

1-1-2003

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Recommended Citation

Eric K. Yamamoto, *Reclaiming Civil Rights in Uncivil Times*, 1 HASTINGS RACE & POVERTY L.J. 11 (2003).
Available at: https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol1/iss1/2

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Reclaiming Civil Rights In Uncivil Times

by
Eric K. Yamamoto*

Introduction: "Why We Are Here"

I'm from Hawai'i.¹ Third generation Japanese American. At the turn of the last century, my grandparents hoped to better their hard life in Japan and emigrated to work on Hawai'i's sugar plantations. In response to oppressive work and living conditions, my grandfather reportedly helped a fledgling union fight the white plantation owners who controlled all political and economic life in the territory. He was branded a trouble-maker/traitor and forced to flee and change his family name.

At the same time, Hawai'i's indigenous peoples, Native Hawaiians, struggled for survival. They had their sovereign nation illegally overthrown with direct U.S. military support.² They lost their homelands. Indeed, the U.S. took all Hawaiian government lands—one-third of all lands of the territory.³ Native Hawaiians had their language barred and customs denigrated and were characterized as uncivilized.⁴ And they were decimated by western disease.⁵ Hawai'i became largely populated by white Americans

* Professor of Law, University of Hawai'i. Portions of the following sections are drawn from Professor Yamamoto's keynote address at the Asian Law Caucus 29th Annual Meeting, "In Defense of Civil Rights," March 23, 2001, San Francisco, California. My thanks to Barbara Wong and the Hastings Race & Poverty Law Journal members for their valuable research assistance.

1. This personal account is drawn from the epilogue in Eric K. Yamamoto, Susan K. Serrano, Minal Shah Fenton, James Gifford, Davi Forman, Bill Hoshijo and Jayna Kim, *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523 (2001).

2. See generally Gary Leupp, *The Rosy Dawn of US Imperialism*, Counterpunch, Jan. 16, 2003, available at <http://www.counterpunch.org/leupp01162003.html>.

3. See generally *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159 (1987).

4. "The English Language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department." Republic of Hawaii School Laws of 1896, § 30, available at <http://www.ksbe.edu/endowment/hawaiian/language/rohban.html>.

5. See generally Letter to the Editor, *Emerging Infectious Diseases* and the

and immigrant workers of color, like my grandfather.⁶

When I was eighteen, just learning about life, I went to a beautiful, isolated beach. Waimanalo is where many Native Hawaiians live on specially designated Hawaiian Homelands (in 1921 the U.S. returned some lands in trust for Indigenous Hawaiians who were then seen as a “dying race”). Waimanalo is culturally rich and economically poor. As I walked, I met a Hawaiian elder, who looked cautiously at me and asked, “Why are you here?” She startled me. Was she asking if I was lost? Only later did I realize that she was really asking if I, as an American with Asian immigrant roots, understood what it meant to stand on native lands; did I understand the Native Hawaiian struggle to deal with the consequences of culture destruction and the loss of nationhood?

Since that time, because of the importance of place and history to peoples’ daily struggles and larger aspirations, wherever I go, I ask myself, “Why are you here?”

I have asked myself this question as I’ve worked in communities for Asian Pacific American civil rights (including redress for interned Japanese Americans, homelands reclamation for Native Hawaiians and compensation for Filipino human rights victims of torture and murder for their political dissent to the Ferdinand Marcos regime); worked in support of African American civil rights (including reparations for the present-day effects of slavery and segregation); and helped build bridges between multiracial communities to deal with our grievances against one another even as we work together for social justice.

I ask this question today but in slightly different terms: Why are *We* Here? As civil rights scholar-advocates? As part of this inaugural issue of this *Hastings Race & Poverty Law Journal*? And why is the *Journal* so timely and so significant?

Over the last decade and especially after far-reaching government reactions to September 11, 2001, contemporary civil rights starts with African American social and economic justice at the core and then reaches out like branches on a large tree to connect many others struggling for just treatment in America. Civil rights now is the struggle for a more just and more egalitarian America in the face of intensifying regressive forces that treacherously employ the language of civil rights, security and democracy to maintain a socially and economically stratified society and to exclude those

Depopulation of French Polynesia in the 19th Century, *EMERGING INFECTIOUS DISEASES*, Vol. 2, No. 4 (October-December 1996).

