

SYMPOSIUM

THE CIVIL RIGHTS ACT AT FIFTY: PAST, PRESENT, FUTURE

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I. PROCEEDINGS

The Civil Rights Act of 1964 stands as one of the great legislative milestones of the twentieth century. Its mandates reach, for good or ill, into wide swathes of American social and economic life. It has spawned a raft of similar legislation, both here and abroad. And it has long sat at the center of much scholarly thinking about American public law. For all these reasons, the fiftieth anniversary of its enactment merits remembrance and reflection. Yet even beyond the semicentennial tidiness of the current moment, now is an ideal time to take stock, as recent events—including Supreme Court decisions limiting job discrimination class actions,¹ the quickening march toward legal recognition of gay marriage,² and the waning of the Voting Rights Act³—have produced a reckoning of sorts about where civil rights law has been and where it might be

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1. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

2. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

3. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

going. The Civil Rights Act's fiftieth, it seems, has come at a fitting time, when reflection is urgently needed.

On January 24-25, 2014, the *Stanford Law Review* and the *Stanford Journal of Civil Rights & Civil Liberties* convened a Symposium, "The Civil Rights Act at Fifty," to venture such reflection. The event brought together a talented cast of scholars who have made significant contributions to our understanding of the Civil Rights Act, five of whom generously shared the Essays in this issue. These scholars include Richard Epstein, whose brief against Title VII some twenty years ago remains a model of academic first-principles thinking,⁴ and Richard Ford, who has since offered his own influential critique of job discrimination laws.⁵ Just as notable are Mary Anne Case, who has long possessed one of the most thoughtful scholarly voices on gender discrimination,⁶ Olatunde Johnson, whose scholarship offers the premier exploration of Title VI's powerful but unfulfilled promise,⁷ and Samuel Bagenstos, who has written lucidly and persuasively about the challenges facing the disability rights movement.⁸

In addition to these scholarly voices, the proceedings also featured individuals who have spent time in the trenches, implementing and, in some cases, even helping to conceive the Civil Rights Act or the cognate job discrimination laws that have sprung up around it. They include William Gould, who long before serving as Chairman of the National Labor Relations Board (NLRB), cut his teeth as a labor and civil rights lawyer at the United Auto Workers and the

4. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

5. See RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* (2011); RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008); RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* (2005).

6. See, e.g., Mary Anne Case, Essay, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655 (2007); Mary Anne Case, Commentary, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

7. See, e.g., Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012); Olatunde C.A. Johnson, Essay, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154 (2011); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007).

8. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004); Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000).

NLRB immediately before and after 1964. They include Chai Feldblum, who, prior to her current position on the Equal Employment Opportunity Commission, helped draft the Americans with Disabilities Act. And they include John Relman, who runs one of the nation's most dynamic for-profit civil rights law firms and has brought a range of innovative lawsuits at the frontier of civil rights practice.⁹

Given the richness of the event, this brief introduction, focused as it is on the Symposium's scholarly output, offers a radically incomplete accounting of what in fact transpired. Nor can it capture the richness of the Essays themselves. But surveying the Symposium's written contributions still offers a revealing snapshot of the state of current debate about civil rights. Perhaps more importantly, a look across the contributions highlights some crosscutting themes that echoed throughout the proceedings—and will surely echo across the debate around civil rights in the years to come. Toward these ends, Part II offers a digestible overview of each of the contributions, while Part III offers some thoughts connecting them.

II. CONTRIBUTIONS

Two stellar Essays focus on Title II's provisions barring discrimination in public accommodations. In *The Unrelenting Libertarian Challenge to Public Accommodations Law*, Samuel Bagenstos eloquently frames the current debate over Title II and its state-law cousins as "how broadly and deeply equality principles should extend into civil, economic, and social relations."¹⁰ For Bagenstos, the Supreme Court's decision in *Boy Scouts of America v. Dale*,¹¹ which upheld the organization's right to bar a gay assistant scoutmaster against a challenge under a state public accommodations law, marks the start of a "tightening siege" in which conservative forces have successfully invoked First Amendment associational freedom in order to chip away at—and ultimately do away with—Title II's guarantee of equal access to public spaces.¹² Much of his account concerns tactics: association rights are the doctrinal weapon of choice, Bagenstos asserts, because of the political unpalatability of a frontal attack on the antidiscrimination principle itself. But the reason the tactic might just work, Bagenstos argues, is jurisprudential: *Dale* gave rise to a distinction between expressive and purely commercial activities that is deeply unstable, as exemplified by a set of percolating cases in which wedding photographers and other

9. See RELMAN, DANE & COLFAX PLLC, <http://www.relmanlaw.com> (last visited June 11, 2014).

10. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1209 (2014).

11. 530 U.S. 640 (2000).

