. 1992, p. 19). Since 1970, Congress has reauthorized preclearance three more times, in 1975 (for five years), 1982 (for 25 years), and 2006 (for another 25 years), albeit over

southern resistance and, in both 1982 and 2006, without further updating section 4's coverage formula (Grofman et al. 1992, p. 39; Toledano 2011, pp. 396–97). The 1975 amendments also expanded VRA protections to language minorities (Grofman et al. 1992, pp. 20–21).

With respect to judicial construction, before the 2013 Supreme Court decision in *Shelby County*, substantial judicial doctrine further extended GCE in voting rights. For example, in *Allen v. State Board of Elections*, the Supreme Court ruled that VRA section 5 extended beyond protecting the right to cast a ballot to ensure that minority groups had a reasonable opportunity to elect their preferred candidates. At issue were changes in election procedures in Mississippi and Virginia that "diluted" the minority vote, that is, minimized its impact. Ruling that VRA preclearance applied to changes in election procedures as well as to changes in registration and ballot access, the Court stated that voting included "all action necessary to make a vote effective. . . . The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" (*Allen v. State Board of Elections*, 393 U.S. 544 [1969], pp. 565–66, 569).

After *Allen*, the DoJ used preclearance "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% to 5.6%, below their population percentage but still a substantial gain (p. 171). Grofman and Davidson's (1994) analysis of city council elections shows that much of this growth came from change in the type of election. Handley and Grofman's (1994) similar analyses of African-American gains in state legislative elections suggest that DoJ pressure to redraw district boundaries and create single-member districts was crucial. African-Americans were 1.3% of state senators and 1.9% of state house members in the South in 1970; in 1985, the figures were 7.2% and 10.8%, respectively (Sutton 2001, p. 171). Meanwhile, by 1990, the black-white registration gap among eligible voters nationwide itself had shrunk to 5%, with 59% of eligible black Americans and 64% of eligible white Americans registered (Toledano 2011, p. 396).

Since *Allen*, and until very recently, much VRA politics and litigation involved race-conscious redistricting, including creating "safe" districts for minority candidates (Grofman et al. 1992). For jurisdictions not covered by preclearance, voting rights plaintiffs had to litigate to prove a VRA violation. The 1982 VRA amendments responded to a 1980 Supreme Court ruling that seemed to interpret liability for vote dilution under VRA section 2 to require proving intent. The 1982 Act made clear that vote dilution allegations under section 2 also would be evaluated by effects, not intent (p. 39). Moreover, "the extent to which members of a protected class have been

elected to office . . . [was] one circumstance that [might] be considered in establishing *the impact* of altered election procedures" (p. 39, quoting 1982 amendments, emphasis ours).

In sum, the general success of the 1965 VRA can be attributed to the very aggressive GCE framework it embodied in its text and enforcement.[13] This is why voting rights advocates were so alarmed by the Supreme Court's 2013 ruling abolishing the statistical trigger, and thus abolishing the effects-based statutory presumption of violation that automatically invoked federal preclearance for covered jurisdictions.

Before the 2013 ruling, voter ID, polling time, early voting, absentee ballot, and other voting rules that disproportionately disadvantaged blacks and Latinos already were issues. But the DoJ could—and did—use section 5 to prevent jurisdictions governed by preclearance from adopting many such rules. Where preclearance-covered jurisdictions could not change voting rules without first proving the proposed changes would not have adverse effects on minorities in noncovered jurisdictions, plaintiffs contesting voting rules with likely disparate impact on minorities had to bear the burden of proving that impact in court (Weiser and Norden 2011).

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

The Obama DoJ prioritized mitigating the damage voting rights advocates attributed to *Shelby County*, initiating multiple lawsuits alleging VRA violations under section 2 (Toobin 2014). However, these "after-the-fact" lawsuits can be time-consuming and expensive. In lawsuits in Texas and North Carolina, the Obama DoJ also tried to mobilize a little-used VRA provision: section 3 authorizing judges to require remedial federal oversight—a so-

[13] With a statutory statistical formula for establishing liability followed by preclearance, one moves directly to remedy, so there is no need to consider the class action element that only becomes relevant when litigation is required. In non-preclearance-covered jurisdictions, whether VRA litigation is brought by the federal government or private plaintiffs, it proceeds against states and localities, necessarily implicating all eligible voters in the jurisdiction. Thus, some legal scholars refer to VRA lawsuits as "de facto class actions," although the litigation is not a formal class action governed by the Federal Rules of Civil Procedures (Morley 2016). As we will show, that early Title VII had many more class actions than did the FHA contributed to the greater effectiveness of Title VII relative to fair housing.

called bail-in reinstating preclearance for a jurisdiction first proven in court to have intentionally violated the VRA. But achieving case-by-case remedial bail-ins would be extremely difficult, given that bail-ins are authorized only in cases of proven intentional discrimination (Eckholm 2015).

Fourteen states had voting restrictions in place for the 2016 presidential election that did not exist before the *Shelby County* ruling (Brennan Center 2016). Federal courts of appeals did strike down voter ID requirements in Texas and North Carolina, but this set up postelection litigation in a Supreme Court reshaped by President Donald Trump. Both a reshaped Supreme Court and the Trump administration DoJ led by newly confirmed Attorney General Jeff Sessions are likely to be unfriendly to aggressive VRA enforcement. Thus, while voting rights plaintiffs and the Obama DoJ made the most of VRA sections 2 and 3—and while overall, the VRA has embodied GCE far more than Title VII or the FHA—today's VRA will remain much less effective than was the pre-2013 VRA with its effects-based statutory statistical trigger automatically invoking federal preclearance for a large section of the country.

