

PART I

Introduction

## 1

## Reassessing the Rights Revolution

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Today the “rights revolution” of the 1960s and 1970s is most often associated with the changes ushered in by the Supreme Court’s 1954 opinion in *Brown v. Board of Education*, the doctrinal innovations of the Warren Court, and the transformative civil rights legislation of the 1960s, especially the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>1</sup> The rights revolution developed in the wake of a sustained popular mobilization, but the institutional reforms that followed were, as one commentator puts it, “led by the Establishment.”<sup>2</sup> The rights revolution consisted of both sweeping changes in constitutional doctrines and landmark legislative reform, followed by decades of innovative implementation in every branch of the federal government – Congress, agencies, and the courts.

In recent years, a growing number of political scientists have sought to integrate studies of the rights revolution’s implementation into accounts of the contemporary American state. The central purpose of this volume is to gather some of the most innovative analyses of the civil rights state to explore the institutional dynamics, scope, and durability of the rights revolution. This reassessment of the rights revolution highlights the institutional turn in the political science scholarship on civil rights enforcement. The contributions to this volume evaluate the role of

<sup>1</sup> See, e.g., Mark Tushnet, “The Rights Revolution in the Twentieth Century,” in *The Cambridge History of Law in America, Vol. III – The Twentieth Century and After*, eds. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 377–402; Lucas Scot Powe Jr., *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000); Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (New York: Oxford University Press, 1990); Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998); Charles R. Epp, “Courts and the Rights Revolution,” in *Institutions of American Democracy: The Judicial Branch*, eds. Kermit L. Hall and Kevin T. McGuire (New York: Oxford University Press, 2006), 343–374.

<sup>2</sup> John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2002), 2.

federal government institutions – Congress, the executive branch, and the federal courts – in strengthening or undermining the private enforcement regime that has taken hold since the 1960s. While the contributors to this volume draw upon a rich sociolegal literature on civil rights litigation and its impact, they are particularly influenced by scholarship in the American political development tradition that is “‘*polity centered*,’ foregoing explanatory privilege to either social interests or the state and looking instead at what is up and running, which is the full array of organized interactions between the two.”<sup>3</sup>

#### TAKING STOCK

In recent years, the fiftieth anniversaries of many of these landmark Johnson-era civil rights bills and the twenty-fifth anniversary of the Americans with Disabilities Act (ADA) of 1990 have inspired a wide-ranging discussion concerning the legacy and impact of the rights revolution. Leading trade publishers have issued an impressive crop of books describing the enactment of these landmark civil rights bills and assessing their legacy,<sup>4</sup> and scholars in a range of disciplines have offered synthetic accounts of the impact of the rights revolution.<sup>5</sup> President Obama delivered major

<sup>3</sup> Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 80 (emphasis added).

<sup>4</sup> See, e.g., Clay Risen, *The Bill of the Century: The Epic Battle for the Civil Rights Act* (New York: Bloomsbury Press, 2014); Todd S. Purdum, *An Idea Whose Time Has Come: Two Presidents, Two Parties, and the Battle for the Civil Rights Act of 1964* (New York: Henry Holt, 2014); Gary May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* (New York: Basic Books, 2013); Ari Shapiro, *Give Us the Ballot: The Modern Struggle for Voting Rights in Modern America* (New York: Farrar, Strauss, and Giroux, 2014); Julian E. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* (New York: Penguin Books, 2015); Caroline Frederickson, *Under the Bus: How Working Women Are Being Run Over* (New York: The New Press, 2015); Gillian Thomas, *Because of Sex: One Law, Ten Cases, and Fifty Years that Changed American Women's Lives at Work* (New York: St. Martin's Press, 2016); Lennard J. Davis, *Enabling Act: The Hidden Story of How the Americans with Disabilities Act Gave the Largest U.S. Minority Its Rights* (Boston, MA: Beacon Press, 2015).