12. See Bagenstos, *supra* note 10, at 1240.

proprietors assert that the expressive nature of their goods or services entitles them to First Amendment protection against public accommodations laws.¹³ For Bagenstos, the doctrinal line drawn in *Dale* thus leaves plenty of room for lower courts, or the Supreme Court itself, to permit the expressive exception to swallow the nondiscrimination rule.

In *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, Epstein joins Bagenstos in criticizing litigation efforts beginning with *Dale*, but not as an unprincipled tactical move. Rather, Epstein worries those efforts will not do *enough* to achieve the ideal: paring back the antidiscrimination principle at Title II's core to cover only "monopoly-like situations," where refusals to deal leave discrimination's victims unable to purchase the same or similar goods or services from a non-discriminatory, profit-seeking rival.¹⁴ To be sure, Epstein does not bemoan Title II's enactment, even if some of its legislative champions envisioned a somewhat broader set of applications. Rather, he celebrates Title II in its initial guise as a fully justified libertarian response to the "manifest imperfection of power structures" at the time, particularly in the "Old South," which exposed commercial entities who employed or served African Americans to retaliation by corrupted public service providers or unpoliced private violence, and without recourse in the equally corrupted courts.¹⁵ But the world has changed since then. Now, as Epstein bluntly puts it, a "civil rights program that at one time protected individual liberty and choice has by degrees become an instrument of repression in the hands of public and private groups."¹⁶ On this view, suits against wedding photographers by spurned gay couples not only drain social resources without materially increasing freedom. They are also a kind of movement-building litigation stunt that ignores the equally acute dignitary harms on the other side of the "v."¹⁷

In *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, Olatunde Johnson turns our attention away from Title II and toward Title VI's prohibition on discrimination in connection with federal programs

13. The example around which both Bagenstos and Epstein structure their analyses is a New Mexico Supreme Court case, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). For the argument regarding doctrinal instability, see Bagenstos, *supra* note 10, at 1236 ("Once we expand the 'expressive' zone to include for-profit businesses that sell their goods or services to the public, it becomes clear that the expressive-commercial distinction cannot be counted on to cabin *Dale*'s constitutional exemption from public accommodations laws.").

14. Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1253 (2014).

15. *Id.* at 1249.

16. *Id.* at 1244.

17. *Id.* at 1283-84.

and expenditures. Tracking some of her past scholarly work, Johnson highlights several reasons why Title VI has, in the view of many, failed to fulfill its promise.¹⁸ The most important is narrowing judicial interpretations refusing to find a private right of action to enforce agency-promulgated regulations prohibiting activities that have a disparate impact on protected groups.¹⁹ Another reason, which Johnson only hints at, is that Title VI's principal mode of *public* enforcement is an agency's termination of federal funds, which can harm program beneficiaries as much as, or even more than, a recalcitrant state or local grant recipient.²⁰ Despite these challenges, Johnson sees promise that civil rights groups have already begun to tap. In the world Johnson describes, the principal legal tools are not towering, abstract rights claims advanced in court, but rather they comprise a slow burn of *administrative* lawyering in which civil rights groups "fil[e] lawsuits and complaints, engag[e] in rulemaking and lobbying, conduct[] policy reviews, analyz[e] data, and participat[e] in planning and design."²¹

The remaining contributions consider Title VII's prohibition on job discrimination, a virtual afterthought in 1964 that has since become the 800-pound gorilla of federal litigation regimes. In *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, Mary Anne Case takes aim at current legislative efforts to extend Title VII's job discrimination protections to LGBT workers, declaring that the Employment Non-Discrimination Act (ENDA) would be "a step backward for the freedom of gender expression and from sex stereotyping for all individuals."²² One reason is that minting new protections outside of Title VII risks privileging individuals who can and do claim LGBT identity, leaving little or no protection for "those whose transgression of conventional gender norms is less extreme, consistent,

18. Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1294 (2014).

19. See *id.* at 1309-10 (discussing, inter alia, *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Court held that an implied private right of action to enforce Title VI of the Civil Rights Act of 1964 did not extend to regulations proscribing conduct having a disparate impact on protected groups).

20. See *id.* at 1328 n.194 ("Termination of funds is rare in Title VI's enforcement regime."); see also U.S. COMM'N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 40 (1996), available at <http://files.eric.ed.gov/fulltext/ED400365.pdf> ("[A]lthough fund termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Fund termination may eliminate entirely the benefit sought by the victim.").

21. Johnson, *supra* note 18, at 1332.

22. Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1336 (2014).

or unidirectional.”²³ Worse, ENDA has been compromised, Case warns, by diluting provisions that leave it systematically weaker than Title VII—the price of a high-salience legislative effort as against, say, quieter judicial efforts. And indeed, the better path forward, in Case’s view, is a federal judiciary that has, in a rising tide of cases, begun to treat discrimination on the basis of sexual identity as just a species of sex discrimination—would a woman who brought her girlfriend to an office party have been treated differently if she were a he?—thus raising questions about whether a diluted, politically compromised ENDA is needed at all.

