



# Civil Liberties and Civil Rights

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## *Chapter Objectives*

Chapter 1 explained that a constitution could be a mainstay of rights. Beyond organizing and granting authority, constitutions place limits on what governments may do. Collectively, these limits are known as civil liberties and civil rights. Civil liberties are legally enforceable freedoms to act or not to act and to be free from unwarranted official intrusion into one's life. They are granted to Americans as a collective and include (but are not limited to) the First Amendment's guarantees of free expression and religious freedom and the Fourth, Fifth, Sixth, and Eighth Amendments' strictures governing police and courts in fighting crime.

Civil rights are individual rights that encompass participation—citizens' rights under the law to take part in society on an equal footing with others. They embrace the guarantees of the three Civil War amendments to the Constitution (the Thirteenth, Fourteenth, and Fifteenth), as well as laws passed to give those amendments meaning and force.

Civil rights are assurances that people are not penalized because of criteria (such as race or gender) that society decides should be irrelevant in making public policy. Yet, even after more than 220 years' experience as a nation, we continue to disagree over what liberty and equality mean in practice. Which rights and liberties do you exercise most frequently? Are there any that deserve more protection than they are currently afforded? What happens when civil rights and liberties come into conflict with one another?

## The Bill of Rights: Securing the Blessings of Liberty

As explained in Chapter 1, when the Constitution left the hands of the framers in 1787, there appeared to be too few restrictions on what the national government could do, leaving individual liberty without sufficient protection. Several of the state conventions that ratified the proposed Constitution did so with the provision that a “bill of rights” would soon be added. In 1791, the Bill of Rights, comprising the first ten amendments, was ratified (see Table 4.1).

### Applying the Bill of Rights to the States

Nearly 180 years elapsed before most of the rights spelled out in the Bill of Rights applied fully to state governments. This was because, as Chief Justice John Marshall (1801–1835) held for the Supreme Court, the Bill of Rights was not intended to apply to the states.<sup>1</sup> As a result, at first disputes between states and their citizens were controlled by the federal constitution to only a small degree. For most abuses of power, citizens had recourse only to their state constitutions and state courts; ratification of the **Fourteenth Amendment** (see Appendix) in 1868, however, laid the groundwork for a drastic change in the nature of the Union. First, its language is directed to *state* governments, so aggrieved persons have the federal Constitution as an additional shield between themselves and their state governments. Second, the words of the amendment are ambiguous. What, for instance, is the “liberty” the amendment protects?

The Supreme Court was initially hesitant to use the Fourteenth Amendment as a vehicle through which to make the Bill of Rights applicable to the states. Within a century, however, the Court did just that. Without additional formal amendment of the Constitution, the Court “incorporated” or absorbed the Bill of Rights into the Fourteenth Amendment in a series of about two dozen cases beginning in 1897 and largely concluding in 1969. The most recent right to be incorporated was the Second Amendment’s right to bear arms, which was not applied to the states until 2010.<sup>2</sup> Today almost all the provisions of the first eight amendments, whether involving free speech or the rights thought necessary for a fair trial, apply with equal rigor to both state and national officials and the laws they make. Only the Sixth Amendment’s stipulation about a trial’s location, the Seventh’s stipulation for a jury trial in most civil suits, the Eighth’s ban on excessive bail and fines, and the Third Amendment still apply only to the national government. Of these, only the Eighth is substantively important (the Ninth and Tenth Amendments, although part of the Bill of Rights, do not lend themselves to absorption into the Fourteenth Amendment).

#### Fourteenth Amendment

Ratified in 1868, the amendment altered the nature of the Union by placing significant restraints on state governments.

### The Fragility of Civil Liberties

Charters of liberty such as the Bill of Rights are commonplace today in the constitutions of many governments. Yet even a casual observer of world affairs knows that civil liberties are more likely to be preserved (or suspended) in some countries than in oth-

**TABLE 4.1** | CONTENT OF THE BILL OF RIGHTS

Consisting of barely 450 words, the Bill of Rights (Amendments I through X) was intended to remedy a defect critics found in the Constitution of 1787. In September 1789 Congress proposed twelve amendments for approval by the states. As the eleventh state (three-fourths of fourteen), Virginia's ratification in December 1791 made the Bill of Rights officially part of the Constitution. The remaining three states—Connecticut, Georgia, and Massachusetts—did not ratify until the 150th anniversary of the Bill of Rights in 1941. One amendment was never ratified. It dealt with apportionment of the House of Representatives and is now obsolete. The other amendment was not ratified until 1992—more than two hundred years after it was proposed! The Twenty-seventh Amendment—called the “lost amendment”—delays any increase in congressional salaries until a congressional election has intervened.

Amendment I	Nonestablishment of religion; free exercise of religion; freedoms of speech, press, petition, and peaceable assembly
Amendment II	Keep and bear arms
Amendment III	No quartering of troops
Amendment IV	No unreasonable searches and seizures; standards for search warrants
Amendment V	Indictment by grand jury; no double jeopardy or self-incrimination; no deprivation of life, liberty, or property without due process of law; compensation for taking of private property
Amendment VI	Speedy and public trial by impartial jury in state and district where crime was committed; nature and cause of accusation; confrontation of accusers; compulsory process for witnesses; assistance of counsel
Amendment VII	Jury trial in certain civil cases
Amendment VIII	No excessive bail or fines; no cruel and unusual punishments
Amendment IX	Recognition of the existence of rights not enumerated
Amendment X	Reserved powers of the states

ers. Even in the United States, the liberties enshrined in the Bill of Rights have meant more in some years than in others because of changing interpretations by the Supreme Court. For example, the Fourth Amendment's ban on “unreasonable searches and seizures” did not apply for a long time to electronic surveillance unless police physically trespassed on a suspect's property. This meant that state and federal agents could eavesdrop electronically in many situations without fear of violating the Constitution. In 1967, however, the Court ruled that the Fourth Amendment covered most electronic searches, too, as long as there was a “reasonable expectation of pri-

vacy.”<sup>3</sup> The words in the Bill of Rights have not changed, but the meaning attributed to those words has changed in the context of Supreme Court decisions.

Exactly why civil liberties thrive in one place or time and not another is a complex phenomenon. However, this much is certain: Civil liberties are fragile. The most frequent and sometimes the most serious threats to civil liberties have come not from people intent on throwing the Bill of Rights away but from well-meaning and overzealous people who find the Bill of Rights a temporary bother, standing in the way of objectives, often laudatory ones, they want to reach. Put another way, constitutional protections are sometimes worth the least when they are needed most. When public opinion calls for a “crack down” on certain rights, such demands are felt in judicial chambers just as they are heard in legislative halls. Unsupported, courts and the Bill of Rights alone cannot defend civil liberties.

## Free Expression: Speech, Press, and Assembly

### First Amendment

The part of the Bill of Rights containing protections for political and religious expression

The place of the **First Amendment** in the Bill of Rights is symbolic. Its liberties are fundamental because they are essential to the kind of nation the framers envisioned.

### The Value of Free Expression

Free expression serves several important objectives. First, *free expression is necessary to the political process set up by the Constitution*. It is difficult to imagine government being responsive to a majority of the political community if the members of that community are afraid of saying what they think. It is even more difficult to imagine members of a political minority trying to persuade the majority without the right to criticize political officeholders. Most importantly, free expression is necessary for a rich information environment to exist; without free expression, informed choices would be impossible. Free expression is therefore, as important to the audience as it is to those who assert their positions. For democratic politics to work, free speech must prevail.

Second, in politics, as in education, *free expression allows the dominant wisdom of the day to be challenged*. Open discussion and debate aid the search for truth and thus foster intelligent policymaking. Whether the question is safeguarding the environment or probing the causes of birth defects, free speech encourages both investigation of the problem and examination of possible solutions.

Third, *free expression aids self development*. Intellectual and artistic expression may contribute to realizing one’s full potential as a human being. If government has the authority to define what kind of art is “acceptable,” other kinds will be discouraged or suppressed altogether. Freedom of expression does not guarantee success as a poet, artist, or composer, but it does guarantee each person’s right to try.