<sup>5</sup> See, e.g., Gavin Wright, *Sharing the Prize: The Economics of the Civil Rights Revolution in the American South* (Cambridge, MA: Harvard University Press, 2013); Jenny Bourne, “‘A Stone of Hope’: The Civil Rights Act of 1964 and Its Impact on the Economic Status of Black Americans,” *Louisiana Law Review* 74 (2014): 1195–1225. Others have emphasized challenges that have remained or worsened for the intended beneficiaries of the rights revolution. Kevin Stainback and Donald Tomaskovic-Devey’s book, *Documenting Desegregation: Racial and Gender Segregation in Private Sector Employment Since the Civil Rights Act* (New York: Russell Sage Foundation, 2012), is the first comprehensive scholarly analysis of the Equal Employment Opportunity (EEO) data compiled by the EEOC since 1966. They provide a compelling overview of the trends in occupational desegregation in the private sector. Black men experienced gains very early and through the 1970s, but the trajectory of progress ended after that. Women, especially white women, entered more fields in the 1970s, and began to assume positions at higher levels in the 1980s. See also Rogers M. Smith and Desmond King, *Still a House Divided: Race and Politics in Obama's America* (Princeton, NJ: Princeton University Press, 2011);

addresses about the rights revolution and its legacy,<sup>6</sup> which were widely covered by journalists and policy analysts who weighed in with ambitious assessments of their own.<sup>7</sup> Leading civil rights organizations issued reports and renewed calls for reform.<sup>8</sup> It has been a time for taking stock and offering appraisals for the future.

The rights revolution produced several indisputable and significant victories. The Voting Rights Act of 1965 succeeded in registering hundreds of thousands of black voters soon after its passage and helped to increase the number of black, Latino, and Asian American elected officials in the United States.<sup>9</sup> Another unassailable success is the Civil Rights Act of 1964's removal of racial restrictions in public accommodations via Title II, which "'tore old Dixie down' almost overnight."<sup>10</sup> Since the passage of the Title VII, African Americans across the nation also began to move into skilled, service, and professional occupations, creating a larger black middle class.<sup>11</sup> In 1966, 78 percent of African American men worked in low-skilled jobs<sup>12</sup>;

Nancy DiTomaso, *The American Non-Dilemma: Racial Inequality without Racism* (New York: Russell Sage Foundation, 2013); Doug McAdam and Karina Kloos, *Deeply Divided: Racial Politics and Social Movements in Postwar America* (New York: Oxford University Press, 2014); Deborah L. Rhode, *What Women Want: An Agenda for the Women's Movement* (New York: Oxford University Press, 2014).

- <sup>6</sup> See, e.g., President Obama, "Remarks at the Lyndon B. Johnson Presidential Library Civil Rights Summit in Austin, Texas," April 10, 2014. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at [www.presidency.ucsb.edu/ws/?pid=105105](http://www.presidency.ucsb.edu/ws/?pid=105105); "Remarks Commemorating the 50th Anniversary of the Selma to Montgomery Marches for Voting Rights in Selma, Alabama," March 7, 2015. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at [www.presidency.ucsb.edu/ws/?pid=109728](http://www.presidency.ucsb.edu/ws/?pid=109728).
- <sup>7</sup> See, e.g., Michael A. Flether, "Fifty Years after March on Washington, Economic Gap between Blacks, Whites Persists," *Washington Post*, August 28, 2013; Thomas Shapiro, Tatjana Meschede, and Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide* (Institute on Assets and Social Policy, Boston, MA: Brandeis University, 2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>; Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles* (Washington, D.C.: Economic Policy Institute Report, 2014), [www.epi.org/files/2014/making-of-ferguson-final.pdf](http://www.epi.org/files/2014/making-of-ferguson-final.pdf).
- <sup>8</sup> See, e.g., African American Leaders Convening (AALC), *21st Century Agenda for Jobs and Freedom* (August 21, 2013), available at <http://iamempowered.com/21st-century-agenda-for-jobs-and-freedom>; Joint Center for Political and Economic Studies, *50 Years after the Voting Rights Act: The State of Race in Politics* (March 3, 2016), available at <http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28updated%29.pdf>; Center for American Progress, *All-in Nation: An America that Works for All*, eds. Vanessa Cárdenas and Sarah Treuhaupt (2013), available at [www.americanprogress.org/wp-content/uploads/2013/07/AllInNation.pdf](http://www.americanprogress.org/wp-content/uploads/2013/07/AllInNation.pdf).
- <sup>9</sup> Joint Center, *50 Years after the Voting Rights Act*, 8–10, 24–34.
- <sup>10</sup> Hugh Davis Graham, "Since 1964: The Paradox of American Civil Rights Regulation," in *Taking Stock: American Government in the Twentieth Century*, eds. Morton Keller and R. Shep Melnick (New York: Cambridge University Press, 1999), 195; Wright, *Sharing the Prize*, ch. 3.
- <sup>11</sup> Stainback and Tomaskovic-Devey, *Documenting Desegregation*, chs. 1–4; Flether, "Fifty Years after March on Washington, Economic Gap between Blacks, Whites Persists" (defining middle class as households earning over \$100,000 per year and observing these African American households have grown fivefold since the early 1960s).
- <sup>12</sup> Stainback and Tomaskovic-Devey, *Documenting Desegregation*, 52–53 (tallying numbers for operative, laborer, and service occupations).