Equal Employment Opportunity

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

Genesis and Limits of Disparate Impact

When Title VII went into effect, it and the EEOC were ill equipped to attack systemic discrimination. Staff highlighted limits in early internal memoranda; commissioners lamented limitations in early staff meetings (Pedriana and Stryker 2004). But what if—despite Title VII's emphasis on complaint processing for individuals and apparent requirement of discriminatory intent—the statute's class action tool could be used to litigate routine employment practices that disproportionately screened out racial minorities, regardless of employers' motives? Making Title VII more effective likely would require moving partly toward a GCE enforcement framework (Cooper and Sobel 1969; Blumrosen 1972).[14]

[14] Unless otherwise noted, discussion of early Title VII enforcement in the next five paragraphs and associated notes relies on Pedriana and Stryker (2004), Stryker et al. (2012), and primary documents cited therein.

Use of cognitive tests to screen applicants for blue- and white-collar jobs increased in Title VII's wake. On their face, cognitive tests were "color blind" and so apparently complied with Title VII. But because blacks historically had been denied equal educational opportunities, whites, on average, outscored blacks by a significant margin. Consequently, whites received a highly disproportionate share of better jobs and blacks remained locked out of the workplace or into very menial, low-paying jobs. Even when tests lacked discriminatory motive or intent, blacks were disproportionately disadvantaged, evidenced by comparative group statistics. There was widespread concern among industrial psychologists about "dangers to equal opportunity if tests were used absent appropriate validation—assessment of whether and the degree to which tests reflected real differences in capacity to do the jobs for which employers hired" (Stryker et al. 2012, p. 786). In the mid-1960s, few employers validated tests. In 1970, the EEOC issued its *Testing Guidelines* (35 Fed. Reg. [Aug. 1, 1970]) stating that employment tests that disproportionately screened out black workers violated Title VII unless the employer could validate the test as "job related" and an accurate predictor of job performance.

Testing was the issue in 15%–20% of early Title VII cases, and the fundamental question was whether complainants could prove unlawful discrimination based largely on group statistical distributions, in the absence of proving discriminatory intent with respect to particular persons. 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 was the disparate impact/adverse effects liability standard that the 1971 Supreme Court established in the class action litigation *Griggs v. Duke Power Company*.[15] The *Griggs* court looked beyond Title VII's language of individual nondiscrimination: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" (401 U.S. 424 [1971], p. 430).

Because Title VII said that "professionally developed" tests did not violate Title VII as long as they were not used to discriminate, litigation addressed the meaning of "professionally developed." Consistent with the EEOC *Testing Guidelines*, plaintiffs interpreted "professionally developed" to mean job

[15] 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.

related. If a test had disparate impact on minorities, and employers could not show it was job related, the test was discriminatory. The Supreme Court agreed. Ruling that Title VII should not be restricted to methods requiring proof of discriminatory intent, the Supreme Court applied job relatedness to all employment practices.[16]

A few years later in *Albemarle Paper v. Moody*, 422 U.S. 405 (1975), the Court clarified and expanded the *Griggs* doctrine, equating tests' job relatedness with using stringent standards for test validation. In 1978, four agencies, including the EEOC, the DoJ, the Labor Department, and the Civil Service Commission (later renamed the Office of Personnel Management), jointly adopted even more elaborated and extremely stringent guidelines covering tests and other selection procedures: *The Uniform Guidelines on Employee Selection Practices* (43 Fed. Reg. 38289–315 [Aug. 25, 1978]). Despite much employer dissatisfaction, the *Uniform Guidelines* remain in force today (Stryker et al. 2012).

In sum, *Griggs* endorsed a GCE approach to Title VII liability. But, unlike the automatic statistical trigger for jurisdictions covered by VRA preclearance, Title VII plaintiffs mobilizing disparate impact had to establish the adverse impact of specific selection devices used by employers in every case. Effects are more easily established than intent, but case-by-case proof of disparate impact creates factual issues often requiring time-consuming, expensive litigation—something voting rights advocates also feared in the wake of the Supreme Court decision in *Shelby County*. Because of this—and because disparate impact originally had no explicit statutory basis but rather was a judicial construction fairly easily eroded over time[17]—Title VII embodies the GCE framework in a much weaker form than the VRA. This is consistent with consensus that equal employment law produced far fewer benefits for blacks than did the VRA.

Still, the conservative Reagan administration mounted a concerted attack on disparate impact in equal employment law enforcement (U.S. Department of Justice, Office of Legal Policy 1987). The administration also supported private employers who tried to undermine disparate impact in court. But ironically, the DoJ continued using disparate impact to prosecute race discrimination in state and local government employment (U.S. Commission on Civil Rights 1987; Ugelow 2005).[18] Once Clarence Thomas became EEOC chair in 1982, the EEOC de-emphasized systemic enforcement, high-

[16] Title VII enforcement also includes two intent-based proof models. For details, and comparison of these with the disparate impact proof model, see Stryker (2001).