Finally, in *Bias in the Air: Rethinking Employment Discrimination Law*, Richard Ford mounts a scintillating effort to reimagine the entire Title VII edifice. For Ford, it is wrongheaded to define discrimination by reference to discriminatory intent. Nor should we expect that judge or jury can reliably determine, based on circumstantial evidence, whether a prohibited motivation was present at the time of an adverse employment decision and, if it was, whether it caused the decision or was merely incidental to it. Instead, we should replace the “conceptually elusive goal of eliminating discrimination with the more concrete goal of requiring employers . . . to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy.”²⁴ The result of this duty-of-care approach would be to refashion all of job discrimination law so that it roughly resembles recent doctrinal innovation in sex harassment law, in which an employer can avoid certain kinds of liability by showing it had organizational structures and processes in place to prevent and remedy harassment.²⁵ Of course, Ford full well admits that his approach would sink the claims of at least some individuals who suffer acts of discrimination, plainly actionable in the current regime, where their employers put in place structures and processes that qualify for the duty-of-care safe harbor.²⁶ But placing job discrimination law on a duty-of-care conceptual and doctrinal footing would pay dividends across the wider run of cases, reducing the error costs of a regime currently built around indirect proof and bringing the core legal inquiry closer to the normative aim of eliminating illegitimate ascriptive hierarchies.

23. *Id.*

24. Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1384 (2014).

25. *Id.* at 1411-12 (discussing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998), wherein the Court created an affirmative defense to punitive damages where an employer can show it “exercised reasonable care” in establishing “antiharassment policies and effective grievance mechanisms”).

26. *Id.* at 1385-86.

III. CONNECTIONS

The Essays thus highlight the state of debate within specific titles of the Act: the optimal reach of Title II and its state-law analogues; the possibilities and limits of the administrative turn in the use of Title VI; and the wisdom of keeping Title VII intact rather than extending it or refashioning it entirely. Yet while each Essay offers a rich and nuanced view within a single title of the Civil Rights Act, a trio of themes emerges across them.

First, it should not surprise anyone that, even fifty years into implementation, heated debate over first principles and questions of value continues unabated. What is striking in the Essays, however, is the extent to which questions of value in the civil rights area intersect, perhaps increasingly so, with questions of empirical fact. For instance, Ford's advocacy of a duty-of-care approach to job discrimination is founded at least in part on the now-common observation that we live in a world of "second-generation" discrimination—characterized by implicit rather than explicit bias in flatter and more collaborative workplaces—that tort-like lawsuits keyed to inferring the intent behind discrete decisions are ill suited to reach.²⁷ A duty-of-care approach, on Ford's view, can improve on this state of affairs by inducing employers to alter organizational structures and processes in ways that benefit protected groups. But past work in organizational sociology suggests that compelled adherence to organizational best practices might also yield "filing cabinet compliance" without materially altering bureaucratic routines that might prove every bit as difficult to identify, and thus prevent, as it is to infer discriminatory intent in the current regime.²⁸ To be sure, Ford does yeoman's work in his effort to place Title VII on a new conceptual and doctrinal footing. But his analysis also points to numerous empirical questions on which the success of a duty-of-care approach would turn and which therefore demand further study.

Another vivid example of the intersection of questions of value and fact is Epstein's contention that a changed world characterized by competitive markets for consumer goods and services justifies a less intrusive antidiscrimination principle in public accommodations. As an initial matter, Epstein's focus on market competition and monopoly excludes other factual questions that might impel an entirely different normative frame than what he adopts. Among these are the possibility that even "correctable" refusals to deal (that is, refusals

27. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

28. See also Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531-35 (1992) (offering a classic account of the organizational response to civil rights enforcement).

within fully competitive markets) impose uniquely costly stigmatic harms, or that custom- and stereotype-enforced discrimination can persist even absent monopoly.

Yet even taken on its own terms, Epstein's analysis leaves the precise connection between his empirical claim and his normative prescription less than clear. One possibility is to replace the current regime with a case-by-case, anti-trust-like inquiry, with warring economic experts or perhaps just back-of-the-envelope estimates of the number of wedding photographers in a town of 50,000 of the sort amici advanced in the *Elane Photography* case noted previously.²⁹ The better reading, however, is that Epstein's market competition claim is more gestalt than grounded empiricism—not something to be proven or disproven at the case level, but a far looser claim about central tendencies or even a kind of “social fact” about the nation as a whole. If so, Epstein's account should give us pause if it indeed moves courts to unilaterally pare back public accommodations laws across the board. Indeed, a purely *judicial* effort to cabin Title II's antidiscrimination principle on the grounds Epstein articulates would seem to require precisely the sort of broadscale empirical judgment that the Court has criticized Congress for making in other antidiscrimination contexts.³⁰