62 percent of white women worked in clerical jobs.<sup>13</sup> Fifty years later, such stark occupational segregation no longer exists.

Serious racial disparities have endured, however. According to data collected by the Equal Employment Opportunity Commission (EEOC), in 2014, white males held 521,941 senior level executive and management positions, while only 13,647 African American males had obtained such roles in the workplace.<sup>14</sup> The wage gap between African American and white workers in 2012 was over 30 percent (larger than the often-discussed gender wage gap).<sup>15</sup> Researchers have estimated that discrimination accounts for at least one-third of this black–white wage gap.<sup>16</sup> Another major cause is the widening of the racial gap in educational attainment. The 10 percent gap in those receiving a college degree in 1970 had widened to a seventeen-point gap in 2012, when 21 percent of black thirty-year olds had received a college degree, compared to 38 percent of whites.<sup>17</sup>

During these same decades, the racial wealth gap has also widened. According to the Pew Research Center, in 2009 the median wealth of white households was “20 times that of black households and 18 times that of Hispanic households.”<sup>18</sup> A core cause of this widening wealth gap is home ownership.<sup>19</sup> In 2014, only 44 percent of African American families owned a home, compared to 73 percent of white families.<sup>20</sup> According to a 2016 report, African American children are much more likely than white children to live in areas of concentrated poverty,<sup>21</sup> and housing

<sup>13</sup> Ibid. Black women were clustered in three categories: clerical, operative, and service occupations.

<sup>14</sup> EEOC, “2014 EEO-1 National Aggregate Report: Job Patterns for Minorities and Women in Private Industry,” [www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2014/index.cfm#select\\_label](http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2014/index.cfm#select_label).

<sup>15</sup> Flether, “Fifty Years after March on Washington, Economic Gap between Blacks, Whites Persists” (“In 1963, black families earned 55 cents for every dollar earned by whites. In 2011, blacks earned 66 cents for every dollar earned by whites.”)

<sup>16</sup> Roland G. Fryer, Jr., Devah Pager, and Jorg L. Spenkuch, “Racial Disparities in Job Finding and Offered Wages,” *Journal of Law and Economics* 56 (2013): 633–689.

<sup>17</sup> David J. Deming, Noam Yuchtman, Amira Abulafi, Claudia Goldin, and Lawrence F. Katz, “The Value of Postsecondary Credentials in the Labor Market: An Experimental Study,” *American Economic Review* 106 (2016): 778–806.

<sup>18</sup> Rakesh Kochar, Richard Fry, and Paul Taylor, *Wealth Gaps Rise to Record Highs between Whites, Blacks, Hispanics* (Washington, DC: Pew Research Center, 2011), 1, available at [www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf) (analyzing 2009 data from the US Census Bureau’s Survey of Income and Program Participation [SIPP]).

<sup>19</sup> Shapiro et al., *The Roots of the Widening Racial Wealth Gap*, 2; Kochar et al., *Wealth Gaps Rise to Record Highs*, 5.

<sup>20</sup> Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing: 2014*, available at [www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14-color-full.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/sonhr14-color-full.pdf)

<sup>21</sup> Anne E. Casey Foundation, *Kids Count Data Book: State Trends in Child Well-Being* (2016), 35, available at [www.aecf.org/2016db](http://www.aecf.org/2016db) (using US Census data, showing 32 percent of African American, 24 percent of Latino, and 5 percent of white children live in census tracts with poverty rates of 30 percent or higher).

segregation has contributed to resegregation of public schools<sup>22</sup> and higher unemployment rates.<sup>23</sup>