Free expression has its risks, however. There are no assurances that open debate and discussion will produce the “correct” answer or the wisest policy. Letting people speak their minds freely will surely stretch out the time it takes for a political community to decide



► Since the Bill of Rights was enacted, freedom of speech has been, and still remains, a subject of controversy.  
(AP Photo)

what to do. Free speech can also threaten social and political stability. Although there are risks in silencing dissent, risks exist in permitting it, also. Nations in upheaval rarely tolerate vocal dissent against official policy. On balance, however, the American people, through their public officials and judges, seem willing to accept these risks most of the time.

## The Test of Freedom

Even though the First Amendment has been part of the Constitution from almost the beginning, freedom's record has not been free of blemishes. The ink had hardly dried on the Bill of Rights when Congress passed the Sedition Act of 1798, making it a crime to publish "false, scandalous, and malicious" statements about government officials. The law was not challenged in the Supreme Court even though at least ten individuals were convicted before it expired in 1801. Scattered instances of suppression occurred on both sides during the Civil War, but the next major nationwide attacks on speech were directed at virtually anyone or anything pro-German during World War I and on socialist ideas during the "Red Scare" that followed.

Only then did the Supreme Court first interpret the free speech clause of the Constitution. During World War I, Charles Schenck was found guilty of violating the Espionage Act by printing and circulating materials designed to protest and obstruct the draft. Announcing the **clear and present danger test**, Justice Holmes (1902–1932) ruled that the First Amendment provided no shield for Schenck's words. "The question ... is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."<sup>4</sup>

Although Schenck lost his case, Holmes's reasoning remained important. Only when harmful consequences of speech were imminent could government act. As Justice Brandeis (1916–1939) later declared, "If there be time to expose through discus-

### clear and present danger test

Guideline devised by the Supreme Court in *Schenck v. United States* [249 U.S. 47 (1919)] to determine when speech could be suppressed under the First Amendment

**incitement test**

The Court's current test for First Amendment restrictions that asks whether a speech act attempts to or is likely to incite lawless action

sion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>5</sup> Since 1969 the clear and present danger test has evolved into the **incitement test**, stressing the Court's insistence that harmful consequences (such as a riot) be exceedingly imminent.<sup>6</sup>

Some settings and speech content also allow for limitations on First Amendment speech rights. In a 2007 case the Supreme Court held that the characteristics of the school environment made it constitutionally permissible for school administrators to demand students remove a banner reading “BONG HiTS 4 JESUS” from a public forum without infringing on the students' speech rights.<sup>7</sup> On the other hand, the Court has held that concern about a lack of decency and respect in location choice does not limit free expression protections. In the 2011 case *Snyder v. Phelps*, the Court concluded that the hateful signs members of the Westboro Baptist Church display at military funerals are protected from liability claims by the First Amendment.<sup>8</sup>

**prior restraint**

Official censorship before something is said or published, or censorship that halts publication already under way is usually judged unconstitutional today under the First Amendment

**Gags**

Of the possible restrictions on speech today, the Court is least likely to approve a **prior restraint**. This is official censorship *before* something is said or published, or censorship that halts publication already under way. Prior restraints are especially dangerous to free expression because government does not have to go to the trouble of launching a prosecution and convicting someone at a trial. Even when *The New York Times* and the *Washington Post* reprinted verbatim parts of a purloined classified study of the Defense Department's decision-making on Vietnam, the Supreme Court, in the “Pentagon Papers case,” refused to ban further publication.<sup>9</sup> Most of the justices admitted that the government could make it a crime to publish such materials, but concluded that there could be no restraints in advance. Likewise, the justices will only rarely approve a pretrial gag on media reports about a crime, even if such suppression would help protect another constitutional right, the right to a fair trial.

**Obscenity and Libel**

Descriptions and depictions of various sexual acts have presented a special problem. Unlike cases involving other types of speech, the Court has required no evidence that obscene materials are in fact harmful. Yet the Court steadfastly regards **obscenity** as unprotected speech because of the widespread public view that exposure to obscenity is deleterious. The justices have had a hard time writing a clearly understood definition of what is obscene. Justice Stewart (1958–1981) once admitted, “I know it when I see it.” Under the current standard, the Court will uphold an obscenity conviction if

**obscenity**

As applied by the Supreme Court, certain pornographic portrayals of sexual acts not protected by the First Amendment (The Supreme Court's current definition of the legally obscene appeared in *Miller v. California* [413 U.S. 5 (1973)]).

- (a) “the average person, applying contemporary community standards,” would find that the work, taken as a whole, appeals to the prurient interest, (b) ... the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) ... the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>10</sup>

The target seems to be “hardcore” pornography. Within limits, the “community” to which the Court refers is local and not national, making the definition of obscenity variable. The policy thus allows one locale to suppress sexually explicit materials while another tolerates them. For example, the Court recently upheld a city ordinance that prohibited nudity in public places, including erotic dancing establishments.<sup>11</sup> Obscenity continues to trouble the nation. Films, videos, and magazines portraying explicit sex are big business. Many think the Supreme Court’s definition is both too lax and insufficiently enforced. Although often reluctant to advocate censorship, some feminists object to obscenity because it degrades women and may even contribute to sexual crimes against women. The Court, however, continues to err on the side of liberty in this issue, even when ruling on a subject as universally condemned as child pornography. In a series of recent cases, the Court has held that the federal Child Online Protection Act and its revisions—measures designed to restrict child pornography on the Internet—have been too sweeping, failing to meet the Court’s “least restrictive means” test for limiting free speech.<sup>12</sup> Moving beyond pornography, a majority of justices applied similar logic to video games in 2011, when they struck down a California law banning the sale of violent video games to minors.<sup>13</sup> The Court held that video games are protected by the First Amendment and that the law was not narrowly tailored and failed to provide a compelling state interest to limit their sale.

### libel

Defamation of a person’s character or reputation, not protected by the First Amendment—(*New York Times Co. v. Sullivan* [376 U.S. 254 (1964)] makes it difficult for public figures and officials to bring successful libel suits against their critics.)

Like obscenity, the First Amendment does not protect **libel**. Involving published defamation of a person’s character or reputation, libel may subject a publisher or television network to damage suits involving thousands or even millions of dollars. Beginning in 1964, however, the Supreme Court made it very difficult for public figures and public officials to bring successful libel suits against their critics because it felt that the democratic process needs robust and spirited debate, which might be muted by threat of legal action. In such situations, public figures and officials initiating libel suits must be able to prove “actual malice”—that is, that the author published information knowing it was false or not caring whether it was true or false.<sup>14</sup>

## Freedom of Assembly and Symbolic Speech

People often convey ideas and attempt to build support for a cause by holding a meeting or a rally. The founders understood that freedom to speak means little if there can be no audience. This is an example of the freedom of assembly that the First Amendment protects. Sometimes assembly involves **symbolic speech** in which words, pictures, and ideas are not at issue, but action is. A person may *do* something to send a message, usually in a dramatic, attention-getting manner. It might be a sit-in at the mayor’s office to protest a budget cut or a sit-down on a public road leading to a nuclear power plant under construction. In some instances, demonstrators may be constitutionally punished for such nontraditional forms of expression, not because of the ideas expressed, but because of the harm that results from the *mode* of expression. It is not the message but the medium that can be the basis of a legitimate arrest.

### symbolic speech

A speech act that centers on action or performance to communicate a point rather than on words





► The First Amendment protects the freedom to assemble. (AP Photo)

Yet in a 1989 decision that generated a storm of controversy, the Supreme Court overturned the conviction of Gregory Lee Johnson for burning the American flag in violation of a Texas law.<sup>15</sup> In a demonstration at Dallas City Hall during the Republican National Convention in 1984, protesters chanted, “America, the red, white, and blue, we spit on you,” as Johnson doused the flag with kerosene and set it ablaze. Short of a protest that sparks a breach of the peace or causes some other kind of serious harm, the Court held (five to four) that a state could not criminalize the symbolic act of flag burning. The Court’s reasoning was that government protects the physical integrity of the flag because the flag is a symbol of the nation. Just as people may verbally speak out against what they believe the nation “stands for,” they may also express the same thought by defacing or destroying the symbol of the nation. The following year, the Court held that the First Amendment also barred Congress from criminalizing flag burning, a decision that sparked a renewed drive to amend the Constitution.<sup>16</sup> The drive failed in 1990 when Congress failed to pass a constitutional amendment by the required two-thirds vote in both houses.