6. As of the year 2000 U.S. census, Native Hawaiians and other Pacific Islanders made up only 9.4% of Hawai‘i’s population. See U.S. Census Bureau, *State and County QuickFacts*, at <http://quickfacts.census.gov/qfd/states/15000.html> (last visited Sept. 8, 2003).

viewed as different, as outsiders.

I. The Three Cs: Celebration, Caution, Challenge

So this is why we are here: to Reclaim Civil Rights In Uncivil Times. We start with three categories of critical analysis and action. Three Cs: Celebration, Caution, and Challenge. Three Cs of both worry and hope. The first C is to celebrate the Civil Rights Movement's accomplishments, then and now—the innumerable ways as the movement broadened it has bettered the daily lives of communities of color and, indeed, all Americans. The second C is caution—to caution against the dismantling of civil rights fueled in part by the conservative New Federalism. The third C is challenge—to envision our role in justice struggles in the post-September 11th Bush-Ashcroft era and, specifically, to think hard about what “Civil Rights” now means and why “reclaiming civil rights” in these “uncivil times” may be the justice imperative for the decade.

A. Celebration

The setting for these three Cs is part uplifting reality and part mad hatter illusion. Civil Rights still means justice for African Americans. Studies reveal that despite important progress, discrimination persists and is most damaging for African Americans.⁷ And it was largely African American blood spilled that secured the civil rights that benefit many.

At the same time, “Civil Rights” has come to mean much more. It's not only white on black. It is multiracial. It encompasses women, immigrants, elders, sweat and tech-shop workers, the disabled. It's gays and lesbians. It reaches into the barrios, Chinatowns and low-income housing. It connects with human rights and indigenous peoples' claims to self-determination and land. Civil rights means on-the-ground progress for people—real gains you can taste. Decent housing for some. Business opportunities for others. Opening the voting booths, and limiting overt discrimination in workplaces, schools and government.

Civil rights now sweeps across new issues like hate crimes, census categorizing, immigrant detentions, police and FBI racial profiling, reparations, interminority tensions as well as the integrating of corporate boardrooms and high political offices. And it catches expansive government efforts in the name of national security to stifle dissent to governmental policies and practices, to

7. Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 994-95 (1989); See generally Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000).

detain and deport immigrants in secret proceedings and to strip citizens unilaterally labeled “enemy combatants” of their civil liberties and incarcerate them indefinitely without charges or trial.⁸

The contemporary civil rights struggle, influenced by international human rights efforts, is dynamic. There are many organizations doing heavy lifting—including the Asian Law Caucus, the Lawyers Committee for Civil Rights, the Equal Justice Society, the American Civil Liberties Union, the New York Lawyers for the Public Interest, the New York Asian Women’s Center, the Urban Justice Center, the Center for Immigrant Families, the Tenant Rights Project as well as the NAACP, Puerto Rican, Mexican American and Asian American Legal Defense Funds, to name just a few. We have much to celebrate.

B. Caution

But, while celebrating on-going successes, we must train our eyes on the wicked undertow. This is the second C—Caution. As the scope of civil rights has broadened, the edifice of civil rights laws is shaking at its foundation—or more accurately, is being dismantled one piece at a time.

It’s like the treacherous undertow at Makapu’u Beach in Hawai’i, near Waimanalo. Gorgeous mountain backdrop. Deep blue water. Powerful undulating body-surfing waves, rushing you toward shore. Or so it seems. There’s an unseen undertow that sucks the energy from waves that break on shore and generates a beneath-the-surface reverse tidal current. If you’re not hyper-vigilant, you think the cascading surface waves are taking you home to shore while the undertow actually is dragging you far out to sea.

After twenty years of orchestrated conservative attacks on civil rights in the name of equality, the civil rights world has gone, in Alice in Wonderland’s words, like the ocean at Makapu’u, all topsy-turvy. These are times in which a California “Civil Rights Initiative,” Prop 209, means the dismantling of affirmative action;⁹ in which a claimed “civil rights victory” includes the invalidation of a school desegregation consent decree originally obtained by the NAACP; in which a civil rights group pays a large sum to a white teacher to block Supreme Court consideration of her civil rights discrimination claim;¹⁰ and in which a federal district court throws

8. See *infra* notes 52-56, 64-67 and accompanying text.

9. CAL. CONST., art. 1, § 31. See also York J. Chang, Comment, *True Convictions: A Post 209 Account of UCLA Law*, 20 CHICANO-LATINO L. REV. 43 (1999).

10. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996). See also Brendon M. Lee, Note, *The Argument For Faculty Diversity: Recommendations After Taxman v. Board of Education*, 27 STETSON L. REV. 739, 743 (1997).

up its hands and ends its order to desegregate public schools.¹¹

These are times in which an impending west coast “civil rights” ballot initiative on “racial privacy” is really designed to allow police to racially profile with impunity—by preventing government and civil rights groups from gathering racial statistics that establish profiling.¹² These are also times in which detentions of Arabs and Muslims in America,¹³ through secret proceedings are based on vague charges of “threat to national security”; a President Bush-appointed member of the U.S. Commission on Civil Rights justifies a potential Arab American internment by citing to *Korematsu v. U.S.*¹⁴—the World War II Japanese American internment case, described in others times as a “civil liberties disaster”; and American citizens are designated “enemy combatants” by the Executive Branch and incarcerated indefinitely without charges, trial or even access to family or counsel. Finally, these are times in which the Center for Equal Opportunity,¹⁵ the American Civil Rights Institute¹⁶ and the Center for Individual Rights¹⁷ are organizations

11. See Barri A. Orlow, *Fifty Years After Brown v. Board of Education: Resegregation of America's Public Schools*, 9 WID. L. SYMP. J. 183, 191-99 (2002) (analyzing how the Supreme Court has undermined desegregation efforts).

12. The attack on civil rights enforcement intensifies with the Classification By Race, Ethnicity, Color or National Origin (CRECNO) ballot initiative, dubbed by its proponents as the “Racial Privacy Initiative,” amending the California Constitution to prohibit the state from collecting data on race, ethnicity, color, or national origin in the operation of public education, public contracting or public employment. Under the mantle of “colorblindness,” this initiative would prohibit the state from gathering data needed to enforce civil rights, monitor discrimination and hate crimes, address the unique healthcare and educational needs of different communities, and conduct meaningful studies on the effectiveness of anti-discrimination laws and other efforts to provide equal opportunity and ensure diversity. The Classification By Race, Ethnicity, Color or National Origin Initiative has been submitted to the California Secretary of State and will appear on the October 7, 2003 Primary Ballot. See Website for California Secretary of State, at http://www.ss.ca.gov/elections/elections_j.htm#2003Special (last visited Sept. 24, 2003). See also Book Review, *Thinking About Race and Races: Reflections and Responses*, 89 CAL. L. REV. 1653, fn. 53 (2001).

13. See Diana West, *Code What?*, WASH. TIMES, Feb. 14, 2003, at A23.

14. 323 U.S. 214 (1943).

15. “Center for Equal Opportunity supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting.” See CEO website, at <http://www.ceousa.org> (last visited Mar. 12, 2003).

16. The founder and chair of the American Civil Rights Institute is Ward Connerly, a Regent of the University of California. He spearheaded and was largely responsible for the abolition of affirmative action in the state university system of California in 1996. See American Civil Rights Institute website, at <http://www.acri.org/people/index.html> (last visited Mar. 12, 2003).

17. Center for Individual Rights lawyers work in private firms and contribute their work pro bono; most of its \$1.2 million budget comes from foundations or individual donors. See Idris M. Diaz, *Mischief Makers: The Men Behind All Those Anti-Affirmative*

engaged in an orchestrated fight *against* genuine equality.

What are the dynamic forces of this undertow? It has two parts. The first is "what's happening": the efforts to dismantle civil rights laws. The second is "how it's happening": the carefully planned conservative social justice agenda under the seemingly benign banner of the New Federalism, particularly after September 11th. Then we'll look at what can be done.

