Introduction

This book is edited by children of the civil rights era. The three of us came of age in a country that held a strong national commitment—in words, if not always in deeds—to realizing the Constitution's promise of equal justice under law. Dr. Martin Luther King, Jr.'s dream that "one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal'" reflected a prevalent aspiration.[1] Yet, even as children, we understood that the day for such equality had not yet come. We experienced discrimination first hand, or witnessed it and felt ashamed. Still, we saw the potential for progress and considered law a vehicle for change.

To us, the term "civil rights" means the bundle of rights that advance inclusion, equal membership, political participation, and economic mobility in our diverse national community. We have never known a United States without federal labor laws and an economic safety net to help prevent the exclusion of working people, the poor, and the elderly from the political and economic mainstream. We take those pieces of 1930s New Deal legislation[2]—which are essential prerequisites to equal citizenship—for granted.

During our youth in the 1960s and 1970s, the federal government worked to establish a national floor on individual rights below which the states could not sink—an endeavor that it had been assigned a century earlier by the Reconstruction amendments.[3] Like the New Deal statutes, these civil rights laws created rights of belonging.[4] We understand them to recognize and proclaim that we all belong to America—therefore, our national identity is imperiled if any one of us is turned down for a job because of our sex, denied access to the ballot because we cannot pass an English literacy test, excluded from public buildings because we are in a wheelchair, or steered away from a white neighborhood because of our race. We take for granted the right to be free from such affronts, and assume that the courts will vindicate those rights—these understandings are central to our conception of a just society.

The civil rights laws of the 1930s, 1960s, and 1970s, and the social justice movements supporting them, reinforced our notion that one of the highest functions of federal authority is "to promote an inclusive vision of who belongs to the national community of the United States and to facilitate equal membership in that community."[5] In some instances, the states have led the way in protecting individual rights.[6] On many more occasions, however, the country has lacked the political will to live up to its ideals: public schools and most neighborhoods have remained racially segregated; Congress has never enacted legislation prohibiting discrimination on the basis of sexual orientation; and the War on Poverty ended long before victory could be declared. Still, we grew up in a country where the federal government, particularly the federal courts, could frequently be relied upon to promote equality and individual rights over private bigotry, corporate malfeasance, and state-enforced exclusion of some groups from social, political, and economic power.

Those childhood memories of America now seem like a dream. Today, our children are growing up in a very different country. Many on the Right now openly question government's role in bettering the lives of Americans. Indeed, our federal courts have abdicated their responsibility to promote equal justice, and the Supreme Court under the leadership of Chief Justice William Rehnquist has issued decisions limiting congressional power to enact progressive legislation, eroding existing civil rights protections, and leaving many vulnerable to exclusion from the social, political, and economic mainstream.

These cases have not received significant media attention and there has been little public discussion regarding the dramatic rollback of civil rights. The few cases in which the Court has ruled in favor of progressive interests—such as those allowing universities to implement race-based affirmative action programs, striking down sodomy statutes, and prohibiting the execution of minors[7]—have garnered far more interest. While important, these victories do not mitigate the many cases in which the Court has targeted the powers of Congress, about which there is almost no debate.

This silence is, in part, because instead of advertising or campaigning against civil rights, the Right has waged a quiet, concerted, and effective crusade to enact changes by dominating the federal courts.[8] Indeed, Justice O'Connor's retirement and Chief Justice Rhnquist's death—as this book goes to press—give the Bush administration an extraordinary opportunity to entrench the Right's control of the Supreme Court and to shape the law for the next generation. The right wing's ideologically-driven judges have already eviscerated Congress's ability to define federal rights and to empower individuals to sue to enforce those

rights. The echoes of these cases will continue to reverberate in the lower federal courts as long as those judicial activists remain on the bench.

Another reason for the silence surrounding the civil rights roll back is that the Court has couched many of its decisions in the language of "federalism"—the division of power between the states and the federal government. Such reasoning is not the stuff of breaking news reports because it sounds abstract, innocuous, or even attractive. In theory, federalism allows both the states and the federal government to champion civil rights, and privileging states' rights over the exercise of federal power can at times favor the disempowered and provide greater protection for individuals. In the U.S., however, federalism's progressive potential has frequently been undermined. States' rights have been used to justify such oppression as slavery, Jim Crow segregation, and, most famously, southern resistance to the implementation of *Brown v. Board of Education*.

We use the term "Federalism Revolution"[9] to refer to the current appeal to states' rights that has been used to justify decisions undercutting Congress' ability to create and enforce civil rights. Perhaps the term "Anti-Antidiscrimination Revolution"[10] would be more accurate, as the Court has regularly abandoned its commitment to states' rights in order to advance an anti-civil rights agenda. We have chosen the term, however, to highlight the Court's federalism rhetoric and expose its hypocrisy.