Compared to white men, in 2015–2016 black men experienced unemployment rates that were twice as large, a disparity that is nearly as stark for black women.<sup>24</sup> The black–white unemployment gap has not budged in over four decades, and a gap persists even among individuals with similar levels of education.<sup>25</sup> Finally, the incarceration rates for African American males are more than six times that of white males,<sup>26</sup> and reports of unemployment rates and labor statistics fail to acknowledge the distortions in the data due to mass incarceration.<sup>27</sup>

Despite all the current talk of “leaning in” and “the rise of women,” serious challenges remain for women’s equality as well.<sup>28</sup> More than fifty years after the passage of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, women in the United States earn 78 percent of what men are paid. Among them, African

<sup>22</sup> See, e.g., Annette Lareau and Kimberley Goyette, eds. *Choosing Homes, Choosing Schools* (New York: Russell Sage Foundation, 2014); Erica Frankenberg and Gary Orfield, eds., *The Resegregation of Suburban Schools: A Hidden Crisis* (Cambridge, MA: Harvard Education Press, 2012); Gary Orfield and Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (New York: The New Press, 1997).

<sup>23</sup> See, e.g., Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (Chicago, IL: University of Chicago Press, 2013); Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993); William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Vintage Books, 1997).

<sup>24</sup> Bureau of Labor Statistics, Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age (2015–2016), available at [www.bls.gov/news.release/empsit.t02.htm](http://www.bls.gov/news.release/empsit.t02.htm)

<sup>25</sup> Neil Irwin, Claire Cain Miller, and Margot Sanger-Katz, “The Upshot: America’s Racial Divide, Charted.” *New York Times*, August 19, 2014, available at [www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?abt=0002&abg=0](http://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?abt=0002&abg=0) (5.7 percent unemployment rate for African Americans with a bachelor’s degree or higher, compared to 3.5 percent for whites with the same level of education).

<sup>26</sup> Pew Research Center, “King’s Dream Remains Elusive: Many Americans See Racial Disparities,” August 22, 2013, available at [www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate](http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate) (comparing figures from 1960, showing five times the rate, with 2010, showing over six times the rate).

<sup>27</sup> Jeff Guo, “America Has Locked Up So Many Black Men It Has Warped Our Sense of Reality,” *Washingtonpost.com Wonkblog*, February 26, 2016, available at [www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality/](http://www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality/). As Guo points out, the unemployment rates would be far worse – almost triple that of whites – if prisoners were included. See Becky Pettit, *Invisible Men: Mass Incarceration and the Myth of Black Progress* (New York: Russell Sage Foundation, 2012); Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2007). No account of the fate of the rights revolution can ignore Michelle Alexander’s book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010), which has changed the national conversation about race, civil rights, and criminal justice reform.

<sup>28</sup> Sheryl Sandberg, *Lean In: Women, Work, and the Will to Lead* (New York: Knopf, 2013); Hanna Rosin, *The End of Men: And the Rise of Women* (New York: Riverhead Books, 2013).

American women earn just 63 percent and Hispanic women 54 percent.<sup>29</sup> The gap per dollar has diminished by just ten cents over the past twenty-five years.<sup>30</sup> While women have made impressive gains in terms of educational attainment and their representation in high-paying occupations and management-level positions,<sup>31</sup> their employment remains overconcentrated in less lucrative fields and in lower-earning positions within occupations.<sup>32</sup> In addition, although the aggregate earnings figures used to measure the wage gap are affected by the types of occupations women pursue,<sup>33</sup> pay disparities persist even when similar educational levels, occupations, and seniority are considered.<sup>34</sup> To gather more data and promote transparency, President Obama issued an executive order in 2016 directing the EEOC to gather pay gap data from the nation's largest companies.<sup>35</sup>

For the disabled, twenty-five years after the passage of the ADA, barriers to employment remain. The one in five Americans who are disabled are twice as likely

<sup>29</sup> These figures are based on median annual earnings. American Association of University Women (AAUW), *The Simple Truth about the Gender Pay Gap*, Spring 2016, 11, available at [www.aauw.org/files/2016/02/SimpleTruth\\_Spring2016.pdf](http://www.aauw.org/files/2016/02/SimpleTruth_Spring2016.pdf).

<sup>30</sup> *Ibid.*, 3.