The Court has also invalidated a city ordinance that outlawed cross burning and other forms of symbolic hate speech directed against certain minorities.<sup>17</sup> The ordinance was defective because it was content-based. Some, not all, hate-messages were banned. The decision may be far-reaching because it calls into question the constitutionality of similar bans at public universities.



► Flag burning is considered an extension of freedom of speech.  
(AP Photo)

## Religious Freedom

Guarantees of religious freedom form the first lines of the First Amendment. Ahead of other protections are an assurance of free exercise and a prohibition of an establishment of religion. Removing religion from the reach of political majorities reflected practical needs in 1791. The United States was already one of the world's most religiously diverse countries, yet large portions of America had laws highly restrictive of some religions and practices.

## Religion and the Constitution

The Constitution is intentionally a nonsectarian document. It had to be if the framers were to secure ratification after 1787 and if the new government was to avoid the religious divisiveness that had plagued Europe before and after the Reformation, as well as plagued the American colonies. Even though a few states still maintained established (state-supported) churches in 1791, the First Amendment said that the nation could not have one.

The United States is even more religiously diverse today. About 82 percent of the population identifies with a particular religion.<sup>18</sup> More than seventeen distinct religious groups claim more than one million members each, with dozens more having smaller memberships.<sup>19</sup> Within this context, the religion clauses have the same objectives, but they work in different ways. The **free exercise clause** preserves a sphere of religious practice free of interference by government. The idea is that people should be left to follow their own dictates of belief or nonbelief. The **establishment clause** keeps government from becoming the tool of one religious group against others. Government may not be a prize in a nation of competing faiths.

Even though both religion clauses work to guard religious freedom, they concern different threats and so at times seem to pull in opposite directions. Rigorous protection of free exercise may appear to create an establishment of religion. Rigorous enforcement of the ban on establishment may seem to deny free exercise.<sup>20</sup>

## Aid to Sectarian Schools

The Supreme Court has never limited the First Amendment's ban on the literal establishment of an official state church. How much involvement between church and state is too much, however? Coins, for example, display the motto "In God We Trust." A troublesome area for almost a half-century has been public financial support for sectarian

### free exercise clause

Provision of the First Amendment guaranteeing religious freedom

### establishment clause

Provision of the First Amendment barring government support of religion

**Lemon test**

A standard announced in *Lemon v. Kurtzman* [403 U.S. 602 (1971)] to determine when a statute violates the establishment clause (The law in question must have a secular purpose and a neutral effect and must avoid an excessive entanglement between church and state.)

schools. The current standard for determining when government has violated the establishment clause in this context dates from a 1971 decision by the Supreme Court.<sup>21</sup> To pass scrutiny under the **Lemon test**, a law must have, first of all, a *secular purpose*. Second, the primary effect of the law must be *neutral*, neither hindering nor advancing religion. Third, the law must not promote *excessive entanglement* between church and state by requiring government to become too closely involved in the affairs of a religious institution. Using these criteria, the Court has upheld some, but not most, forms of state aid that have been challenged. Generally, direct grants of money from a government agency to a religious institution are the least likely to be found acceptable under the Constitution. However, in 2011, drawing a distinction between direct and indirect state contributions, the Supreme Court let stand an Arizona law that provided tax credits for individual contributions to religiously-affiliated schools.<sup>22</sup>

## Prayer in the Public Schools

Whether or not religious observances can take place in public schools is another thorny issue. Even though we don't tend to think of schools as part of the government, public schools are funded through tax dollars and are governed by elected school boards—they are government-run institutions. Because of strong emotions on both sides of the prayer issue, the Court's decisions have stirred up controversy. In 1962, the justices outlawed a nondenominational prayer prescribed by the Board of Regents for opening daily exercises in the public schools of New York State. The following year, a Pennsylvania statute mandating daily Bible readings in public schools met a similar fate.<sup>23</sup> Reaction to these decisions in Congress and the nation was anything but dispassionate. After the New York prayer case, the U.S. House of Representatives unanimously passed a resolution to have the motto "In God We Trust" placed behind the Speaker's desk in the House chamber. The motto is still there for all to see during televised sessions of Congress.

Of course, the Supreme Court has never said that students cannot pray in school—students have been doing that before exams for years—but the Court has remained firm in its opposition to state-sponsored religious activities in public schools. For example, an Alabama statute authorizing a period of silence at the start of the school day for "meditation or voluntary prayer" was seen by most justices as constitutionally defective because the law endorsed religion as a preferred activity.<sup>24</sup> A bare majority of the Court even found an invocation offered by a rabbi at a public middle school commencement constitutionally objectionable. Although student attendance at the ceremony was optional, the prayer nonetheless carried "a particular risk of indirect coercion" of religious belief, according to Justice Anthony Kennedy.<sup>25</sup> For the four dissenters, Justice Antonin Scalia asserted that the nation's long tradition of prayer at public ceremonies was a compelling argument that the school had not violated the establishment clause. In 2000, the Court maintained course by finding a student-led prayer played over a public address system prior to a school football game to be in violation of the establishment clause.<sup>26</sup>



► The Supreme Court has held state-sponsored religious activities in public schools unconstitutional. (AP Photo)

## Religious Observances in Official Settings

Because of the impressionable nature of children, the Court has been quickest to strike down religious influences in elementary and secondary schools. Elsewhere, the justices sometimes wink. In 1983, the Court approved Nebraska's practice of paying the state legislature's chaplain out of public funds.<sup>27</sup> (Both houses of the United States Congress also have chaplains who pray at the beginning of each day's session.) The following year, a bare majority allowed city officials in Pawtucket, Rhode Island, to erect a municipally owned Christmas display, including a crèche, in a private park. However, the Court has placed some limits on official observances of religious holidays, finding unacceptable a privately owned crèche displayed in the county courthouse in Pittsburgh, Pennsylvania. Above the crèche was a banner proclaiming "Gloria in Excelsis Deo" (Latin for "Glory to God in the highest"). Yet in the same case, the Court found acceptable a nearby display that combined an eighteen-foot menorah and a forty-five-foot tree decorated with holiday ornaments. The justices explained that the crèche and banner impermissibly "endorsed" religion, but that the menorah and tree only "recognized" the religious nature of the winter holidays.<sup>28</sup>

Most recently, in 2005 the Court held that a display of the Judeo-Christian "Ten Commandments" in a Kentucky courthouse violated the establishment clause because it violated the requirement of government neutrality. Employing the *Lemon* test, the majority of justices found that the display lacked a primary secular purpose.<sup>29</sup> On the same day, however, the Court handed down another decision in which it found acceptable a display of the Ten Commandments at the Texas state capitol.<sup>30</sup> The justices found the passive nature of the display, as well as its location and historical presence to be the key factors distinguishing it from the Kentucky case. Such decisions point to the difficulty in deciding how much separation the establishment clause commands between government and religion.

## Free Exercise of Religion

Contemporary free exercise problems typically arise from application of a law that by its own words has nothing to do with religion, yet works a hardship on some religious groups by commanding them to do something that their faith forbids or by forbidding them to do something that their faith commands. This kind of conflict often occurs with small separatist groups whose interests are overlooked when laws are made. Relying on the free exercise clause, they ask to be exempted on religious grounds from obeying the law. For example, a nearly unanimous bench in 1972 exempted members of the Old Order Amish and the Conservative Amish Mennonite churches from Wisconsin's compulsory school attendance law.<sup>31</sup> Like most states, Wisconsin required school attendance until age sixteen. The Amish were religiously opposed to formal schooling beyond the eighth grade. The justices found a close connection between the faith of the Amish and their simple, separatist way of life. The law not only compelled them to do something at odds with their religious tenets but also threatened to undermine the Amish community. On balance, in the Court's view, the danger to religious freedom outweighed the state's interest in compulsory attendance.