1. *Dismantling Civil Rights*

During the 2000 election we saw starkly the politics of law, as the Supreme Court disenfranchised many American voters, particularly African Americans. This same politics of law drives the on-going attack on civil rights. Over the past twenty years, conservative advocates and Republican-appointed judges have undercut hard-earned civil rights. That process accelerated in *Alexander v. Sandoval*, another 5-4 Supreme Court decision.¹⁸

The *Sandoval* decision embodies Alabama's successful assault on a cornerstone of the 1960s' civil rights edifice. Specifically, the Supreme Court in *Sandoval* obliterated the basic right of individual victims to sue under Title VI of the 1964 Civil Rights Act to stop federal dollars from subsidizing "disparate impact" discrimination by states or businesses.¹⁹

Sandoval is crucial for three reasons. First, its ruling undermines hardworking, limited English-reading immigrant Americans, like Martha Sandoval, who seek to be free from state discrimination (in her case, government tests in English Only).²⁰ Second, the case offers a frightening answer to the crucial larger question, "who can sue to end disparate impact discrimination by the many states and businesses receiving federal money?" Its answer is that harmed individuals like Sandoval, or you and me, are barred from the courthouse. Enforcement of anti-discrimination regulations under Title VI is left to overburdened or uninterested federal agencies.

Third, the *Sandoval* decision is integral to the treacherous undertow. It signals America's accelerating retreat from its commitment to civil rights for all.²¹ Civil rights victories in the

Action Lawsuits, Black Issues in Higher Educ., Dec. 25, 1997, at 14-21, available at http://www.cir-usa.org/articles/cir_profile_black_issues.html.

18. 532 U.S. 275 (2001).

19. 42 U.S.C. § 2000d et seq. (1994). Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color or national origin by federally funded entities.

20. See *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1291-98 (M.D. Ala. 1998) (district court's factual findings that English-only policy results in significant actual harm to plaintiffs and others of foreign descent).

21. See *supra* note 1, (introductory remarks of Eric K. Yamamoto). See also Harris, *supra* note 7, at 2012-14.

courts now are few and far between. Instead, piece by piece, a divided U.S. Supreme Court and lower federal courts (and in many instances state courts) are dismantling civil rights. This is not an exaggeration. I'll summarize.

The U.S. Supreme Court is dismantling civil rights under the 14th Amendment (equal protection) and 15th Amendment (voting) by banning claims of institutional discrimination,²² invalidating federal and state affirmative action programs,²³ limiting federal court powers to monitor school desegregation,²⁴ rejecting proof of racially discriminatory impact in death-penalty sentencing,²⁵ scuttling state hate crimes legislation,²⁶ countermanding state voter redistricting designed to ensure that votes of minorities count,²⁷ invalidating disability rights legislation,²⁸ allowing the Boy Scouts to ban gay leaders,²⁹ and striking down state constitutional provisions for Native Hawaiian elections.³⁰ That's just the 14th and 15th Amendments.

As part of the "New Federalism" trumpeted by conservative think tanks and legal advocacy groups, the Court is also dismantling civil and indigenous peoples' rights under the 11th Amendment (limiting the Americans with Disabilities Act³¹ and Native American sovereignty) and under the Commerce Clause (striking key parts of the Violence Against Women Act³²). This New Federalism operates through the movable mantle of "states rights," with federal courts deferring to states when they cut back on civil rights and overruling states when they expand civil rights protections.³³

Also as part of this New Federalism, the Supreme Court is drastically restricting the reach of civil rights statutes.³⁴ It is limiting

22. *Washington v. Davis*, 426 U.S. 229 (1976).

23. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

24. Orlow *supra* note 11, at 191-99.

25. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

26. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

27. *Shaw v. Reno*, 509 U.S. 630 (1993).

28. *See, e.g., Board of Trustees v. Garrett*, 531 U.S. 356 (2001).

29. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

30. *Rice v. Cayetano*, 528 U.S. 495 (2000).

31. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). *See also* Jennifer Lav, Note, *Conceptualizations of Disability and the Constitutionality of Remedial Schemes Under the Americans with Disabilities Act*, 34 COLUM. HUM. RTS. L. REV. 197 (2002).

32. *United States v. Morrison*, 529 U.S. 598 (2000). *See also* Christy Gleason, *Presence, Perspectives and Power: Gender and the Rationale Differences in the Debate Over the Violence Against Women Act*, 23 WOMEN'S RTS. L. REP. 1 (2001).