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

[18] 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).

lighting the need to resolve individual complaints and "make whole" identified individual victims (U.S. Congress, House of Representatives 1985*b*).[19] Thomas found statistical proof of adverse impact and a group orientation to liability and remedies flawed. He reduced but did not eliminate completely EEOC prosecution of class actions relying on statistics (U.S. Congress, House of Representatives 1985*a*, 1985*b*; U.S. Commission on Civil Rights 1987).[20] In 1989, when an increasingly conservative Supreme Court reinterpreted the disparate impact proof model so as to weaken its effectiveness against employers, Congress was able to partially—but not fully—restore the earlier punch, by amending Title VII (see Stryker et al. 2012; Stryker, Scarpellino, and Holtzman 1999).

In *Ricci v. DeStefano*, 557 U.S. 557 (2009), an employment testing case involving the New Haven Fire Department, recently deceased Supreme Court Justice Antonin Scalia wrote a concurring opinion suggesting that soon, a conservative court majority might push to eliminate Title VII disparate impact doctrine on constitutional grounds. This has not yet happened, but it may, given that President Trump may be able to make multiple new conservative appointments to the Court.

Other Group-Centered Aspects of Early Title Enforcement

Voluntary and court-ordered remedial affirmative action plans characteristic of early Title VII enforcement bear strong imprints of GCE. Affirmative action as part of Title VII enforcement was made possible by the EEOC's very early policy mandating standardized employer reporting of race and ethnic (and gender) composition of major job categories; these are known as the EEO-1 reports (Graham 1990, pp. 190–201; Skrentny 1996). In 1979, the EEOC published affirmative action guidelines for employment, to help ensure that all employers knew that Title VII supported voluntary affirmative action. In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court essentially endorsed the EEOC's *Affirmative Action Guidelines* allowing numerical goals and timetables, while ruling that an employment training program adopting temporary, voluntary race-based quotas was permitted under Title VII and did not constitute reverse discrimination. *Weber* was the high water mark for judicial acceptability of a voluntary approach to affirmative action.

Backed by the Supreme Court, the EEOC thus incentivized employers to adopt voluntary affirmative action, including effects-based minority hiring goals and timetables. Affirmative action programs spread quickly in public

[19] See also R. Stryker interviews with Al Golub, Silver Spring, Md., March 18, 2005, Washington, D.C., June 8, 2008.

[20] R. Stryker interview with Mark Rosenblum, Washington, D.C., June 4, 2008.

and private sector employment, so that by the late 1980s, affirmative action was widespread in the American workplace (Edelman 1992; Reskin 1998; Stryker 2001; Dobbin 2009). The EEOC's *Affirmative Action Guidelines* remain in force today, and two 1980s Supreme Court decisions also made clear that judges could order remedial "goal and time-table" affirmative action in cases in which they found "widespread, systematic and egregious" employment discrimination (Player 1988, p. 312). However, both Reagan administration assistant attorney general for civil rights William Bradford Reynolds and EEOC chair Clarence Thomas strongly disliked remedial goals and timetables and limited use of them in government-brought lawsuits (U.S. Commission on Civil Rights 1987).[21] And with continued political and legal attacks on the constitutionality of affirmative action a constant over the last 30 years, effects-based remedies for employment discrimination remain partially curtailed (Pedriana and Stryker 1997; Harper and Reskin 2005).

Title VII: Between Civil Rights Policy Success and Failure

Early Title VII enforcement moved a surprising distance toward GCE but embodied a far weaker variant of this approach than the VRA. Evidence suggests that Title VII 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 GCE.

Stronger, longer-lasting, and more frequent reliance on effects-based liability could have made Title VII more effective, especially if accompanied by a fully effects-based interpretation of remedial affirmative action. Donohue and Heckman's (1991) review of civil rights law's impact on black-white labor market inequalities among men found that the greatest impact occurred in 1965–75, when EEO law most emphasized a GCE approach to liability. Black men benefited 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 U.S. workplaces especially from 1966 to 1972 and somewhat from 1973 to 1980, when the entire federal government favored aggressive affirmative action. Later periods saw minimal or no gains. Other research also shows the greatest benefits of equal employment policy for blacks in the early enforcement period (Leonard 1984; Smith and Welch 1984). Kalev and Dobbin (2006, pp. 855–56) found that compliance reviews in the 1970s were more effective than such reviews in the 1980s.

[21] See also R. Stryker interview with Alfred Blumrosen, New York, June 5, 2008.

Clearly, the early impact of federal EEO law could have been greater still and would likely have been so had affirmative action goals and timetables been hard quotas, as their critics charged they were (Leonard 1990, p. 54; Burstein 1993; Stryker 2001). That impact was greatest, yet still modest, in the early enforcement period is consistent with our hypothesis emphasizing the role of the GCE framework. Also consistent, Kellough's (1989) study of two government agencies found that increasing emphasis on affirmative action goals and timetables—a relatively effects-based approach—enhanced minority employment. Reviewing research on affirmative action, Reskin (1998) likewise argued that goals and timetables, and monitoring and rewarding results, increased effectiveness. Kalev et al. (2006) showed that private sector affirmative action increased representation of blacks and women in top management.