Recently, however, the Court has become less hospitable to free exercise claims. In 1990, the justices ruled against two members of the American Indian Church who were fired from their jobs as drug counselors in a clinic in Oregon after they ingested peyote (a hallucinogen) as part of a religious ritual. Oregon officials then denied them unemployment compensation because their loss of employment resulted from "misconduct." Under state law, peyote was a "controlled substance" and its use was forbidden. The two ex-counselors cited scientific and anthropological evidence that the sacramental use of peyote was an ancient practice and was not harmful. The Court, however, decided that Oregon had not violated the First Amendment. When action based on religious belief runs afoul of the criminal law, the latter prevails.<sup>32</sup> Even though Congress attempted to reverse this ruling with the Religious Freedom Restoration Act in 1993, the Court found that this act exceeded congressional authority.<sup>33</sup> More recently the Catholic, Methodist, and Episcopal Churches are fighting prosecutions under Alabama laws which prohibit priests from baptizing, administering church sacraments to, or inviting undocumented immigrants to church functions.

## Fundamentals of American Criminal Justice

### legal guilt

The concept that a defendant's factual guilt be established in accordance with the laws and the Constitution before criminal penalties can be applied

The American system of criminal justice insists not simply that a person be proved guilty but also that the guilt is proven in the legally prescribed way. This is the concept of **legal guilt**, inherent in the idea of "a government of laws and not of men."<sup>34</sup> Courts sit not just to make sure that wrongdoers are punished but also to see that law enforcement personnel obey the commands of the Bill of Rights. The precise meaning of these commands at a given time represents the prevailing judgment on the balance to be struck between two values: the liberty and the safety of each citizen. The

first focuses on fairness to persons accused of crimes and emphasizes that preservation of liberty necessitates tight controls on law enforcement officers, even if some guilty persons go unpunished. The second focuses on crime control, emphasizing that too many rules hamstringing police and judges, give lawbreakers the upper hand, and disserve honest citizens. Tension between the two values persists.

Inconvenient as they may be, the strictures of the Bill of Rights deliberately make government's crime fighting tasks harder to perform. Yet, holding police to standards of behavior set by the Constitution protects the liberty of everyone. Otherwise, officials would have the power to do whatever they wanted to whomever they wanted, whenever they wanted. Without limits to authority, America would be a far different place in which to live.

### presumption of innocence

A concept in criminal procedure that places the burden of proof in establishing guilt on the government

### ex post facto laws

Laws that make an act a crime after it was committed or increase the punishment for a crime already committed—prohibited by the Constitution

### bill of attainder

A law that punishes an individual and bypasses the procedural safeguards of the legal process—prohibited by the Constitution

### Fourth Amendment

Part of the Bill of Rights that prohibits unreasonable searches and seizures of persons and their property

### warrant

Official authorization for government action

### probable cause

A standard used in determining when police can conduct arrests and searches

## Presumption of Innocence and Notice of Charges

The idea that a person is “innocent until proved guilty” is often misunderstood. It does not mean that the police and prosecuting attorney think that the accused person is innocent, for putting obviously innocent people through the torment of a criminal trial would be a gross injustice. Instead, the **presumption of innocence** lays the burden of proof on the government. It is up to the state to prove the suspect's guilt “beyond a reasonable doubt.” Along with a convincing case of factual guilt, the prosecution must also demonstrate criminal intent, or *mens rea*.

A suspect is entitled to know what the state intends to prove and therefore, what he or she must defend against. The state must go beyond saying merely that someone is a thief. The charge must explain, among other things, (1) what was stolen, (2) approximately when it was stolen, (3) by whom, and (4) from whom it was stolen. This principle also means that criminal laws must be as specific as possible so that citizens can have fair notice of what conduct is prohibited. The greater the vagueness in a law, the greater the danger of arbitrary arrests and convictions.

The basic fairness component of advance notice is why the Constitution prohibits **ex post facto laws**, criminal laws that apply retroactively. The Constitution also forbids a bill of attainder for a similar reason. A **bill of attainder** is a law that imposes punishment but bypasses the procedural safeguards of the legal process. Thus, a person might not have the opportunity for even a simple defense.

## Limits on Searches and Arrests

The **Fourth Amendment** denies police unbounded discretion to arrest and search people and their possessions. Many searches and some arrests cannot take place at all until a judge has issued a **warrant**, or official authorization. To obtain a warrant, the police must persuade a judge that they have very good reason (called **probable cause**) for believing that someone has committed a crime or that evidence exists in a particular location. Warrantless searches of arrested suspects or automobiles are permitted in certain circumstances, but police officers who have made a warrantless search

must still convince a judge afterward that they had probable cause to act. In 2009, the Court clarified that warrantless automobile searches are only permissible if there are safety concerns or if there is a reasonable belief the car contains evidence relevant to the specific crime for which the suspect is being arrested.<sup>35</sup>

Electronic surveillance is also usually considered to be a search, in the constitutional sense. Under current law, practically all such “bugging” must be done on the authority of a warrant, except for exceptional situations involving agents of foreign powers.<sup>36</sup> Advances in surveillance technology continue to push the boundaries of the Fourth Amendment. In 2001, the Court held that heat sensing equipment that detects whether a private home is radiating abnormal levels of heat (which might indicate the use of heat lamps for growing marijuana plants) could not be used without a warrant.<sup>37</sup> Similarly, in 2012 a Court majority held that police could not install a GPS device on a vehicle in order to track its owner without a warrant.<sup>38</sup>

Once a valid arrest has been made, however, police have a right to search a detained individual. In a 2012 case, the Court ruled that a man arrested for failing to appear at a court hearing to pay a fine could be subjected to a strip-search.<sup>39</sup> This search was found acceptable in order to ensure the safety of the correctional facility where he was being detained, regardless of the reason for the initial arrest.

What happens when a judge concludes that police officers have acted improperly when making an arrest or conducting a search? In such instances, the **exclusionary rule** may come into play. This judge-made rule puts teeth into the Fourth Amendment by denying government, in many situations, the use of evidence gained as a result of violation of the suspect’s rights. The rule lies at the heart of the clash between the values of fairness and crime control.<sup>40</sup>

### exclusionary rule

Rule developed in the case *Mapp v. Ohio* [367 U.S. 643 (1961)] that prevents the state from bringing evidence against a defendant when that evidence was obtained illegally

## Assistance of Counsel and Protection Against Self-Incrimination

Other constitutional restraints are at work in the police station and in the courtroom. As interpreted by the Supreme Court, the Fifth Amendment denies government the authority to coerce confessions from suspects or to require suspects to testify at their own trials. These restraints conform to presumption of innocence. The state must make its case—it may not compel the suspect to do its work. Under *Miranda v. Arizona*,<sup>41</sup> judges exclude almost all confessions, even if no physical coercion is present, unless police have first performed the following actions:

1. Advised the suspect of his or her right to remain silent (that is, the right not to answer questions)
2. Warned the suspect that statements he or she might make may be used as evidence at a trial
3. Informed the suspect of his or her right to have a lawyer present during the interrogation

**Miranda rights**

Requirements announced in *Miranda v. Arizona* [384 U.S. 436 (1966)] to protect a suspect during a police interrogation

**plea bargain**

A deal with the prosecutor to obtain fewer or lesser charges or a lighter sentence

**Sixth Amendment**

Provision of the Bill of Rights assuring, among other things, the right to counsel

**capital case**

A criminal proceeding in which the defendant is on trial for his or her life

**misdemeanor**

Less serious criminal offense, usually punishable by not more than one year in jail

**felony**

A serious criminal offense, usually punishable by more than one year in prison

**Eighth Amendment**

The part of the Bill of Rights that prohibits “cruel and unusual punishments” and that is often at issue in death penalty cases