33. Mitchell Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517 (2000).

34. Pamela M. Martey, Casenote: *"The Last Temptation Is The Greatest Treason: To Do the Right Deed for the Wrong Reason": After-Acquired Evidence in Employment Discrimination Claims: McKennon v. Nashville Banner Publ. Co.*, 28 Creighton L. Rev. 1031 (1995).

Title VII employment discrimination protections³⁵ and enervating formerly potent Section 1983 civil rights claims against state and local government actors.³⁶ Indeed, following the Supreme Court's lead, the Third Circuit just closed the last window *Sandoval* left open by prohibiting use of Section 1983 to challenge disparate impact discrimination³⁷ and another lower federal court extended the principle in *Sandoval* to reject the use of Section 1983 to enforce Title IX disparate impact sex discrimination claims.³⁸

Indeed, *Sandoval* also has spawned recent federal court rulings rejecting private rights of action to challenge environmental racism (Title VI), health insurance discrimination (HIPAA) and foster care program failures.³⁹

Observers now predict that the hugely important Public Accommodations section of the Civil Rights Act, Title II, which prohibits private discrimination in hotels, theaters and restaurants, may be the next target.⁴⁰ The recent California Supreme Court anti-affirmative action *Hi-Voltage*⁴¹ decision, banning even race-based city outreach in contracting, and a Texas Appeals Court decision upholding a 1860s' sodomy law targeting gays,⁴² are but two state court counterparts to this attack. For civil rights, these are indeed uncivil times.

So what's really going on? Civil rights progress is supposed to be a hard but steady upward pull toward real equality. This oft-told story, however, is part truth and part illusion. Here's a more realistic account.

Following the Civil War, America promised equality to African Americans – the First Reconstruction.⁴³ Newly freed Blacks began to make political and economic gains. The U.S., however, quickly

35. See, e.g., *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995).

36. See John M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002-17 (2002) (discussing the history of the application of, and recent limitations on, 42 U.S.C. § 1983).

37. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002). See also Brendan Cody, Note, *Annual Review of Environmental and Natural Resources Law: South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983*, 29 ECOLOGY L.Q. 231 (2002).

38. *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999).

39. *Yamamoto*, *supra* note 1.

40. Pub. L. No. 88-352, Title II, § 201, 78 Stat. 243 (codified as amended at, 42 U.S.C. § 2000a).

41. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000).

42. *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd sub nom. Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

43. U.S. CONST. amend. XIV, § 1 (nationalizing citizenship and prohibiting the states from abridging the privileges and immunities of any United States citizen or depriving any citizen of due process or equal protection under the law); U.S. Const. amend. XV (guaranteeing the right to vote to all men regardless of race or color).

revoked that promise.⁴⁴ The civil rights laws adopted as the Reconstruction's foundation were torn apart by court rulings and massive popular and political resistance.⁴⁵ Harsh legalized segregation, backed by violence, took root. A First Broken Civil Rights Promise.

In the 1960s, the U.S. acknowledged its failed first Reconstruction promise. After sustained African American protests, once again, the nation committed itself to equality, through both new laws and re-invigorated older ones.⁴⁶ Those new laws embraced affirmative action to level a grossly unequal playing field.⁴⁷ Civil rights protests with African American blood in the streets led to new law and a Second Reconstruction. Progress commenced.

But now, as before, has come a cultural and political backlash against the gains of minorities, women and immigrants, followed by the undertow of court decisions dismantling civil rights.⁴⁸ This attack on the Second Reconstruction is now pushing the U.S. backward—a “re-segregating” of America. The precipice of a Second Broken Civil Rights Promise.

And the attack on civil rights will likely persist, if not intensify. Theodore Olsen, the Solicitor General, who represented George Bush in *Bush v. Gore*,⁴⁹ has led the civil rights assault in recent years. For instance, backed by conservative think tanks and scholars, he headed the offensive in the Supreme Court's *Rice v. Cayetano*⁵⁰ case that has now jeopardized all Native Hawaiian programs, including

44. See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 unconstitutional); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that “separate but equal” comports with the constitution).

45. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1, 11 (1985). See also *Giles v. Harris*, 189 U.S. 475 (1903) (refusing equity jurisdiction in suit alleging that state constitutional provision violated fifteenth amendment); *Giles v. Teasley*, 193 U.S. 146 (1904) (no mandamus jurisdiction in same circumstance); *James v. Bowman*, 190 U.S. 127 (1903) (lack of state action gave federal government no authority to prosecute individual who prevented Kentucky Blacks from voting in a congressional election through an act of bribery); *Breedlove v. Shuttles*, 302 U.S. 277 (1937) (poll taxes do not violate constitutional rights).

46. Civil Rights Act of 1964, Pub. L. No. 88-352; 78 Stat. 241 (codified as amended in various sections of 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq.); See MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN AMERICA, 1945-1990* (2d ed. 1991); Harris, *supra* note 7, at 1993-94 (discussing the Warren Court's “resuscitation” of the First Reconstruction civil rights statutes, including 42 U.S.C. §§ 1981, 1982, 1983).

47. *Id.*

48. See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 139-45 (1996).

49. 531 U.S. 98 (2000).

50. 528 U.S. 495 (2000).

the very Hawaiian Homelands program mentioned at the outset.⁵¹ And Attorney General Ashcroft's anti-civil rights record speaks for itself.⁵²

The 2001 Patriot Act addressed the pressing issue of strong security for America's people and institutions.⁵³ We know the importance of that security and the difficulties encountered by, and sometimes heroic efforts of, those protecting us. Yet comprehensive security actions come at a steep cost. Congress passed the Patriot Act with little scrutiny. It dramatically expands government power over electronic surveillance,⁵⁴ immigration detentions and deportations⁵⁵ and search of private financial records.⁵⁶ The new national security regime has resurrected government and private ethnic profiling. And the sweeping definition of "terrorist" catches not only those who pose a genuine threat to people's security, but also those who are exercising First Amendment rights to organize and peaceably protest. We can debate the extent to which specific security measures are needed and properly limited. What is undisputed is that the already existing cloud over civil rights in America has grown darker.

2. *The Conservative Agenda Under the Banner of New Federalism*

But why is the twenty-year systematic, multifaceted conservative attack on civil rights being achieved with only belated

51. See Bruce Dunford, *State Funded Programs Benefitting Native Hawaiians Challenged*, PR NEWSWIRE, Feb. 15, 2001, 2000 WL APWIRE (sic); Dunford, Olsen As Solicitor General Could Impact Hawaiians, PR NEWSWIRE, 2001 WL APWIRE.

52. A staunch opponent of gun control and abortion and proponent of the death penalty, most recently Ashcroft led a partisan attack in the Missouri Senate last year against the confirmation of a prominent, moderate African American jurist to the federal bench. See also John Solomon, *Democrats Target Ashcroft Views on Race, Civil Rights*, REC. OF N. N.J., Dec. 28, 2000, at A1, 2001 WL 5234006. Describing his voting record during his term in the United States Senate as "abysmal" and questioning whether he would carry out his function as top law enforcement officer of the nation's civil rights laws, a broad coalition of civil rights groups opposed his nomination to the post of Attorney General. See, e.g., *Lawyers Committee for Civil Rights Under Law Urges Rejection of John D. Ashcroft as Attorney General of the United States*, U.S. NEWSWIRE, Jan. 22, 2001, 2001 WL 4139263.

53. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

54. Nathan C. Henderson, *The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications*, 52 DUKE L.J. 179, 180 (2002).

55. Adrienne R. Bellino, *Note & Comments: Changing Immigration For Arabs With Anti-Terrorism Legislation: September 11th Was Not the Catalyst*, 16 TEMP. INT'L & COMP. L.J. 123, 131 (2002).

56. Andres Rueda, *International Money Laundering Law Enforcement & The USA Patriot Act of 2001*, 10 MICH. ST. U-DCL J. INT'L L. 141 (2001).

publicly organized resistance? Why have some even become emboldened to say there's no longer any discrimination in America (with the exception of, as the Center for Individual Rights reportedly said recently, discrimination against males and whites).

The dynamics are complex, including the state of the economy, who has legislative power, who serves as judges, who funds the think tanks, and who has media access. There is, however, a less visible dynamic I want to highlight. It's the topsy-turvy conservative civil rights agenda under the seemingly benign banner of the New Federalism.