But what about evidence pertaining to disparate impact proof of liability, especially given that, even in *Griggs*'s immediate aftermath, disparate impact causes of action accounted for just 9% of all employment discrimination cases filed and, by the late 1980s, just 5% (Stryker 2001, p. 23)? First, Burstein and Pitchford's (1990) analysis of Title VII appellate cases, 1965–85, supports our claim that plaintiffs more easily win disparate impact cases than cases requiring proof of intent. Second, despite their small numbers, disparate impact lawsuits targeted "large, industry leading firms" (Stryker 2001, p. 24). This, combined with its effects-based nature, gave disparate impact doctrine high visibility in the personnel management and business press, convincing employers that the threat of time-consuming, costly litigation, bad publicity, and adjudicated liability was real (Pedriana and Stryker 2004; Dobbin 2009). This in turn encouraged employers to change their practices to preempt litigation.

In 1973, a prominent organization of large employers, the Conference Board, noted that following *Griggs*, "leading companies have reported that the central thrust of the court decisions dealing with non-discrimination have become sufficiently clear to serve them as a reliable guide to action" and that courts were imposing "broad penalties and stringent controls" and "saying that it is the *results* of an employer's actions, and not his intentions that determine whether he is discriminating"; consequently, "rapid changes" would be needed for companies to "avoid serious legal problems" (Pedriana and Stryker 2004, p. 745, quoting Schaeffer). 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. 761). African-American mayors also used "disparate impact challenges to testing" to promote minority hires in city employment (Goldstein 2010, p. 757). Burstein and Edwards (1994) conclude that disparate impact, along with class actions, positively affected blacks' earnings in the 1960s and 1970s.

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

Fair Housing

Even though the FHA's text and enforcement structure paralleled Title VII, and even if fair housing threatened whites more than did Title VII or the VRA, HUD was initially in a stronger position than the EEOC to build GCE-based enforcement. For a few years HUD boldly, but somewhat secretly, considered enforcement more aggressive in vision and anticipated results than anything the EEOC achieved.

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

In addition, where both the VRA and Title VII benefited from favorable judicial rulings after passage, the Supreme Court significantly expanded equal housing rights before the FHA's enactment. As Congress debated the FHA, the Supreme Court handed down *Jones v. Mayer*, 392 U.S. 409 (1968), a landmark ruling resurrecting a Reconstruction-era statute barring race discrimination in housing sales and rentals and clarifying that it applied to housing discrimination by private actors as well as government. *Jones* made no reference to GCE issues. But in conjunction with a visionary policy entrepreneur and HUD's fund cutoff authority, it seemed that legislative, administrative, and judicial efforts all were pushing aggressive fair housing. By 1968–69, HUD also could look for inspiration to EEOC creativity and VRA success.

Why did the promise of the first few years, when Romney stated that HUD's mission was to "pursue policies directed not only at nondiscrimination but at the elimination of segregation as well" come to so little?[22] 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

[22] Romney to Sloane, Dec. 9, RG 207, REL 6-2, box 68, folder "Sept. 9–Dec. 31 1969," p. 1, U.S. Department of Housing and Urban Development Papers, National Archives, College Park, Md. (hereafter HUD Papers).

on behalf of individual victims (Schwemm 1988; Selmi 1998). In 1966, an interagency task force deliberating options for fair housing legislation considered a proposal containing a VRA-like trigger leading to remedial action where Congress found serious housing discrimination to exist. But the task force could not identify any "feasible formula" for the trigger, and the proposal died (Graham 1990, p. 265). Unlike overt, race-based denials of voting rights, overt housing discrimination plagued the entire country, including especially northern cities, making a statistical trigger policy politically thorny (Denton 1999; Lamb 2005).

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

Where the early EEOC moved quickly to generate employer record keeping and reporting on which it based targeted enforcement, publicity, and voluntary affirmative action, the early HUD wrote no administrative rules or interpretive guidelines articulating or promoting effects-based enforcement (Johnson 2011). Nor did the early HUD engage in information sharing, networking, or informal enforcement collaboration with private advocacy groups that characterized early Title VII enforcement (Johnson 1995, 2011). Notwithstanding lower court rulings adopting disparate impact as an adjunct to intent-based fair housing enforcement, the Supreme Court failed to endorse disparate impact in housing until July 2015 (Schwemm 1988; Schwemm and Taren 2010; Seicshnaydre 2013; *Texas Dept. of Housing v. Inclusive Communities*). An innovative fair housing analogue to aggregate goals and timetables affirmative action in employment came very late to FHA enforcement, although it could have been practiced much earlier. Finally, where large, industry-leading private employers offered institutional leverage for results-based EEO enforcement, early FHA enforcement had no such leverage point. Real estate agents were locally based and dispersed; both homeowners and landlords typically dealt with one or a small number of units (Schwemm 1988; Johnson 2011).

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

and the VRA and with respect to variation within FHA enforcement—supports our GCE hypothesis.

Early HUD Initiatives

In 1969, HUD launched Open Communities and Operation Breakthrough (Lamb 2005). Both were bold initiatives for suburban and racial integration. Planning both was made possible by HUD's multiple missions of fighting race discrimination in housing while meeting a dramatic shortage of affordable housing (Lamb 2005; Bonastia 2006). An undated HUD memorandum titled "A Strategy for Metropolitan Open Communities" pointed out that "[the FHA] mandates HUD to use its own programs for achieving open occupancy goals. . . . Massive new subsidized [housing] programs [are] major mechanisms for achieving metropolitan open communities."[23]

As one HUD official summarized, "the 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."[24] A confidential draft of HUD's proposed Open Communities policy in late 1969 concurred with Daniel Patrick Moynihan's advice that "'the 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.'"[25]

This was not the language of passive nondiscrimination and individual complaint processing; it called for nothing less than a full-on GCE approach. How to achieve that goal was complicated and controversial. HUD's authorization under the Omnibus Housing Act of 1968 to increase substantially the supply of affordable housing provided both opportunities and constraints. The National Association of Home Builders was a natural ally because HUD's quest to have more subsidized low-income housing built in the suburbs increased development opportunities for private builders. Communities and the white public were another matter.