As children of the civil rights era, we have a duty to protect what our parents fought, marched, and lobbied for—and what others died for—both for ourselves and for our children. We hope that this book of essays, which stems from a conference held in 2002 at Columbia Law School to celebrate the founding of the National Campaign to Restore Civil Rights (NCRCR), can serve as a beginning. The contributors—activists, law professors, public interest lawyers, and students—tell of some who have been deprived of justice by the rollback. This book is also intended as a call to arms. Progressives and liberals who share our conception of a just society are engaged in a struggle to reclaim civil rights. We write to bring their work to light, and to invite readers to join in their efforts.

Part I, *The Rehnquist Court's Federalism Revolution and Civil Rights*, explores the historical underpinnings of federalism and the Federalism Revolution. Chapter 1, by legal historian Paul Finkelman, explains how, starting with the battle over slavery, federalism and civil rights have been inextricably linked. Southern states enshrined protections for slavery in the Constitution, while federalism enabled northern states to free their black citizens. The Court undermined federalism's progressive potential, however, when it upheld the right of southern states to maintain slavery in the infamous *Dred Scott* decision in 1857, but hinted that northern states would not have the right to protect free

blacks. The balance of power between the states and the federal government was radically transformed by the Civil War, Reconstruction, and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870. These gains in civil rights protections were soon lost when a series of Court decisions struck down many of the federal laws that sought to protect the equal citizenship of newly freed blacks.

In chapter 2, respected civil rights leaders Wade Henderson and Janell Byrd-Chichester canvass the Federalism Revolution cases and begin our discussion of strategies to reverse the rollback. Henderson and Byrd-Chichester first discuss the series of statutes enacted in the 1960s and 1970s to protect civil rights and address the needs of the poor. Many consider those laws more important in dismantling state-enforced segregation and blatant racial discrimination than any Court decisions.[11] Their effectiveness was muted by Court interpretation, however. In the 1970s, the composition of the Court changed and civil rights enforcement waned. By the 1990s, the Rehnquist Court began to roll back civil rights protections in earnest.

Part II, *The Impact of the Federalism Revolution on the Lives of Americans*, explores the effects of the Federalism Revolution on all Americans. Because the Federalism Revolution has been incremental and involves technical legal issues, many are unaware that they have lost civil rights protections. Each chapter begins with a brief narrative to illustrate and personalize the injustices people have experienced.

The perception that civil rights are associated with racial minorities is too narrow. People of all races and nationalities—women, older Americans, people with disabilities, immigrants, gay men and lesbians, and workers—all need civil rights protections. Still, the history and pervasiveness of racial discrimination compels particular attention. Accordingly, the first three chapters of Part II address the impact of the rollback of civil rights on communities of color.

Lia Epperson, a civil rights lawyer with the NAACP Legal Defense and Education Fund, opens chapter 3 with a description of conditions at a segregated public school in Gadsen, Alabama. Focusing on the impact of the Federalism Revolution on African Americans, Epperson discusses educational opportunity, affirmative action, voting, employment, and the provision of government services. Her chapter, like those before it, notes the eerie similarity between the current rollback of civil rights and the civil rights retrenchment that led the country into the Jim Crow era.

Chapter 4, by Sandra Del Valle, a civil rights lawyer with the Puerto Rican Legal Defense and Education Fund, and chapter 5, by Vincent Eng, Deputy Director of the National Asian Pacific American Legal Consortium, and Ju-

lianna Lee, a Michigan Law School student, explore the rollback's impact on Latinos and Asian Americans. Del Valle juxtaposes two Court cases affecting Latinos—the first a successful 1966 voting case, and the second, an unsuccessful 1991 jury discrimination case—and argues that the arc of those cases traces the Court's declining protection of civil rights. In contrast, Eng and Lee highlight the Court's consistent denial of Asian American civil rights, citing the Court's decisions upholding the 1882 Chinese Exclusion Act, the internment of Japanese Americans during World War II, and more recent employment discrimination and voting rights cases.

Both the Asian American and Latino communities have been particularly harmed by the Court's treatment of language rights and immigrant workers. These issues are examined in chapter 10 by Rose Cuison Villazor, and in chapter 11 by Marielena Hincapié and Ana Avendaño-Denier. The authors contend that judicial decisions limiting access to the courts have had a dire impact on vulnerable communities. Villazor argues that these decisions tacitly approve government programs that exclude language minorities. Similarly, Hincapié and Avendaño-Denier contend that Court decisions limiting undocumented workers' labor rights create perverse incentives for employers to hire and exploit undocumented workers instead of American workers whose rights are better protected. The Federalism Revolution has, of course, hurt communities of color not addressed in this book. We are particularly sorry not to have addressed the impact of the Rehnquist Court's decisions on Native Americans.