First, the conservative new federalism is "new" because the old conservatism was overtly racist, sexist, nativist and homophobic; it was explicitly anti-civil rights. "No coloreds allowed." The new conservatism is different. It deploys language of "equality," "colorblindness" and "responsibility."⁵⁷ It emphasizes "fairness to the individual" and, most important, "states' rights and immunities."⁵⁸ It purports to embrace "civil rights."⁵⁹ Surely worthy things.

But although New Federalism in language, it's still old conservatism in substance. By focusing tightly on fairness to the individual, it wants us to ignore the reality that decisionmakers tend to treat people as members of groups. By deploying language of states' rights and immunities, it wants to shield states to allow aggressively discriminatory state actions. And by doing so, it wants us to ignore the still existing institutional barriers to advancement in jobs, education and housing. It wants us to blind ourselves to the reality faced by hate crime victims James Byrd,⁶⁰ Joseph Iletto,⁶¹ Matthew Shepard⁶² and others—your identity matters. By ignoring real continuing obstacles of race, gender, sexuality and immigrant status, the new conservatism says, "any problem, limitation or

57. See American Civil Rights Institute, Center for Equal Opportunity, Center for Individual Rights, *supra* notes, 10, 13-15, and accompanying text.

58. *Id.*

59. *Id.*

60. James Byrd, Jr., an African American man was brutally murdered by being kidnapped, beaten unconscious, spray painted in the face with black paint, tied to the back of a pick-up truck, pants dropped down to his ankles, dragged 2.5 miles over pavement through a rural black community in Jasper County, Texas called Huff Creek, leaving his skin, blood, arms, head, genitalia, and other parts of his body strewn along the highway, his remains were dumped in front of a black church. See Roy Bragg, *Jasper Trial Defendant Says Byrd's Throat Was Cut*, SAN ANTONIO EXPRESS NEWS, Sept. 17, 1999, available at <http://www.texasnaacp.org/jasper.htm>.

61. Postal worker Joseph Iletto was gunned down by white supremacist Buford Furrow Jr. See *Postal worker Joseph Iletto mourned as President Clinton sends condolences*, Aug. 15, 1999, <http://www.cnn.com/US/9908/15/california.shooting.01/>.

62. See Website for Matthew Shepard Foundation at <http://www.matthewshepard.org>.

failure is your fault and your fault alone." You don't need the law's intervention to help you overcome long-standing group practices and institutionalized discrimination. Moreover, if you get any government help, that help constitutes unfair "preferences" in your favor, regardless of how tilted the playing field remains. Civil Rights Topsy-Turvy.

Second, this New Federalism provides the substance, the ideology, for guiltlessly rolling back civil rights. Boiled down, it is quite comfortable with continuing inequality, a stratified society. It's okay for those struggling at the bottom to stay there—it's their fault. And this conservatism uses the language of individualism, responsibility and, yes, equality so as not to feel badly about it. Recall the infamous anti-affirmative action California "Civil Rights Initiative" with its harsh impact on African Americans and Latinos—conservatives cast it as an "equality" measure.

Finally, this conservatism under the banner of New Federalism is insidious because it's the wolf in sheep's clothing. Its lofty "federalism" language, and media PR, tell us we're all heading safely toward the beautiful shore, while ignoring the wicked anti-civil rights undertow dragging many out to sea.⁶³

Post-September 11th government restrictions of civil liberties have heightened the danger to civil rights, but in a different way. In contrast with the covert exclusionary goals of the New Federalism, the post-September 11th undermining of civil liberties has been largely above board. "Outsiders" have been targeted⁶⁴ and restrictions of *their* civil liberties have been supported by mainstream America.⁶⁵ Yet all in the United States pay the price in the loss of cherished democratic values. Moreover, overt post-September 11th national security restrictions of civil liberties of non-citizens and citizens⁶⁶ have shocked out of complacency many who had been lulled into misbelieving that the New Federalism was really about fairness and personal responsibility. Some of the government's post-September 11th security measures were needed and appropriate. But the Bush Administration's misuse of the true horror of that day to implement a pre-existing and far-reaching conservative anti-civil rights agenda places in stark relief the

63. See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

64. Susan Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, 298-99 (2002).

65. *Id.* at 355.

66. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 459-61 (4th Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564, 596 (S.D.N.Y. 2002).

significance of and threat to contemporary civil rights.⁶⁷

C. Challenge

This is why the struggle to “Reclaim Civil (and indeed, Human) Rights” in these uncivil times is so important.

Because only collectively can we help organize our communities to meet pressing daily needs while simultaneously doing the intellectual, organizing and legal work essential to stemming the civil rights assault. This brings us to our third and final C: Challenge. There are no magic answers. But I do suggest that progressives can, and must, turn the Cautions into Actions. We are at the Civil Rights Crossroad. Among the possible action paths, let me briefly suggest five.

The first action path begins right here. Whole-heartedly support and work with the frontline advocacy organizations mentioned earlier, and others. They must be inordinately strong. With our help, these groups fight our fights, give us hope, lift our spirits. Also, support the badly needed progressive civil rights think tanks like the Institute for Democracy that’s scrutinized the powerful Federalist Society. They are hugely outnumbered and out-funded in comparison to the conservative think tanks. They give us in-depth research and fresh strategic thinking.

The second action path is resistance. Get involved to resist the New Federalism and the orchestrated dismantling of civil rights. This means organizing with lawyers, advocacy groups, community organizations, students and media and then climbing into the trenches. It means fighting collectively on specific cases—with Martha Sandoval and for the constitutional liberties at stake in the *Grutter* affirmative action case⁶⁸ and the post-September 11th *Hamdi* and *Padilla* (“enemy combatants”) cases and the *Detroit Free Press* and *North Jersey Media Group* (First Amendment) cases.⁶⁹ And it means fighting against damaging legislation—like the impending “Racial Privacy” Initiative. And very important, challenging judicial nominees hostile to civil rights. The outcome of these battles will affect our lives for years to come.

The third path is forward-looking. *Rebuild civil rights*—reconstruct the Second Reconstruction. Develop, test, legislate, litigate new ideas and approaches, not just defensive ones. For example, we need an all-out campaign to change the current federal

67. Michael Elliot & James Carney, *First Stop, Iraq*, TIME MAG., Mar. 31, 2003 at 174-75.

68. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

69. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

law's restrictive definition of discrimination—to include subconsciously biased acts by decisionmakers and institutionalized forms of discrimination. We also need a persuasive theory of reparations that in part draws upon human rights principles and that shows larger society's strong interest in healing the deep wounds of injustice.⁷⁰ And we need to make powerfully clear the connection of "civil rights" to the rights of women, immigrants, gays and lesbians and those with disabilities. In short, we need compelling theory, new doctrines and sober strategies to counteract the conservatives' New Federalism—to reclaim civil rights. On this note, we can support new groups like the dynamic Roll Back Coalition, started by the New York Lawyers for Public Interest, which now encompasses frontline lawyers, labor, clergy and women's groups.

The fourth action path is where the personal meets the political. *Reject the New Federalism and its anti-civil rights agenda that tells us that nothing more need be done, that things are fine as they are.* And speak out (or write out—letters to the editor are often potent) when others say the New Federalism or blind support of ostensible national security is where we find justice.

The fifth path is *alliance-forging*. Cross traditional boundaries to form new and deeper alliances—across boundaries of ethnicity, race, national origin, gender, sexuality, poverty and disability. Easy to say. Hard to do. How do progressives forge those alliances to reclaim civil rights? How do we widen the progressive umbrella while dealing with the internal tensions this generates? Indeed, these are the critical coalitional struggles of the moment.⁷¹

II. Closing

So, in closing, this is why "we are here." To *celebrate* the justice struggles of the past. To *caution* about the insidious New Federalism and the federal government's restrictions of civil liberties under an overly expansive and sometimes false mantle of national security. And to chart out *challenges* for "Reclaiming Civil Rights in Uncivil Times" for our collective future. We will know when we are succeeding. In the words of Remco Campert:⁷²

Someone no longer sleeps
Someone wakes up
Someone remains awake

70 WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999).

71. See ERIC YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999).

72. Dutch poet and writer (1927-).

Someone points the questions

Someone resists

And then another person

And another

And another