Integrating housing by race as well as by income meant that federal officials might set numerical targets for minority composition of suburban com-

[23] "A Strategy for Metropolitan Open Communities," n.d., RG 207, box 10, general records of Richard Van Dusen 1969–72, ADM1–16, folder 1, "Open Communities," 1969, p. 5, HUD Papers.

[24] Schechter to Chapin, Aug. 7, RG 207, ADM-1, Subject Files of Richard C. Van Dusen, box 10, folder "Open Communities," p. 1, HUD Papers.

[25] "Draft for a HUD Policy on Open Communities," Sept. 22, RG 207, ADM-1, Subject Files of Richard C. Van Dusen, box 10, folder "Open Communities," p. 3, HUD Papers.

munities and neighborhoods as a condition for the federal housing funds given to localities for technical assistance and building the water and sewer lines required for further housing development (Lamb 2005; Bonastia 2006). Numerical targets by race were precisely the type of results-driven remedies that brought strong white opposition to busing and other (perceived) coerced school integration efforts. White suburban communities wanted and needed government assistance for further growth, but that did not mean that they wanted racial integration (Lamb 2005).

HUD was keenly aware of potential fallout and kept early deliberations under the radar, hidden from Nixon and the general public (Lamb 2005). One internal HUD memorandum reminded Secretary Romney, "the 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."[26]

Nor was it clear that HUD had authority to preempt state and local housing policy when deciding whether to provide or cut off federal housing grants to suburbs. Local zoning ordinances limiting or prohibiting construction of low-cost housing were among the most used means by which suburbs preempted racial or economic integration. HUD and Romney viewed such restrictions as the major threat to HUD objectives (Shipler 1970).[27] In 1969–70, Romney and senior staff considered good-cop/bad-cop strategies to woo progressive-minded cities and threaten holdouts. Meanwhile, the federal courts were dealing with fundamental questions involving fair housing, generally, and the scope of federal power over historically autonomous state and local housing laws, specifically.

As the courts were trying to sort things out, the public got wind of HUD's plans. Outraged responses from politicians and citizens alike quickly found their way to the White House (Herbers 1970, p. 153). At that point, the politics of white resentment took over and more or less ended whatever HUD momentum had existed for an aggressive GCE approach (Congressional Quarterly 1970; Lamb 2005).

Still, if Romney's grand designs for residential integration proved politically unrealistic, perhaps a more limited GCE approach similar to that endorsed for Title VII by *Griggs* could be reached. Like the EEOC, HUD could issue interpretive guidelines, but unlike the EEOC, HUD provided no early guidelines defining or promoting effects-based liability for the FHA (Johnson 2011). Even so, discriminatory housing practices were also challenged

[26] Van Dusen to Romney, Aug. 15, RG 207, ADM-1, Subject Files of Richard C. Van Dusen, box 10, folder "Open Communities," p. 1, HUD Papers.

[27] Van Dusen to Assistant Secretaries, Jan. 23, RG 207, ADM-1, Subject Files of Richard C. Van Dusen, box 10, folder "Open Communities," HUD Papers.

through private lawsuits, and through the mid-1970s, federal courts were as friendly to housing discrimination plaintiffs as they were to employment discrimination plaintiffs. Collectively, the courts seemed to hint at an effects-based concept of FHA liability (Schwemm 1988; Lamb 2005; Seicshnaydre 2013).

Fair Housing in the Courts

Fair housing policy and HUD confronted an even greater number of entrenched actors and practices than did equal employment. These included private and public sellers, banks and mortgage lenders, realtors, government housing contractors, and state and local governments. Discriminatory housing practices included redlining, blockbusting, and restrictive covenants, and local ordinances allegedly violated the FHA, the Equal Protection Clause of the U.S. Constitution, or both.[28]

Early on, a number of lower federal courts referred explicitly to discriminatory effects as one guiding principle in fair housing (Seicshnaydre 2013). Some early cases stated that HUD had an affirmative duty to assure nondiscrimination by considering racial effects of housing practices (Johnson 2011; Schwemm 2012). From 1974 to 1984, 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 FHA disparate impact liability included the DoJ (Schwemm 1988; Seicshnaydre 2013). However, unlike the Supreme Court's Title VII stance, the 1970s Supreme Court never endorsed disparate impact in housing, leaving the ultimate judicial fate of the doctrine in housing, along with the specific proof standards that would govern it, in doubt. By the 1980s, the Reagan DoJ refused to undertake disparate impact housing cases.

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

[28] 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).

The number of reported court decisions in the first 20 years of FHA enforcement was five to 10 times less than in the analogous period for the EEOC, and the Supreme Court decided only four fair housing cases (Schwemm 1988, p. 381). Although Massey and Denton's (1993) influential book recommended that HUD fund data gathering and enforcement by private fair housing advocacy groups, HUD began to do so only in the late 1980s (Temkin, McCracken, and Liban 2011).