**cruel and unusual punishment**

Prohibited by the Eighth Amendment— at issue in capital cases

4. Offered the services of a lawyer free of charge during the interrogation to suspects financially unable to retain one

If a suspect refuses to talk to the police, the police may not continue the interrogation. If a suspect waives these **Miranda rights** and agrees to talk, the state must be prepared to show to a judge’s satisfaction that the waiver was done “voluntarily, knowingly, and intelligently.” As it is, many defendants decide that it is in their interest to accept a **plea bargain**—a deal with the prosecutor to obtain fewer or lesser charges or a lighter sentence in exchange for a guilty plea. Guilty pleas allow most criminal cases to be settled without going to trial, so the legal use of confessions continues. In 2010, the Court clarified that simply remaining silent for a period of time is not the same as invoking the right to remain silent; therefore, law enforcement can continue to question a suspect even if he or she does not initially respond.<sup>42</sup>

For a long time, the **Sixth Amendment’s** assurance of counsel, or legal assistance, remained more promise than substance. Many defendants simply could not afford to hire an attorney, and some courts provided free counsel for the poor only in **capital cases** (cases in which the death penalty might be imposed). Until the 1970s, for example, 75 percent of people accused of **misdemeanors** (less serious offenses, punishable by a jail term of less than one year) went legally unrepresented. Since the 1930s the Supreme Court has greatly expanded the Sixth Amendment right. Today all persons accused of **felonies** (serious offenses, punishable by more than one year in jail) and all accused of misdemeanors for which a jail term is imposed must be offered counsel, at the government’s expense if necessary.<sup>43</sup>

In 2008 the Court exercised its power of judicial review in finding that parts of the Detainee Treatment Act of 2005 and the Military Commissions Act had unconstitutionally denied the writ of habeas corpus to foreign nationals detained in the American facilities at Guantanamo Bay.<sup>44</sup> The ongoing and contentious nature of these cases speaks to the currency and importance of establishing clear and fair rules for the criminally accused.

Still, none of the right-to-counsel rulings create full equality in access to legal assistance. The Constitution, after all, does not guarantee a “perfect” trial, only a “fair” one. Indigents must be content with public defenders and court-appointed attorneys paid from public funds. Public defenders carry heavy caseloads; their time is spread thin; and compared to others in their profession, they are underpaid. In federal courts they are now responsible for over half of all defense work. They can cope with their caseloads only with the help of plea bargains. Defendants retaining counsel at their own expense also fare differently. Only a few can “afford the best.”

**Limits on Punishment**

Guilty verdicts by juries or with guilty pleas usually result in punishment for the accused. Generally, the Constitution leaves the particular sentence to legislators and judges, subject to the **Eighth Amendment’s** prohibition of “**cruel and unusual punishment**.” In the Supreme Court’s view this means, first, that certain kinds of penalties





► The Supreme Court found that the foreign nationals detained at the Guantanamo Bay facilities were denied the writ of habeas corpus. (AP Photo)

(torture, for example) may not be imposed at all; second, that certain acts or conditions (such as alcoholism) may not be made criminal;<sup>45</sup> and third, that penalties may not be imposed capriciously. Indeed, the Eighth Amendment comes into play most frequently when someone has been sentenced to death. In only a few noncapital cases has the Court overturned a sentence because it was too extreme.<sup>46</sup> Most recently, in 2012, the Court found that sentencing a juvenile to life in prison without parole violated the Eighth Amendment.<sup>47</sup>

Between 1930 and mid-2012 there were approximately 5,159 legal executions in the United States, with about 75 percent of these occurring before 1972. Today, thirty-three of the fifty states, as well as the federal government, allow capital punishment; however, the states vary widely in terms of the number of executions carried out, as Figure 4.1 shows. Nationally about 3,170 persons

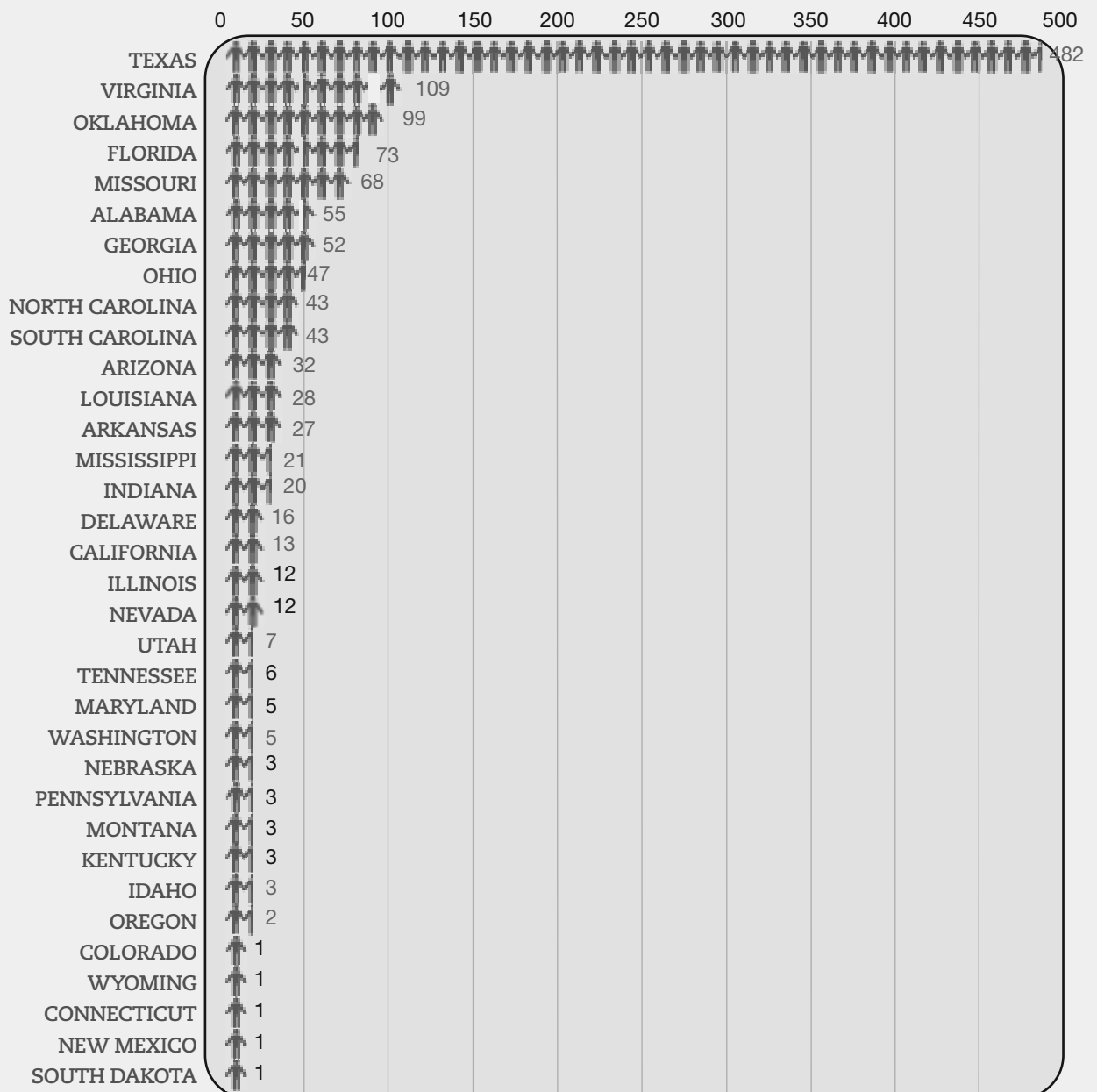
were on “death row” as of mid-2012.<sup>48</sup> Opponents of the death penalty would like the Supreme Court to impose more restrictions on the states. Death penalty opponents claimed a rare victory in 2005 when the Court held that the execution of defendants under the age of eighteen was a cruel and unusual punishment.<sup>49</sup> Even if executions are not inherently “cruel and unusual,” many believe that they are racially discriminatory because African Americans are more likely than whites to be sentenced to die, as are killers of whites versus killers of African Americans.<sup>50</sup> Others conclude that the sentencing process is fundamentally flawed because it results in caprice. One study found little or no difference between the facts of murder cases in which the death penalty was imposed and in which it was not.<sup>51</sup> Plea bargaining has recently added controversy to the capital punishment debate because, when facing the death penalty, the guilty are most likely to seek a plea bargain that takes execution off the agenda while the innocent are more likely to go to trial. When commuting the sentences of those sitting on Death Row in 2003, Illinois Governor George Ryan (1999–2003) argued that this was one reason that many innocent persons sat on the Illinois Death Row.

