

# CIVIL RIGHTS

## RE-ENVISIONING CIVIL RIGHTS

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The past century has witnessed extreme shifts in the struggle for civil rights. In 1900, race and other forms of discrimination were firmly entrenched in both public and private sectors of American life. In the era of “Jim Crow” laws, many Americans of color were treated as less than full humans, not only subject to racial segregation, but also prohibited from basic rights we take for granted today, such as the right to own property. But as the civil rights movement gathered momentum in the 1950s, we saw legally sanctioned discrimination diminishing. In particular, state and federal courts struck down “separate but equal” treatment of people of color, particularly African Americans, in everything from education to marriage, and the passage of the federal Civil Rights Act of 1964 barred discrimination based on race, color or national origin. Following on the heels of the Civil Rights Act, Congress dismantled restrictive immigration quotas that unfairly targeted Asia, Latin America and most other non-European nations.

But a half-century after some of these discriminatory laws crumbled under the weight of advancing equality and justice, civil rights activists find ourselves struggling with the concern that the progress we have made in racial and social justice is being slowed or reversed.

In some cases, we have not necessarily retreated on major civil rights issues, but demographic shifts have complicated social dynamics, making progress harder to measure and evaluate. The key change is that before the civil rights movement helped to open up immigration from Latin America and Asia, the struggle for civil rights dealt mostly with a binary paradigm of “black and white.” But as immigration from across the globe has changed the face of our nation, ideas of racial justice have broadened over time to reflect this demographic shift, e.g., incorporating issues around language or immigration status. Other groups have gained a voice over time so that our civil rights struggles now include issues of gender and sexual orientation. While these are distinct from racial justice struggles, the reality is that all the groups within the movement for social justice share common opponents and limited resources. We are inextricably linked, and losing the war on one front affects the battles along all of the others.

Besides demographics, the other major factor causing a shift in racial justice was September 11th. There is no denying that post-9/11, fundamental civil liberties and civil rights have taken a backseat to national security and the “War on Terror,” with people of color bearing the brunt of this shift and most of the resulting racial injustices being perpetrated by government institutions. Civil rights issues now include new developments like detention and torture, issues that were once discussed solely in the global human rights paradigm but now face us here at home. In addition, the recent spike in immigration raids and cases of brutal treatment in detentions has thrust immigration-related civil rights issues into the forefront.

Too often, the focus on race in our nation pits groups against each other. That is a red herring. The real battle, which the Applied Research Center has helped to lead the charge on, is against institutionalized racism. As many of us know, past racism has left a legacy of institutions, structures and policies that perpetuate white privilege, perhaps not in so many words, but policies and institutions can perpetuate racism without blatantly saying so on their face.

In antidiscrimination law there is something called the intent doctrine, which requires proof that discrimination was intentional. But we live in a day and age when discrimination is no longer so overt and apparent. Whether it’s because people are less intentionally discriminatory or whether they have learned to hide it is not clear. The

intent doctrine presumes individual actors and does not address the real problem, which is a larger system that favors those already in positions of privilege (e.g., whites, heterosexuals) and as a consequence perpetuates discrimination in a less direct way. While individuals can be racist or discriminatory, the kind of discrimination that holds back an entire community is not individual discrimination per se—it is institutional discrimination perpetrated by large entities like government agencies or corporations. For example, in the past eight years, the U.S. Department of Justice has shifted significant civil rights resources toward prosecuting labor and sex trafficking, which focuses on mostly individual or smaller groups of smugglers as opposed to traditional civil rights prosecutions to hold local police departments accountable for race discrimination or abuse of power. While going after human traffickers is both serious and necessary, the main enforcer of our nation’s civil rights laws should not trade off one for the other. The end result is that racial justice and fighting institutional discrimination are no longer priorities for our federal government.

With a new presidential administration taking office on January 20, 2009—the first one in over 20 years that will not have an incumbent President or Vice President—we have the best opportunity in a generation to reinvigorate our federal government’s commitment to civil rights and racial justice.

To shift away from the current status quo on racial and social justice, the next administration must take a number of steps, some immediate, some longer-term, to affirmatively reprioritize civil rights.

Given that five of the nine justices are currently aged 70 or older, the next president will likely have the opportunity to appoint at least two U.S. Supreme Court justices. The three youngest justices are among the Court’s most conservative voices and have clearly indicated that issues of racial justice, like school desegregation, are not priorities. The next President must balance the current voices on the U.S. Supreme Court with justices who are capable of compassionate and fair-minded decisions on issues impacting communities of color—not just issues of race, per se, but issues such as criminal justice, low-wage labor, etc. that disproportionately affect people of color. The appointment of Supreme Court justices is the greatest legacy that any President can have, because Supreme Court justices average 25 years on the bench, more than six presidential terms. Also important for the next President will be the appointment of fair-minded federal district and circuit court judges, which creates a pipeline for possible future Supreme Court nominations. The lower court appointments are also critical from a local, community perspective in that these lower court judges hear and decide the majority of cases brought by civil rights lawyers, and only a minute percentage of cases in federal court ever find their way to the Supreme Court.

In Congress, the next administration must prioritize passing legislation that reverses civil rights setbacks of the past few decades. An immediate goal is to pass currently pending legislation such as the Ledbetter Fair Pay Act, which would ensure that employees alleging discrimination be able to sue over unequal pay once the discrimination is discovered and regardless of when it started (a matter that the current Supreme Court has already rejected), and the Employee Free Choice Act, which would make it easier for employees to unionize.