<sup>31</sup> Stainback and Tomaskovic-Devey, *Documenting Desegregation*, chs. 1–4. According to the 2014 EEOC data for executive and senior-level positions, white women hold 202,815 of these positions (compared to 521,941 for white men), while African American women hold only 12,442 (compared to 13,647 for African American men). EEOC, “2014 EEO-1 National Aggregate Report: Job Patterns for Minorities and Women in Private Industry,” available at [www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2014/index.cfm#select\\_label](http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2014/index.cfm#select_label)

<sup>32</sup> Ariane Hegewisch and Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* (Washington, DC: Institute of Women's Policy Research, 2014), available at [www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done](http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done). For example, women make up 86 percent of paralegals, a third of lawyers, and only 16 percent of partners in large law firms. Rhode, *What Women Want*, 26.

<sup>33</sup> Francine D. Blau and Lawrence M. Kahn, “The Gender Wage Gap: Extent, Trends, and Explanations,” National Bureau of Economic Research Working Paper No. 21913, January 2016, 1 (other variables economists have traditionally emphasized include education, work experience, family division of labor, and selection into the labor force).

<sup>34</sup> See, e.g., AAUW, *The Simple Truth about the Gender Pay Gap*, 13, 16–17; see also Claudia Goldin, “A Grand Convergence: Its Last Chapter,” *American Economic Review* 104 (2014): 1091–1119 (showing that the pay gap persists in the highest-paying occupations, likely due to inflexibility regarding hours and work location); Blau and Kahn, “The Gender Wage Gap: Extent, Trends, and Explanations,” 8 (observing that pure discrimination could account for 38 percent of the gap – what economists call the “unexplained” gender wage gap – and could further indirectly affect the types of occupations women enter, resulting in fewer women pursuing male-dominated, high-paying occupations); Robert L. Nelson and William P. Bridges, *Legalizing Inequality: Courts, Markets, and Unequal Pay for Women in America* (New York: Cambridge University Press, 1999) (examining four cases showing that entrenched power disparities within organizations contribute to the gender wage gap).

<sup>35</sup> Danielle Paquette and Drew Harwell, “Obama Targets Gender Pay Gap with Plan to Collect Companies' Salary Data,” *Washingtonpost.com Wonkblog*, January 19, 2016, available at <https://www.washingtonpost.com/news/wonk/wp/2016/01/29/obama-targets-gender-pay-gap-with-plan-to-collect-salary-data-from-big-businesses/>.



to be unemployed when of working age, and many more drop out of the labor force entirely.<sup>36</sup> Workers with disabilities earn 63 cents for every dollar earned by those without disabilities, and disparities remain even when the level of education is factored in.<sup>37</sup> According to the US Census Bureau, in 2013 the poverty rate for working-age people with disabilities was 34.5 percent in contrast to 12.2 percent for those without disabilities.<sup>38</sup> The National Council on Disability in 2015 called attention to these “astonishingly low” and “unacceptable” employment rate statistics for people with disabilities even as it commemorated the twenty-fifth anniversary of the ADA.<sup>39</sup> When the primary author and sponsor of the ADA, Senator Tom Harkin, delivered his final speech on the Senate floor in 2015, he lamented the continuing low unemployment and labor force participation rates of people with disabilities, which he described as a “blot on our national character.”<sup>40</sup>

Although the broader public is largely unaware of these disparities, those familiar with these data and other indicators of growing inequality in the United States may question why so many scholars persist in referring to a “rights revolution” at all.<sup>41</sup>

<sup>36</sup> According to the Bureau of Labor Statistics, in the final quarter of 2014 the unemployment rate for working-age individuals with disabilities was 12.4 percent. The labor force participation rate for disabled persons aged 25–64 was 31.3 percent in 2013, compared to 81.3 percent for those without disabilities. Rebecca Vallas, Shawn Fremstad, and Lisa Ekman, *A Fair Shot for Workers with Disabilities* (Washington, D.C.: Center for American Progress, January 28, 2015), 3.

<sup>37</sup> American Institute for Research, *An Uneven Playing Field: A Lack of Equal Pay for People with Disabilities*, (Washington, D.C.: December 2014), available at [www.air.org/sites/default/files/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities\\_Dec%2014.pdf](http://www.air.org/sites/default/files/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities_Dec%2014.pdf).

<sup>38</sup> Vallas et al., *A Fair Shot for Workers with Disabilities*, 3. These figures are from the US Census American Community Survey, which covers six categories of disabilities. Available at <https://www.census.gov/people/disability/methodology/acs.html>.