The constitutionality of capital punishment remains a contentious issue. In 2008, the Court rejected an argument that lethal injection as a method of capital punishment subjected the condemned to cruel and unusual punishment, but overturned a Louisiana law that allowed for the death penalty as a punishment for the rape of a child because “evolving standards of decency” preclude death as a punishment for a crime that does not itself cause a death.<sup>52</sup>

**FIGURE 4.1** | EXECUTIONS BY STATE, 1976–2012\*

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court ruled five to four that the death penalty, as then administered, was cruel and unusual punishment in violation of the Eighth Amendment. Too much discretion in the hands of juries and judges had made application of the death penalty capricious. Most states then reinstated capital punishment (as did Congress for aircraft hijacking) with more carefully drawn statutes to meet the Court's objections in *Furman*. In *Gregg v. Georgia*, 428 U.S. 152 (1976), a majority of the Supreme Court concluded that the death penalty was not inherently cruel and unusual and upheld a two-step sentencing scheme designed to set strict standards for trial courts. A jury would first decide the question of guilt and then in a separate proceeding impose punishment. Of the thirty-three states that now permit capital punishment, two (New Hampshire and Kansas) executed no one between 1976 and 2012. The states of Texas, Virginia, Oklahoma, and Florida accounted for approximately 60 percent of the executions. Twenty states executed ninety-eight convicted capital felons in 1999, the largest number of executions in a single year since 1951, when 105 persons were put to death.

\* Data are current through 28 June 2012. SOURCE: Death Penalty Information Center.



## A Right to Privacy

### Ninth Amendment

Part of the Bill of Rights that cautions that the people possess rights not specified in the Constitution

### *Roe v. Wade*

Supreme Court decision [410 U.S. 113 (1973)] establishing a constitutional right to abortion

Some liberties Americans enjoy are not specifically mentioned in the Constitution, as the **Ninth Amendment** cautions. One such judicially discovered civil liberty is the right to privacy, announced in 1965.<sup>53</sup> With far-reaching implications, this decision invalidated a Connecticut statute that prohibited the use of birth control devices. The Court held that the right to privacy is the origin of the Third (prohibition against quartering), Fourth (prohibition against unreasonable search and seizure), Fifth (prohibition against forced self-incrimination), and Fourteenth (due process and equal protection) Amendments to the Constitution. These Amendments assured that a person could not be targeted by government or law enforcement without good reason. By preventing the government from arbitrarily trying to find illegal activities of persons who criticize it, the founders hoped to restrain the powers of government over individuals.

## The Abortion Controversy

Several decisions that followed led to *Roe v. Wade*,<sup>54</sup> the landmark abortion case. Throwing out the abortion laws of almost all the states, the Court recognized a woman's interest in terminating her pregnancy, the state's interest in protecting her health, and the state's interest in protecting "prenatal life." According to the seven-justice majority, the Constitution prohibited virtually all restrictions on abortions during the first trimester of pregnancy, allowed reasonable medical regulations to



# CONTEMPORARY CONTROVERSIES

## How Much Affirmative Action?

Suppose that a school board and a teachers' union agree to increase the number of minority faculty members in the public schools. In this district there has been no prior racial discrimination; the union and the school officials simply conclude that it is good publicity to hire more minority teachers. Suppose, also, that the agreement protects minority teachers by providing that if layoffs become necessary, the percentage of minority teachers would not be reduced. Next assume that budget reductions force layoffs, with the result that white teachers with greater seniority are laid off before minority teachers with less. In a 1986 case with similar facts from Jackson, Michigan,<sup>1</sup> the Supreme Court ruled that racially preferential firing was not permissible unless identifiable victims of past discrimination were being protected. Most justices thought the Michigan plan went too far by imposing undue burdens on particular individuals in order to achieve the laudable objective of racial equality. Yet, a majority believed that racially preferential hiring was permissible under certain circumstances. According to Justice O'Connor, "a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals. ..."

In another situation, suppose that a city government requires contractors receiving city business to subcontract out a certain percentage of the dollar amount of each contract to one or more minority-owned businesses. Called a set-aside quota, the plan is designed to assist minorities by overcoming their exclusion in past years from the construction trades. Modeling

its program on a 10 percent set-aside mandated by Congress and upheld by the Supreme Court in 1980,<sup>2</sup> the city council in Richmond, Virginia, adopted a 30 percent set-aside plan in 1983. In 1989, however, the Supreme Court ruled that the quota violated the Fourteenth Amendment's equal protection clause.<sup>3</sup> According to Justice O'Connor, "To accept Richmond's claim that past societal discrimination alone can serve as a basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ..." The ruling in the Richmond case has had a widespread impact—thirty-six states and 190 cities had similar remedial programs.

In a situation like the Michigan case, should consideration of race be permitted in hiring but not in firing? In his dissent in the layoff case, Justice Stevens compared the Michigan plan to a contract that gives added job protection to computer science or foreign-language teachers. Should race-based classifications be regarded differently from those that are skill-based? In the Richmond case, do you agree with the Court's decision? Should it make any difference that a bare majority of Richmond's city council was African American at the time the council adopted the set-aside quota? The Court has also addressed affirmative action in college admissions (see the section titled "Affirmative Action" later in this chapter). Do your views on affirmative action differ depending on whether it involves school or work? Why or why not?

<sup>1</sup> *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

<sup>2</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>3</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

guard the woman's health in the second trimester (but no outright prohibitions of abortion), and permitted the state to ban abortions only in the third trimester after the point of fetal "viability" (except when the pregnancy endangered the woman's life). For fifteen years after *Roe*, Congress and some state legislatures tried to limit the availability of abortion and to discourage its use; however, the Supreme Court invalidated most restrictions, reasoning that the right to an abortion was a fundamental right, and thus the government had to show compelling reasons when the right was curtailed.

In 1989, opponents of abortion won a significant victory in the Supreme Court. In a case from Missouri, five justices upheld, among other things, a requirement for fetal viability testing prior to the twenty-fourth week of pregnancy, something which the Court previously would have doubtless struck down.<sup>55</sup> Moreover, the Court discarded *Roe*'s trimester-based analysis of the abortion right, but stopped short of overruling *Roe*. In 1992, the Court upheld parts of a Pennsylvania statute that imposed several conditions before a woman could obtain an abortion.<sup>56</sup> These included informed consent provisions, a twenty-four-hour waiting period, parental consent for minors, and record-keeping regulations for medical personnel. However, the Court refused to accept a requirement for spousal notification because it imposed an "undue burden" on the abortion right.

The decisions in the Missouri and Pennsylvania cases have led to four conclusions. First, abortion is no longer a fundamental right, but it does enjoy modest constitutional protection. Second, and as a consequence of the first, total or near-total bans on abortion are almost certainly unconstitutional. Third, it remains to be seen what additional abortion regulations the Court is prepared to accept. Fourth, except for outright bans, a woman's freedom to terminate a pregnancy now depends largely on what her state legislature, Congress, and the executive branch allow. That being said, in 2000 the Court further defined the scope of legislative restrictions by ruling unconstitutional a Nebraska statute that criminalized late-term abortions that used a specific medical procedure called "partial birth" by its opponents.<sup>57</sup> In a follow-up case in 2007, however, the Court refused to strike down a more narrowly worded federal law banning the procedure.<sup>58</sup> The right to choose abortion again came into play in 2010, when anti-abortion legislators threatened to block passage of the health care reform bill until they were assured that limits on federal funding of abortion would be kept in place.<sup>59</sup>

In 1989 the Supreme Court ruled in *Webster v. Reproductive Health Services* that states could impose certain restrictions on abortions performed in public facilities. In that case it upheld a Missouri ban on abortions performed by public employees. Up until that time, the Court had not deviated greatly from the *Roe v. Wade* (1973) decision, which established the legality of abortion. The Court had struck down most state laws restricting abortion in the later 1970s and early 1980s, though it had permitted restrictions on Medicaid assistance.