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

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

Policy Initiatives toward Effectiveness?

Consistent with our GCE hypothesis, two recent initiatives by government and private advocacy groups showed promise to provide pockets of effectiveness. Undertaken under the 1988 FHA amendments enacted to lower the burden and costs for victims to pursue their claims, one of the initiatives targets states and localities, could have been done under the original FHA, and was consistent with Romney's initial vision. The other targets private financial institutions and involves discrimination implicating increasingly sophisticated mortgage risk management strategies that did not exist until more recently.[29] Both innovations have borne some fruit, although recent

[29] Because the 1988 FHA amendments granted HUD cease and desist powers, these amendments went further than the 1972 Title VII amendments in increasing formal enforcement power. But enforcement agency cease and desist power—not an element of GCE—is irrelevant to both recent initiatives.

Supreme Court limits on class actions under the *Federal Rules of Civil Procedure* partially stymied the second (Ropiequet 2012; Ropiequet and Naveja 2013). Similarly, although the Supreme Court's recent decision finally endorsing disparate impact under the FHA retains an enforcement strategy that is more effective than intent-based methods for establishing liability (*Texas Dept. of Housing v. Inclusive Communities*), that decision also limits the practical reach of effects-based housing enforcement and came 40+ years too late to transform the overall history of fair housing from failure to success.

The first recent initiative that may have provided at least small pockets of greater effectiveness centers on the FHA requirement that HUD (and other executive departments and agencies) administer "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of fair housing" (AFFH; 42 U.S. Code secs. 3608(d), 3608(e)(5)). It was AFFH combined with HUD's mission to promote development of affordable housing that stimulated plans for Operation Breakthrough and Open Communities. But the promise of AFFH was a casualty of white resentment and Nixon's opposition to using the federal purse to achieve integration. In 2006, pressured by civil rights and fair housing groups, HUD finally enacted regulations defining AFFH and giving race composition requirements for public housing. Several threatened fund withholdings by HUD have led county grantees to change local rules impeding fair housing, and in 2009, HUD withheld $1.7 billion in Community Development Block Grant funds to Texas because, as a federal grantee, Texas failed to adhere to AFFH (Johnson 2011).

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

A second recent FHA initiative invoking effects-based liability as well as the group-centered aspect of GCE is the nationwide filing of class action lawsuits attacking discretionary pricing as a means of housing discrimination by race and national origin. In the 1990s–2000s, growing use of automated credit scoring facilitated the rise of "risk-based pricing" in which bor-

rowing costs varied with individuated risk profiles. Borrowers below a credit-risk cutoff 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 combining data collected pursuant to the 1989 Home Mortgage Disclosure Act 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 independent variables related to risk (Bocian, Ernst, and Lee 2006, p. 3).

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

At this time, however, there is no research linking reduced discrimination or racial segregation directly to recent fair lending enforcement. As well, the Supreme Court's 2011 ruling refusing to uphold class certification in the mega–class action employment discrimination lawsuit against Wal-Mart stores nationwide may have nipped effectiveness in the bud.

Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011), evidenced serious Supreme Court concern about class action overreach under the *Federal Rules of Civil Procedure* governing all federal civil rights class actions (Stryker et al. 2012). In *Wal-Mart*, the Supreme Court refused to find discretionary decision making a common corporate policy on which to base a class action relying on aggregate statistics showing inferior pay and promotion for women, relative to men, across *Wal-Mart* stores nationwide. This undermined the basis for fair lending class actions that likewise were based on decentralized, discretionary decision making by lenders nationwide (Ropiequet and Naveja 2013). Post *Wal-Mart*, courts have rejected class certification in private fair lending cases, so these are drying up. Somewhat inexplicably, *Wal-Mart* has not (yet) substantially undermined DoJ capacity to obtain favorable settle-

ments in its own class action fair lending enforcement (Ropiequet 2012; Ropiequet and Naveja 2013). But DoJ as well as HUD priorities almost surely will retreat from aggressive fair housing enforcement during the Trump administration.

DISCUSSION AND CONCLUSION

Grounded in evidence from our analyses of Title VII, the 1965 VRA, and the 1968 FHA, we suggested the extent to which each law incorporated a GCE statutory and enforcement strategy as an alternative explanatory hypothesis for the hierarchy of civil rights policy success achieved among federal EEO, voting rights, and fair housing laws. Our primary goal was to build on prior theory and research to construct an analytic design that could reveal important theoretical and empirical puzzles and provide empirical grounding for a theoretically compelling solution. We hope that our suggested solution will stimulate future research moving further toward constructing and testing a more general theory of civil rights policy success.

We did not propose GCE as a new single-factor explanation. Arguments focused on state administrative capacities, policy entrepreneurship, and the Nixon/white resistance thesis must be part of a total explanation for civil rights policy success, but no prior hypothesis could explain the hierarchy of success among voting rights, equal employment, and fair housing. We showed that our GCE hypothesis could account for variability in observed civil rights outcomes in these policy domains in ways that suggest a central—but not exclusive—explanatory role for GCE.