<sup>39</sup> National Council on Disability, *National Disability Policy: An Annual Report* (Washington, D.C.: July 26, 2015), available at [https://www.ncd.gov/sites/default/files/Documents/2015NCD\\_Annual\\_Report\\_508.pdf](https://www.ncd.gov/sites/default/files/Documents/2015NCD_Annual_Report_508.pdf).

<sup>40</sup> Jennifer Lazlo Mizrahi, “Tom Harkin and the Ladder of Opportunity,” *Huffington Post*, December 15, 2014.

<sup>41</sup> For example, while a 2015 Harris Poll found that while 83 percent of those polled favor and support the ADA, 66 percent believe applicants should be required to disclose disabilities during the hiring process, and 48 percent believe companies should not be required to accommodate disabilities not disclosed in the hiring process – a set of views reflecting widespread ignorance regarding how disability discrimination in hiring produces persistently high unemployment and low labor force participation rates. Harris Poll, July 24, 2015, available at [www.theharrispoll.com/politics/Support-For-the-ADA.html](http://www.theharrispoll.com/politics/Support-For-the-ADA.html). See also Michael I. Norton and Samuel R. Sommers, “Whites See Racism as a Zero-Sum Game That They Are Now Losing,” *Perspectives on Psychological Science* 6 (2011): 215–218 (national survey showing white respondents believed white bias was more prevalent than anti-black bias); Hannah Fingerhut, “In Both Parties, Men and Women Disagree over Whether Women Still Face Obstacles to Progress” (56 percent of men believe that “obstacles that made it difficult for women to get ahead are largely gone,” while only 34 percent of women agree); Pew Research Fact Tank, August 16, 2016; Pew Research Center, “King’s Dream Remains an Elusive Goal,” 9 (79 percent of black respondents reported “a lot” needs to be done to achieve racial equality, compared to 44 percent of whites). It appears that the Black Lives Matter movement has helped since 2014 to shift perceptions, at least among white liberals and moderates, about race discrimination. See, e.g., Gallup, “U.S. Worries



It is thus perhaps more precise to clarify that this revolution refers to the dramatic increase in EEOC claims, federal court filings, inventive agency regulations, and the growth of a network of human resources and compliance professionals – rather than a substantial shift in power in society. This book’s assessment of the rights revolution seeks to evaluate these changes in the institutional mechanisms of enforcement that have occurred and their impact, even while acknowledging that much more remains to be done to fulfill the goals these civil rights statutes were enacted to achieve.

For many legal scholars and practitioners, the recent anniversaries of these landmark statutes produced rather muted celebrations.<sup>42</sup> Some asked how the civil rights enforcement regime might be preserved and extended “once the impulses and energies that birthed it have faded,”<sup>43</sup> in order to address challenges like structural racism that cannot be addressed within Title VII’s legal framework,<sup>44</sup> and others going so far as to declare a “judicial repeal” of Title VII<sup>45</sup> and the “dismantling” of the Voting Rights Act.<sup>46</sup> In recent years, other scholars have called attention more generally to a judicial “retrenchment,”<sup>47</sup> “procedural activism,”<sup>48</sup> a conservative “assault,”<sup>49</sup> a civil rights “rollback,”<sup>50</sup> and a “conservative counterrevolution.”<sup>51</sup>

about Race Relations Reach a New High,” April 11, 2016, available at [www.gallup.com/poll/190574/worries-race-relations-reach-new-high.aspx](http://www.gallup.com/poll/190574/worries-race-relations-reach-new-high.aspx) (showing a sharp increase in concern about race relations since 2014).

<sup>42</sup> Law schools across the country hosted major symposia to mark these anniversaries in 2014 and 2015. Yale Law School organized a conference to mark the publication of Bruce Ackerman’s 2014 book, *The Civil Rights Revolution*, which also featured reflections on the anniversaries of these landmark civil rights statutes. Stanford, Michigan, and Boston University law schools organized symposia on the fiftieth anniversary of Title VII and its legacy. Major conferences on the fiftieth anniversary of the Voting Rights Act were held at Washington & Lee, the University of Alabama, Louisiana State University, and Florida State University law schools. In 2015, the annual meeting of the American Association of Law Schools featured an event commemorating the twenty-fifth anniversary of the ADA.