The significant effect of the 1989 Webster decision was to open the door for states to pass increased restrictions on abortion. The Court was, by that time, more conservative (three new Justices had been appointed by Reagan) and indicated that it

would continue to rule in favor of abortion restrictions. Indeed, in 1992 the Court ruled in *Planned Parenthood v. Casey* that states could restrict abortion so long as the regulations did not place an "undue burden" on the woman. That case opened even wider the door for states to impose restrictions on abortion. Since that time, the overall abortion rate has been in decline.

## Personal Autonomy and Sexual Orientation

For many people, the principle of personal autonomy, which lies at the heart of privacy cases, suggests that government should leave people alone in their choices about sexual relations. Nonetheless, all states today have laws regulating private behavior and personal relations to some extent. Homosexual marriages, for example, are not officially recognized by any state, and in 1996 Congress passed the Defense of Marriage Act, which provides a federal definition of marriage that specifically excludes same-gender couples. In some locales, homosexual couples may not adopt or have legal custody of children. While twenty-one states have banned discrimination based on gender identity

and/or sexual orientation, it remains legal in many places to engage in sexual orientation discrimination in housing and public accommodation practices.<sup>60</sup>

The two most salient issues regarding government regulation of sexual orientation have been anti-sodomy laws and laws recognizing or banning same-sex marriages and domestic partnerships. Before 2003, five states outlawed sodomy (oral or anal sex) between persons of the same gender, and twelve more states outlawed sodomy regardless of gender. Although the Supreme Court found such policies acceptable under the Constitution in 1986, ten years later it found that a Colorado constitutional amendment that prohibited laws barring discrimination against homosexuals was in violation of the equal protection clause of the Fourteenth Amendment.<sup>61</sup> In 2003, the Court went a step further, directly overturning the 1986 decision and declaring that laws prohibiting sexual acts between same-sex partners violated the due process



► In some areas, same-sex couples may not adopt or have legal custody of children. (AP Photo)

clause of the Fourteenth Amendment.<sup>62</sup> Regarding same-sex marriage, in 1996 Congress passed the Defense of Marriage Act, which provides a federal definition of marriage that specifically excludes same-gender couples. Forty-one states have passed similar laws, many of which have now been challenged in the courts.<sup>63</sup> In 2004, the Massachusetts Supreme Judicial Court brought more attention to this controversy

when it held that its proposed state law creating civil unions for same-sex couples was discriminatory and that the state must give same-sex couples the same marriage rights as opposite-sex couples. In reaction to this decision, eleven states modified their statutes or constitutions in November 2004 to specifically forbid same-sex marriage. In May 2008 the California Supreme Court found the state's ban on same-sex marriage to be unconstitutional, and the state began issuing marriage licenses to same-sex couples in June of that year. However, in November 2008, California voters went to the polls and a narrow majority voted for a ballot initiative that revised the state constitution in order to re-institute the ban. The initiative was subsequently challenged in federal court on the grounds that it served no legitimate state interest and that gays and lesbians should be treated as a protected class with constitutional protections from discrimination. In 2012, the 9th Circuit Court of Appeals held that the law violated both the due process and equal protection clauses of the 14th Amendment, leaving appeal to the U.S. Supreme Court as a possible final step.<sup>64</sup> In 2011, New York joined New Hampshire, Massachusetts, Connecticut, Iowa, and Vermont as states legalizing same-sex marriage. President Barack Obama (2009– ) made headlines in May 2012 when he became the first president to take a public position in favor of same-sex marriage. As a majority of Americans now believe same-sex marriages should be recognized by the law as valid, and as other states and the federal government grapple with their own laws and constitutional amendments, this issue promises to be one of evolving debate in the years to come.<sup>65</sup>

## Racial Equality

### equality of opportunity

A standard that calls for government to remove barriers of discrimination, such as segregation laws or racially exclusive hiring practices that have existed in the past

The United States is racially and ethnically wealthy because of centuries of immigration from virtually every part of the globe. The nation's motto (*E Pluribus Unum*—"out of many, one") symbolizes this coming together of peoples as much as it does the union of the states. Some groups have encountered massive discrimination, however; racial, religious, and ethnic stigmas have been real barriers for many. Perhaps because of color and certainly because of centuries of slavery, African Americans have had the biggest challenge overcoming discrimination in America. Latinos, whose numbers in this nation have increased in recent years, have faced some of the same obstacles to equality.

### equality of condition

A standard, beyond equality of opportunity, which requires policies, such as redistribution of income and other resources, that seek to reduce or eliminate the effects of past discrimination

## Equality: A Concept in Dispute

A word like *equality* can mean different things to different people. For believers in **equality of opportunity**, it is enough if government removes barriers of discrimination that have existed in the past. If life is like a marathon, all people should be allowed to participate by having a number and a place at the starting line. Others think government should promote **equality of condition**. To do this, policies should seek to reduce or even eliminate handicaps that certain runners face because of the lingering effects of past discriminations. The marathon can hardly be fair, they say, if some runners

### equality of result

A standard, beyond equality of condition, which requires policies such as affirmative action or comparable worth, that places some people on an equal footing with others

### Thirteenth Amendment

The first of the Civil War amendments to the Constitution, adopted in 1865, banned slavery throughout the United States.

### equal protection clause

Part of the Fourteenth Amendment that is the source of many civil rights, and declares that no state shall deny to any person “the equal protection of the laws”

start out with their shoelaces tied together or have to wear ill-fitting shoes. Accordingly, the government will have to redistribute income and resources, collecting from those who have more and giving to those who have less. Head Start programs for preschool children and need-based scholarships for college students are obvious devices intended to further equality of condition. Some find such policies inadequate. The effects of inequality, whether of wealth or race or gender, are too strong and pervasive. Government must, therefore, pursue **equality of result**. In the marathon, government may have to carry some runners to the finish line if they are to get there at all. Some affirmative action programs are aimed at achieving equality of result.

## The Legacy: Slavery and Third-Class Citizenship

Shortly after the Civil War ended, in 1865, ratification of the **Thirteenth Amendment** banished slavery and “involuntary servitude” from the country. Following quickly were ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870 and passage of several civil rights acts. Collectively these conferred rights of citizenship on the newly freed slaves and officially removed race as a criterion for voting. Especially significant was the **equal protection clause** of the Fourteenth Amendment: “... nor shall any State deny to any person within its jurisdiction the equal protection of the laws” (see Table 4.2).

By the end of the nineteenth century, however, it was clear that the nation had abandoned the promises of full citizenship for the former slaves. Enforcement of civil rights laws became lax, and the Supreme Court made it clear that the Constitution would not stand in the way of racially discriminatory policies. In *Plessy v. Ferguson*, for example, the Court announced the **separate-but-equal doctrine** in upholding a Louisiana law that required racial segregation on trains.<sup>66</sup> As long as racially separate facilities were “equal,” the Court maintained, the Constitution had not been violated.



► Head Start programs for preschool children are intended to further equality of condition. Actress Jennifer Garner reads to the children.  
(AP Photo)



**TABLE 4.2** | CHRONOLOGY OF MAJOR CIVIL RIGHTS DECISIONS, LAWS, AMENDMENTS

The drive for political equality for all Americans has been a long process and remains incomplete. Congressional statutes and Supreme Court decisions since the Civil War have been important in achieving equality.