We do not claim that our analysis closes out debate for the cases we analyzed or that it provides sufficient basis for a more general theory of comparative civil rights policy success. Instead, consistent with the iterative "mutual adjustment" of ideas and evidence characterizing much case-oriented comparative research (Stryker 1996, p. 304), we moved the debate forward by respecifying some key concepts and mechanisms while also building on past research to construct a new law-centered conceptual framework and mechanism. This allows scholars to identify new, useful research questions and the criteria that further comparative designs must meet to address these questions empirically.

For example, we acknowledge the important explanatory role for white resistance but suggest that white resistance impeded FHA—but not VRA—policy success because, in the case of the FHA, resistance included northern, as well as southern, whites. Similarly, our revisiting of the advantaged institutional home explanation led us to suggest that there are multiple aspects of institutional advantage and disadvantage and that, among these, having multiple missions provides opportunities as well as constraints. Research is needed to specify further the multidimensionality of an advantaged ver-

sus disadvantaged "institutional home" and how white resistance including both north and south is likely to reshape issues presented by litigation and the policy interests and capacities of political and administrative actors.

We also suggested a more precise explanatory role for the combination of northern and southern white resistance in the FHA case: white resistance was consequential because, notwithstanding that early FHA enforcement benefited from an aggressive policy entrepreneur, given President Nixon's views and the voters to whom he appealed, white resistance derailed the GCE enforcement approach that fair housing's policy entrepreneur favored. In the FHA case, GCE seems to provide a key mechanism through which white resistance helped reduce policy effectiveness. Nonetheless, given our theorization of the GCE framework and how and why it has its impact, we suspect that, no matter whether nationwide white resistance or some other factor(s) promoted limits on GCE, those limits—if present—would themselves work proximately to reduce civil rights policy effectiveness. On theoretical grounds, we also suspect that, even without white resistance, in the complete absence of any GCE approach to a law-enforcement-centered civil rights policy, aggregate inequalities would be reduced little if at all.

That our GCE framework provides explanatory leverage for understanding variable civil rights policy success is further supported by brief consideration of U.S. policy to end racially segregated schooling. School desegregation did not meet all the criteria for our comparative design (see n. 3), but its dynamics do rest on law enforcement, so our GCE approach should provide some explanatory leverage. It does so.

School desegregation was substantially less successful than the 1965 VRA (Chesler et al. 1988; Sutton 2001). Still, when judges actively monitored implementation of court decisions or consent decrees with an eye to achieving results, racial desegregation increased (Chesler et al. 1988). Sutton (2001) compared trends in school desegregation in different time periods and in the northern and western versus southern United States to show that partial moves toward effects-based proof of liability and effects-based remedies in education litigation were associated with greater desegregation. Retreats from effects-based liability and remedies likewise were associated with diminished impact for desegregation enforcement.

For example, because racially segregated schools were mandated by law in the U.S. south, there was no need for lawsuit-by-lawsuit proof of intent for plaintiffs alleging race discrimination in public schooling. Racial segregation patterns themselves constituted the needed proof. Meanwhile, in the U.S. north and west, where school segregation was not mandated by law but resulted from residential segregation, plaintiffs had to prove in each lawsuit that segregation stemmed at least partially from intentional discrimination by the local school district. Sutton (2001) argues that this is one reason why there was much more desegregation in the south than in the north and

west in 1968–80. Meanwhile, just as white resistance impeded GCE in fair housing, white resistance impeded a GCE approach to desegregating public schools—in the latter case by bringing litigation diminishing the extent of effects-based proof of liability and of results-based remedies (see Chesler et al. [1988] for key Supreme Court cases).

Title VI of the 1964 Civil Rights Act authorized the Department of Health, Education, and Welfare (HEW) to cut off funding to school districts found to engage in racial discrimination, and HEW's administrative rules determined what would count as eliminating discrimination (Sutton 2001; Bonastia 2006). When HEW accepted "freedom of choice" voluntary desegregation plans, by which all schools in districts previously practicing de jure racial segregation were stated to be open to all students regardless of race, little desegregation occurred even in the South. But when HEW issued new rules based on percentages of blacks who had moved out of segregated schools and federal courts affirmed HEW's results-based standards for ensuring elimination of race discrimination in public schooling, substantial desegregation occurred in the South (Sutton 2001).

Many of the potential explanatory factors we examined and also our proposed GCE explanation involve conjunctions of multiple elements. As well, Title VII's pathway toward a limited GCE approach to equal employment policy shows that there are multiple pathways to achieve at least limited GCE, although the full-on statutory approach taken by the VRA was far less limited and led to greater policy success. Our three-domain research design does not allow us to examine empirically the outcomes of all conceivable conjunctions of explanatory factors we identified. But given our theoretical specification of what GCE is and how it works, we suspect that, at least so long as civil rights are legislated, then implemented through law enforcement including courts and litigation, no matter what pattern of presence and absence of other potential explanatory factors we would observe, civil rights policy success would remain very limited in the absence of any recourse to GCE.

Future research must cover much ground to bridge between our explanatory argument within its delimited scope and a more general theory of civil rights policy success. Whether and at what threshold GCE is either necessary or sufficient for civil rights policy effectiveness generally we cannot say on the basis of our empirical research alone. On the basis of our theory and research, however, we *can* say that a general theory of civil rights policy success that fails to include a role for GCE will very likely be inadequate.