Chapters 6 through 9 demonstrate that civil rights—and the Federalism Revolution—reach beyond racial discrimination. In chapter 6, Emily Martin addresses Congress's attempt to provide national civil rights protection for battered women and the Court decision striking down that statute in the name of federalism. Chapters 7 and 8, by Simon Lazarus and Caroline Palmer respectively, also illustrate the Court's use of federalism to eviscerate civil rights and limit congressional authority. Those chapters describe recent cases limiting the reach of the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Medicaid. As a result of those cases, older Americans and people with disabilities can be subjected to employment discrimination by state employers without a judicial remedy, and individuals who rely on Medicaid for their health care face barriers to enforcing their civil rights in court.

The gay rights movement has had many of its recent success in courts, either in the Court's decision striking down state sodomy laws or in state court decisions sanctioning same-sex marriage.[12] However, the Federalism Revolution may imperil lasting federal protections for this community as well. Chapter 9, by Professor Arthur Leonard, explains that sexual minorities still lack fed-

eral protection from employment discrimination and hate crimes, and how the Federalism Revolution has limited Congress's authority to enact such legislation. Accordingly, Leonard urges gay rights advocates to join with other civil rights activists to restore congressional authority to redress discrimination.

Part III builds on Part II by looking more closely at the impact of the Federalism Revolution on the provision of government services, including education, health care, the environment, our criminal justice system, and immigration. In chapter 12, Professor Denise Morgan addresses the continuing racial segregation and fiscal inequities in our public school system, and explores the Court's 1970s decisions that reneged on the promise of *Brown*. She then details how the Federalism Revolution cases restricting access to the courts have undercut recent efforts to achieve equal educational opportunity.

In chapter 13, Jane Perkins similarly contends that the Federalism Revolution has denied the fifty-five million people who rely upon Medicaid (the elderly, low-income, and people with disabilities) access to the courts. Since its inception four decades ago, Medicaid has improved the health of these otherwise vulnerable populations. These successes are now at risk, Perkins contends, because states often ignore federal mandates unless they are ordered to comply.

In chapter 14, Olga Pomar and Professor Rachel Godsil argue that the Federalism Revolution cases doomed litigation that sought to eradicate the link between the lack of environmental protection and race. The chapter begins with the story of how a neighborhood in Camden, New Jersey, won a court injunction to prevent the operation of a toxin-spewing cement factory, only to have the decision overruled by the Supreme Court.

In chapter 15, Professor Michelle Alexander paints an ominous picture of the lack of meaningful access to courts in our criminal justice system, focusing on the mass incarceration of people of color. Alexander draws a connection between the high rate of incarceration—which has serious repercussions on employment, voting, and education—and federalism, because the Court has precluded federal civil rights challenges to state and local criminal enforcement measures, even when those measures have a vastly disproportionate effect on blacks and Latinos.

This part of the book ends with an examination of the rollback of civil rights in the context of the war on terror. In chapter 16, Barbara Olshansky, who has represented detainees at Guantánamo Bay, contends that the Federalism Revolution laid the groundwork for the executive branch's ongoing assault on civil liberties that now threatens our constitutional democracy. In chapter 17, Professors Lori Nessel and Anjum Gupta explore how Congress limited immigrants' rights in the wake of 9/11, and argue that for immigrants, it is Court deference to congressional enactments rather than judicial activism that causes concern.

While many of the preceding chapters hint that the Federalism Revolution is motivated by more than an abstract commitment to adjusting the balance of power between the states and the federal government, Part IV, *Federalism Revolution: Principle or Politics?* makes the argument explicit by contending that the Court's appeal to federalism is a rhetorical veil for a political agenda.

In chapters 18 and 19, the late Herbert Semmel and Nathan Newman conclude that the Court's commitment to states' rights is thin. Semmel finds that the Rehnquist Court has consistently ignored states' rights and the principles of federalism whenever states favor civil rights interests. Newman canvasses the Court's treatment of labor and employment laws since the New Deal, and contends that the Rehnquist Court has regularly betrayed the principle of states' rights in order to limit labor and employment rights.

The 2004 elections should be seen as a clarion call. The Right is in ascendance, and those of us committed to the preservation of civil rights must fight an uphill battle. The final part of the book, *Strategies for Reversing the Rollback*, explores the multiple dimensions of our struggle. In chapter 20, Lee Cokorinos and Alfred Ross describe the Right's blueprint to roll back civil rights. The chapter concludes with ten lessons that civil rights activists and progressive and liberal politicians must learn in order to shift the nation's political mindset.