A second, and related, theme sits at the intersection of civil rights enforcement and institutional choice. The importance of institutional setting is readily apparent in Johnson's account of the shift toward administrative lawyering under Title VI. It is also apparent in Case's implication that courts might be a quieter, and thus more effective, institutional forum than Congress for extending Title VII's protections to LGBT employees. Less obvious, however, is a related move embedded in Ford's effort to refashion Title VII. Indeed, Ford's duty-of-care shift would not just put job discrimination law on a new conceptual, doctrinal, and evidentiary footing. It might also require placing job discrimination law on a different *institutional* footing. As Ford notes, redirecting the inquiry away from the concept of intent and toward organizational structures and practices will also move the system out of the domain of psychology and into the

29. See, e.g., Brief of Amici Curiae Cato Inst., Eugene Volokh, & Dale Carpenter in Support of Petitioner at 19, *Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014) (No. 13-585), 2013 WL 6665006 (using a blog post's estimate of the number of wedding photographers nationwide, based on the annual number of weddings and the maximum possible workload of photographers, to assert that “even a town of 50,000 people would likely contain over 15 wedding photographers”); see also *supra* note 13.

30. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Another version of this is the Court's recent decision in *Shelby County*, which struck down a portion of the Voting Rights Act because of Congress's failure to update section 5's preclearance coverage formula from its 1975 version. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). See generally William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 89 (2001).

domain of management science, where agency expertise might be especially welcome.³¹ One could thus imagine vesting the Equal Employment Opportunity Commission—famously referred to at its birth as a “poor enfeebled thing”³²—with the legislative rulemaking power it currently lacks, including the power to promulgate binding rules specifying safe harbors of the sort used in many other regulatory areas. To that extent, Ford’s conceptual and doctrinal vision dovetails with a line of scholarship that seeks to reform job discrimination regulation by fundamentally altering institutional powers and responsibilities.³³

Third and finally, the collected Essays, coming on the heels of fifty years of implementation efforts, suggest some broader insights about the lifecycles of legal and regulatory regimes. For instance, the contributions vividly illustrate two kinds of (re)design challenges that come with the passage of time and seem to arise with particular force in the antidiscrimination context. The more obvious of the two is how to retrofit a regime once the ground has shifted out from under an initial set of institutional designs. This is readily glimpsed in Epstein’s and Ford’s contributions: as just noted, both scholars’ prescriptions flow from claims about tectonic shifts in ground-level regulatory realities—the degree of market competition and the sources and nature of discrimination—since 1964. The second type of challenge is how to extend a regime once the impulses and energies that birthed it have faded. For instance, Case’s analysis suggests that the gay rights movement can no longer rely on the creedal passion of 1964, borne of images of police dogs and water hoses turned on peaceful marchers and other outrages, to drive forward legislative efforts. To the contrary, ENDA may be coming at a time of creedal exhaustion—or at least skepticism about the extent of regulatory intrusion that Title VII has come to represent. The result is that gay rights champions may ultimately achieve a legislative victory in ENDA. But, as Case worries, it is likely to be less potent than Title VII’s original design.

Yet we can also glimpse a deeper, and far gloomier, insight about legal and regulatory lifecycles in Johnson’s work on Title VI. Importantly, the shift in Title VI lawyering Johnson observes is not just a shift in institutional forum, from courts to agencies. It is also part of an often-noted, *substantive* shift in legal challenges under the Civil Rights Act and other constitutional and statutory antidiscrimination mandates. Gone are the days in which civil rights lawyers

31. See Ford, *supra* note 24, at 1419.

32. See MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966).

33. See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 275-79 (1995); Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996); Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405.

leveled abstract rights claims challenging wholesale exclusion from American political, social, and economic life. Instead, civil rights claims have grown progressively more mired in the substance of specific institutional or regulatory contexts. Civil rights claims are also less likely to contest the complete denial of resources that comes with wholesale exclusion and instead assert subtler distributive claims regarding *how much* in the way of resources should flow to protected groups relative to other deserving recipients.³⁴ As a result, while Johnson outlines the promise of a new, administrative brand of civil rights lawyering under Title VI, one can glimpse a darker, Lowi-esque view of the entire enterprise in which the civil rights struggle has moved from relatively clean judicial challenges contesting outright exclusion to the messy pull and haul of interest group, administrative politics.³⁵

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Taken together, the five Essays that follow offer a rich trove of insights about the Civil Rights Act's past, present, and future. They are a fitting tribute as the Act marks its fiftieth year.

34. For a seminal treatment of this issue in the special education context, see MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1998).

35. See THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969).