Our research has broader implications for sociology, foremost among them the utility of restoring research on law to the central place it held in the study of economy, polity, and society among classical sociologists such as Weber (1978). Our research is but part of a much larger body of research highlight-

ing opportunities as well as limits of law for enhancing equality and social justice in capitalist democracies (e.g., Yeager 1990; Stryker 2007; Dobbin 2009; Edelman 2016).

For sociologists of law, our analyses confirm that critics of liberal legalism (e.g., Kairys 1998) are correct to presume that little social change will result from a civil rights enforcement paradigm modeled on individualism and the need to prove intent. Scholars emphasizing need for a social support structure for litigation (Epp 1998) and strategies to give one-shot players some of the benefits that repeat players normally enjoy in litigation (Galanter 1974) are on the right track. Our GCE hypothesis builds on their work and on Weber's distinction between formal and substantive law, at the same time as it suggests an important role for data production and social science analysis in implementing a GCE approach to civil rights law enforcement.

Consistent with Stryker et al.'s findings (2012), our research shows that public-private networks for advocacy, data gathering, and transmission are important. Consistent with the findings of Stainback et al. (2005), Hirsch (2009), Skaggs (2009), and Stainback and Tomaskovic-Devey (2012), our research suggests a key role for media publicity and for interaction effects between litigation and various aspects of political advocacy or the political environment. These too are promising areas for further research.

For political sociologists, our research confirms earlier arguments that social movement pressure from below promotes substantive, effects-based civil rights law enforcement as an alternative path to strong state administrative capacity in the United States (Pedriana and Stryker 2004). Likewise, it reminds us how much law, courts, and civil and political rights figured in constructing the contours and exceptionalism of a U.S. welfare state in which regulatory and social policies are deeply intertwined, and the politics of race is fundamental (Lempert and Sanders 1986; Forbath 1991; Quadagno 1994; Skrentny 2006; Fording, Soss, and Schram 2011).

Although we focused on civil rights and antidiscrimination in the United States, our analyses are relevant to scholarship on rights globally, including not just civil and political but also economic, social, and cultural rights. By providing rights that are implemented through law enforcement, courts, and litigation, a variety of international treaties, national constitutions, and national and local legislative initiatives are trying to reduce poverty and inequalities in access to, for example, water, land, electricity, and health and also to reduce discrimination based on, for example, disability, immigration, age, sexual orientation, and union membership, as well as race and gender (Stryker and Haglund 2015). Future research should examine how GCE principles can be adapted to apply to non-U.S. law and whether variability in the degree to which non-U.S. law embodies a GCE approach helps to explain variability in its effectiveness.

Finally, our study is timely and important from a policy standpoint. The Supreme Court's 2013 *Shelby County* ruling abolished preclearance, so now the greatest hurdle to enacting voting law changes that suppress minority turnout in state and federal elections no longer exists. The Trump administration DoJ is likely to reverse the aggressive after-the-fact enforcement course the Obama DoJ set to mitigate as much as possible the impact of losing federal preclearance. Although legislation was introduced in Congress in 2015 to revise section 4 preclearance criteria so as to withstand constitutional challenge and restore section 5 of the Voting Rights Act, its chances of passage were nil even before the 2016 presidential election.

The Trump administration also will likely reverse the DoJ and HUD course on aggressive fair housing enforcement. And with respect to the courts, notwithstanding the Supreme Court's endorsement of a limited form of disparate impact under the FHA, in recent years some Supreme Court justices indicated that disparate impact methods of proving discrimination under Title VII might be in peril of elimination or of substantial cutback (see Justice Scalia's concurring opinion in *Ricci v. DeStefano*). Certification of class actions for large, systemic cases, whether based on intent or effects-oriented proof of liability, has become more difficult (*Wal-Mart v. Dukes*; Ropiequet, Naveja, and Noonan 2013). After Justice Scalia's death and without the participation of Justice Kagan, the University of Texas's affirmative action program using race as a factor to help diversify its student body barely survived constitutional review by a one vote margin, 4–3 (*Fisher v. University of Texas [Fisher II]*, 579 U.S. __ [2016]). President Trump likely will reshape the Supreme Court in ways that are far less favorable to using results-based methods of proving liability and remedying discrimination in all civil rights litigation.

Given dominant U.S. legal and political-cultural traditions, it is very unlikely that legislation and enforcement of any U.S. civil rights law in any era would achieve complete consistency with our ideal-typical GCE framework. Our analysis highlighted many moments of political and legal backlash against effects-based enforcement. Stratification researchers long have recognized that (especially, but not only when it comes to race) many Americans tend to blame individuals rather than social structures for disadvantage (e.g., Ryan 1976), and they tend to favor provision of opportunity to individuals rather than group-based redistributive results (e.g., Kleugel and Smith 1986). Judges are not immune from these tendencies. Indeed, socialization into liberal legal culture, emphasizing procedural and individual justice, exacerbates them (Kairys 1998).

Still, our research also shows that important moves toward GCE principles in U.S. civil rights policy legislation and enforcement have been feasible historically and, that, when they occurred, they enhanced civil rights policy success. It may be especially useful to remember this as we move from

an Obama administration interested in safeguarding the rights of minorities to a Trump administration likely to be very unfriendly to minority civil rights. If we are not willing to move beyond individual-, intent-, and procedure-oriented legal doctrine, attempts to lessen racial inequalities *through* anti-discrimination laws will fail.

APPENDIX

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