Several longer-term priorities would be to correct recent U.S. Supreme Court decisions that undermine the rights of workers. For example, the Supreme Court in *Hoffmann Plastic Compounds, Inc. v. NLRB* held that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to back pay, overturning a long-standing precedent and creating an incentive for non-unionized companies to hire and exploit undocumented workers. Without a solution to address Hoffman Plastics, that decision will expose an estimated 8.6 million low-wage immigrant workers who lack legal status to further exploitation.

Another longer-term priority would be to correct *Alexander v. Sandoval*, a 2001 U.S. Supreme Court decision that essentially eliminated private lawsuits under Title VI of the Civil Rights Act of 1964 that allege “disparate impact” (meaning unintentional) discrimination. The consequence of this decision is that it is very difficult now for an individual to bring a lawsuit alleging racial or national origin discrimination, since, post-Sandoval, a plaintiff can only allege intentional discrimination. This leaves the enforcement of civil rights in the hands of government agencies, which can still bring cases on behalf of individuals, but the federal government has not

prioritized these types of cases for many years. This fix is critical for issues like language access challenges, where the discrimination can be profound but is often difficult to characterize as intentional.

Also critical for the next Congress to address are barriers to voting, particularly for low-income and new voters, as well as people convicted of felonies; for example, the new administration should seriously prioritize getting states to rectify poor compliance with the National Voter Registration Act, which is commonly known as Motor-Voter and requires states to offer voter registration to citizens when they apply for public assistance. The new administration should also consider other proposals to increase voter participation such as Election Day voter registration, as well as take steps to mitigate the impact of, or even bar outright, restrictive voter identification laws.

In addition to correcting missteps of the past, Congress must also pass legislation that expands civil rights, not just puts us back where we were in the past—for example, repealing the Defense of Marriage Act and the federal bar on same-sex marriage. A near-term fix is to pass the Local Law Enforcement Hate Crimes Prevention Act that would expand protected categories to include gender, sexual orientation and disability, as well as strengthen federal ability to investigate and prosecute hate crimes cases. And Congress and the new administration must also affirmatively assess the racial and social justice impact of other laws, such as those being passed to address the nation's current economic crisis. For example, as the nation continues to grapple with the onslaught of home foreclosures, foreclosure and counseling mitigation services going forward must be provided equitably to all communities, particularly communities of color and limited-English-speaking communities, who were disproportionately targeted for fraudulent loans.

The next President will also have wide latitude to influence the operations of the federal agencies within the President's Cabinet—these are the government entities that operate or fund all of the major government programs in our country. Chief among the next President's priorities should be refocusing the Department of Justice (DOJ), which is the federal government's chief enforcer of laws. In particular, the DOJ's Civil Rights division, which was established in 1957 during the era of massive civil rights changes, must reprioritize its original mission of fighting racial discrimination. As civil rights laws have expanded over the years, it is both natural and desirable that the DOJ's mission has expanded to include fighting discrimination on other bases, such as disability. However, in recent years the DOJ's Civil Rights division has shifted from being at the vanguard of championing the rights of the most vulnerable in our society and taking on those who perpetuate systemic discrimination to focusing on issues like freedom of religion that do not clearly benefit vulnerable populations, or human trafficking, which targets individual actors instead of institutions. The DOJ's own Bureau of Justice Statistics released a 2008 report showing that the number of civil rights cases brought by the department has dropped significantly in recent years, falling 21% from 2000 to 2006. The next President also needs to depoliticize the DOJ in order to rehabilitate the agency's reputation after the recent scandals involving the influence of partisan politics on hiring and enforcement decisions.

The next administration must also ensure that the civil rights enforcement divisions of the other federal agencies refocus on enforcing racial and other related social justice issues (e.g., access for persons with limited English proficiency or physical disabilities). Over the past few decades, many of these civil rights agencies, which have a great day-to-day impact on key programs like Medicaid and public education that affect people of color and low-income communities, have lost so much funding and support that they cannot effectively carry out their missions. Some of these agencies have also absorbed significant new "mandates" that in some cases have overwhelmed the traditional civil rights mission—for example, the Office for Civil Rights of the U.S. Department of Health & Human Services now also enforces the Health Insurance Portability & Accountability Act, meaning that privacy investigations now dominate many of these offices.

Besides reviving the original civil rights mandate for the federal civil rights enforcement agencies, the next administration should also highly prioritize the improved and expanded collection of federal data on race, ethnicity, national origin, primary language and religion. An immediate priority should be ensuring the success of the 2010 Census. But a longer-term priority is to ensure the overall quality of Census data collection. For example, the

Census is shifting away from a decennial survey to the American Community Survey (ACS), which will collect data on a rolling and ongoing basis. As the Census shifts towards the ACS, issues have arisen about the inability of the ACS to accurately capture data at small geographies and for small populations, such as language minorities. Without such detailed data, communities of color and other communities struggling for justice will be at a significant disadvantage in advocating for increased support and funding.

In summary, the next President and Congress must seize the opportunity to reinforce and expand the civil rights of communities of color, poor communities and others who struggle every day for justice, prioritizing:

- Appointing U.S. Supreme Court and lower court justices, as well as Cabinet members and agency heads, who are committed to racial justice and equity
- Passage of legislation that reinforces and expands civil rights
- Incorporating a civil rights analysis into laws that do not clearly target people of color
- Improving and expanding federal data pertaining to race, national origin, primary language and religion