The remaining chapters each address a specific dimension of the struggle to restore civil rights. In chapter 21, Susan Lerner argues that the extreme Right has pursued its anti-civil rights agenda outside of the public eye by stacking the courts rather than lobbying Congress. Lerner concludes that to halt that trend, political activity must be focused on court appointments. In chapter 22, Joy Moses argues that because the Right's anti-civil rights agenda lacks widespread public support, another first step in reversing the rollback should be to lobby Congress. Many of the rollback cases involve misinterpretations of congressional intent, which can be addressed through new legislation.

While some focus their political energies on fights in Washington, DC, others are engaged in political work closer to home. Indeed, states have provided important forums for successful civil rights work. In chapter 23, Dennis Parker, Bureau Chief for the Civil Rights Bureau in the Office of New York State Attorney General Eliot Spitzer, describes three state civil rights strategies currently being employed in some progressive states: state enforcement of federal civil rights laws, state opposition to efforts to strike down federal laws in the name of states' rights, and state waiver of sovereign immunity (which protects states from lawsuits) in federal civil rights actions.

Grassroots organizing has always been critical to any struggle for social justice. Chapter 24, a compilation of essays by Andrew Friedman, Robert Gar-

cía, Erica Flores Baltodano, Julie Hyman, Brad Williams, and Tracie Crandell, explores grassroots activist strategies by poor people, environmental justice activists, and people with disabilities. These struggles are cause for optimism in an otherwise arid political climate. Chapter 25, by Columbia Law students Lisa Zeidner and Luke Blocher, describes the social theory underlying student activism, and provides as examples the movements supporting affirmative action and the anti-sweatshop movement. Zeidner and Blocher offer specific action items to galvanize student organizing, which is crucial to the national civil rights restoration movement.

Marianne Engelman Lado, General Counsel to the New York Lawyers for the Public Interest and one of the founders of NCRCR, concludes the book by discussing litigation strategies to pursue social justice in the wake of the Federalism Revolution. In chapter 26, Lado examines the historical roles of both the courts and progressive lawyers in the protection of civil rights, concluding that federal courts have played a "crucial but inconsistent role." History teaches us that progressive lawyers must employ flexible strategies such as litigating in state courts, providing technical assistance to community groups, and engaging in creative litigation in federal courts.

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Denise C. Morgan, Rachel D. Godsil, and Joy Moses
New York City, 2005

Endnotes

1. Martin Luther King, Jr., "I Have a Dream," speech on the steps of the Lincoln Memorial (Aug. 28, 1963).

2. The 1935 National Labor Relations Act (the Wagner Act), the 1935 Social Security Act, the 1938 Fair Labor Standards Act.

3. The civil rights legislation enacted in the 1960s and 1970s included: the 1964 Civil Rights Act (prohibiting race discrimination in public accommodations and by recipients of federal funds, and employment discrimination on the basis of race, color, national origin, sex, or religion), the 1965 Immigration and Nationality Act (abolishing the national origins quotas that restricted Asian immigration), the 1965 Voting Rights Act (prohibiting states from denying or abridging the right to vote), the 1967 Age Discrimination in Employment Act (prohibiting employment discrimination against people age forty and over); the 1968 Fair Housing Act (prohibiting discrimination in the sale and rental of housing), Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in federally funded educational programs), and §504 of the Rehabilitation Act of 1973 (prohibiting discrimination by the federal government against people with disabilities).

4. Denise C. Morgan and Rebecca E. Zietlow, The New Parity Debate: Congress and Rights of Belonging, *73 Cincinnati L. Rev.* (2005) 1347.

5. Id.

6. See, e.g., chapter 1.

7. *Grutter v. Bollinger*, 539 U.S. 306, (2003), *Lawrence v. Texas*, 539 U.S. 558, (2003), *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

8. See chapters 20 and 21 discussing the extreme Right and its efforts to dominate the federal courts.

9. See Erwin Chemerinsky, The Federalism Revolution, *31 N.M. L. Rev.* (2001) 7, 7 (coining the term and describing the "revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism").

10. See, e.g., Jed Rubenfeld, The Anti-Antidiscrimination Agenda, *111 Yale L.J.* (2002) 1141, 1144 ("some of the Court's federalism cases are not really federalism cases at all… they cannot be intelligently explained or debated in the doctrinal terms in which they present themselves").

11. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004).

12. See *Lawrence v. Texas*, 539 U.S. 558 (2003), *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309, 798 N.E. 941 (2003), *Hernandez v. Robles*, 2005 NY Slip Op 25057 2005, NY Misc. LEXIS 248 (NY Sup. Ct. Feb. 4, 2005).