<sup>43</sup> David Freeman Engstrom, “The Civil Rights Act at Fifty: Past, Present, and Future,” *Stanford Law Review* 66 (2014):1203.

<sup>44</sup> William Wiececk and Judy L. Hamilton, “Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace,” *Louisiana Law Review* 74 (2014): 1095–1160.

<sup>45</sup> Nancy Gertner, “The Judicial Repeal of the Johnson/Kennedy Administration’s ‘Signature Achievement,’” in *A Nation of Widening Opportunities: The Civil Rights Act at Fifty*, eds. Samuel Bagenstos and Ellen Katz (Ann Arbor, MI: University of Michigan Press, 2015).

<sup>46</sup> Samuel Issacharoff, “Voting Rights at 50,” *Alabama Law Review* 67 (2015): 387–414.

<sup>47</sup> Pamela S. Karlan, “David C. Baum Memorial Lecture: Disarming the Private Attorney General,” *University of Illinois Law Review* 2003 (2003): 183–209; Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (New York: Oxford University Press, 2015).

<sup>48</sup> Goutam U. Jois, “Pearson, *Iqbal*, and Procedural Activism,” *Florida State University Law Review* 27 (2010): 901–944.

<sup>49</sup> Erwin Chemerinsky, *The Conservative Assault on the Constitution* (New York: Simon & Schuster, 2011).

<sup>50</sup> *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice*, eds. Denise C. Morgan, Rachel D. Godsil, and Joy Moses (Durham, NC: Carolina Academic Press, 2006).

<sup>51</sup> Lynda G. Dodd, “The Rights Revolution in the Age of Obama and Ferguson: Policing, the Rule of Law, and the Elusive Quest for Accountability,” *Perspectives on Politics* 13 (2015): 1–25; Amanda

Indeed, in his 2014 book, *The Civil Rights Revolution*, Bruce Ackerman observes that “the sun is setting on the civil rights revolution.” In his assessment of the struggles of the 1960s and the changes they wrought, he concludes: “All this is ancient history for the rising generation.”<sup>52</sup> While there is much evidence to support Ackerman’s claim, civil rights activism in the United States during the Obama presidency – most prominently concerning immigration reform; lesbian, gay, bisexual, transgender (LGBT) rights; and police brutality – led to renewed debate about the rights revolution and its future. Given this concomitant revitalization of the rights revolution and pessimism about its operation and future, this is an especially opportune time to offer a wide-ranging appraisal of the development of the civil rights state. What are the institutional dynamics of the rights revolution? How have the Supreme Court and the federal courts strengthened and undermined the rights revolution? How have officials in the other branches responded to these developments?

#### THE SHIFT TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS

The most important institutional feature of the rights revolution is its dependence on private litigation. This volume seeks to contribute to the vibrant and influential literature in political science that examines this major shift in governance to private enforcement, including Robert Kagan’s now classic 2001 book *Adversarial Legalism* and Sean Farhang’s award-winning 2010 book, *The Litigation State*.<sup>53</sup> Instead of considering the constitutional doctrines so often featured in accounts of the rights revolution since the 1960s, the following chapters address the landmark statutes that have been central to the creation of the litigation state: the Equal Pay Act of 1963,<sup>54</sup> the Civil Rights Act of 1964,<sup>55</sup> the Voting Rights Act of 1965,<sup>56</sup> the Age Discrimination in Employment Act of 1967,<sup>57</sup> the Fair Housing Act

Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015).

<sup>52</sup> Bruce Ackerman, *We the People, Vol. III: The Civil Rights Revolution* (Cambridge, MA: Belknap Press, 2014).

<sup>53</sup> Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton, NJ: Princeton University Press, 2010).

<sup>54</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, codified at 29 U.S.C. § 206(d).

<sup>55</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, codified at 42 U.S.C. §§ 2000e et seq. (Title VII), § 42 U.S.C. §§ 2000d et seq. (Title VI). Title VI of the 1964 act provides in part: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

<sup>56</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, codified at 42 U.S.C. §§ 1973 et seq.

<sup>57</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 St. 602, codified at 29 U.S.C. §§ 621 et seq. This statute was amended several times. In 1974, it was extended to apply to the federal, state, and local government, and extended the law to all those with over twenty employees. The