1865	Thirteenth Amendment abolishes slavery and “involuntary servitude.”
1868	Fourteenth Amendment prohibits state action denying any person “the equal protection of the laws.”
1870	Fifteenth Amendment removes race as a qualification for voting.
1875	Civil Rights Act bans racial discrimination in places of public accommodation.
1883	Civil Rights cases hold 1875 statute unconstitutional.
1896	<i>Plessy v. Ferguson</i> upholds constitutionality of state law requiring racial segregation on trains in “separate but equal” facilities.
1920	Nineteenth Amendment extends franchise to women.
1954	<i>Brown v. Board of Education of Topeka</i> declares unconstitutional racially segregated public schools; <i>Plessy v. Ferguson</i> reversed.
1957	Congress establishes the Civil Rights Commission.
1963	Congress passes the Equal Pay Act.
1964	Congress passes the Civil Rights Act: Title II outlaws racial discrimination in places of public accommodation; Title IV allows the Justice Department to sue school districts on behalf of African American students seeking integrated education; Title VI bans racial discrimination in federally funded programs; Title VII prohibits most forms of discrimination (as on the basis of race or gender) in employment and creates the Equal Employment Opportunity Commission. Twenty-fourth Amendment eliminates poll taxes in federal elections.
1965	Congress passes the Voting Rights Act. President Johnson bans racial discrimination by federal contractors.
1968	Civil Rights Act’s Title VIII prohibits most forms of discrimination in sale or rental of housing.
1971	Twenty-sixth Amendment lowers national voting age to eighteen.
1972	Congress submits Equal Rights Amendment to states for ratification.
1978	<i>Regents v. Bakke</i> invalidates a medical school admissions program that reserved a specific number of seats for minority applicants.
1979	<i>Steelworkers v. Weber</i> upholds legality of a voluntary affirmative-action plan for industrial apprenticeships that gives preference to African American workers over white workers with greater seniority.
1982	Ratification of Equal Rights Amendment fails. Congress extends and amends Voting Rights Act. Title IX of Educational Amendments bars sex discrimination in “any education program or activity receiving Federal financial assistance.”
1989	<i>Richmond v. J. A. Croson Co.</i> invalidates a municipally mandated 30 percent set-aside quota for racial minorities.
1990	Congress enacts the National Hate Crimes Statistics Act, which requires the Justice Department to gather data on crimes motivated by prejudice about race, religion, ethnicity, or sexual orientation. The Americans with Disabilities Act becomes law.
1991	Congress enacts a civil rights bill designed to modify several 1989 Supreme Court decisions that had made on-the-job discrimination more difficult to prove, and affirmative action plans easier to challenge in court.
2003	The Supreme Court finds the University of Michigan’s law school admission process, which uses race as affirmative criteria, acceptable because it is narrowly tailored.
2006	Congress reauthorizes the Voting Rights Act for an additional twenty-five years.
2011	President Obama certifies the congressional act repealing the military’s “Don’t Ask, Don’t Tell” policy. This allows gay men, lesbians, and bisexuals to serve openly in the military for the first time.

### separate-but-equal doctrine

The standard announced by the Supreme Court in *Plessy v. Ferguson* in 1896 that allowed racially separate facilities on trains (and by implication in public services such as education), as long as the separate facilities were equal (overturned by *Brown v. Board of Education of Topeka* in 1954)

Three kinds of policies then developed that denied many African Americans their rights until after the middle of the twentieth century. First, the law racially segregated virtually every aspect of life in the South (the region of the nation in which most African Americans lived). Elsewhere, segregation existed, too, but it was enforced more by custom than by law. No section of the nation was immune to racist attitudes and racially motivated violence, including riots and lynchings. Segregated neighborhoods became fixtures in the North and South alike.

Second, Southern politicians systematically excluded African Americans from the political process. To get around the Fifteenth Amendment, legislatures turned to devices such as poll taxes, good character tests, and literacy tests to keep African Americans away from the ballot box. Until its use was declared unconstitutional by the Supreme Court,<sup>67</sup> the “grandfather clause” allowed whites to vote who would otherwise have been disfranchised by those same barriers. Of all the discriminatory devices, the white primary was probably the most effective. Because one party, the Democratic, was dominant in the region after 1900, the real electoral choices in state, local, and congressional races were made in the primary, not in the general election. White Democrats thus excluded African Americans from meaningful political participation by adopting party rules that allowed only whites to vote in the Democratic primaries. Even though the white primary seems an affront to the Fifteenth Amendment, it was not until 1944 that the Supreme Court ruled that such deception violated the Constitution.<sup>68</sup> Still, for two decades afterward most African Americans were kept from voting in many places.

Third, without the vote African Americans were shortchanged across the board in the delivery of public services such as education. Favors are rarely extended to entire groups that are permanently disfranchised, especially when they bear racial or religious stigmas as well. Thus, the spirit of *Plessy* was honored only in part; although separate, services and facilities were rarely equal.

## The Counterattack

Opponents of racism saw little hope of victory through the legislative process. At the local level, African Americans were politically powerless in the areas in which segregation was most pervasive. At the national level, Congress operated racially segregated schools in Washington, D.C., and provided separate eating and working places for African American civil servants. Even Uncle Sam’s toilets were marked “Whites Only” and “Colored.” The armed forces remained racially segregated until President Truman (1945–1953) ordered an end to the practice in 1948.

Thus, the counterattack against racism looked to the federal judiciary and was led principally by the National Association for the Advancement of Colored People. Known by its initials, the **NAACP** was founded in 1909 to improve the social, economic, and political condition of African Americans. A separate division for litigation, called the Legal Defense Fund (LDF), began work in 1939 and had the primary responsibility of pressing

### NAACP

National Association for the Advancement of Colored People: an organization founded to improve the social, economic, and political condition of African Americans

### ***Brown v. Board of Education of Topeka***

Landmark Supreme Court decision [347 U.S. 483 (1954)] that overturned the separate-but-equal standard of *Plessy v. Ferguson* [163 U.S. 537 (1896)] and began an end to racial segregation in public schools

the desegregation drive in courtrooms in the 1940s, 1950s, and 1960s. One prominent African American attorney in the LDF was Thurgood Marshall, later the first African American justice on the Supreme Court (1967–1991).

The assault on racial segregation reached a climax in the landmark decision of May 17, 1954: ***Brown v. Board of Education of Topeka***.<sup>69</sup> “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?” asked Chief Justice Earl Warren (1953–1969). “We believe that it does. ... In the field of public education,” he concluded, “the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Plessy* was overruled.

## **Putting *Brown* to Work: The Law and Politics of Integration**

The Court had made its decision. What was to happen? Rather than order an immediate end to segregation, the justices announced that integration was to proceed “with all deliberate speed.”<sup>70</sup> In most places “deliberate speed” proved to be a turtle’s pace. A decade after the Court’s historic pronouncement, less than 1 percent of the African American children in the states of the old Confederacy were attending public school with white children. In six border states and the District of Columbia the figure was much higher: 52 percent.

Several factors severely hampered quick implementation of *Brown*, making the 1954 decision a test case of the Supreme Court’s power. First, some federal judges in the South were themselves opposed to integration. They did little to press for *Brown*’s speedy implementation. Second, state legislatures and local school boards usually reflected strong white opposition to *Brown*’s enforcement. Third, fear of hostile reaction by the local white community discouraged litigation. It was economically and physically risky for parents of African American children to sue local officials. Fourth, the Court received little initial support from Congress, the White House, and a large part of the organized legal community.

Significant enforcement of *Brown* and the lowering of other racial barriers did not come until civil rights activists, such as Martin Luther King, Jr., riveted the nation’s attention on injustices that persisted and called for action. Congress then enacted two important pieces of legislation: the **Civil Rights Act of 1964** and the Elementary and Secondary Education Act of 1965. The importance of the first for *Brown* came in Title VI: Every federal agency that funded local programs through grants, loans, or contracts was required to press for an end to racial discrimination. The 1965 school aid act was the first massive federal appropriation for local school systems; to keep the money, however, school systems had to move swiftly on integration. The 1964 act was the hook, and the 1965 act was the bait. Ironically, public schools in the South are now among the most integrated in the nation, whereas schools in the Northeast are among the most segregated.

The National Civil Rights Museum was established in Memphis, Tennessee, in 1991. Visit this website for an interactive tour of the museum.



<http://www.civilrights museum.org/>

### **Civil Rights Act of 1964**

Comprehensive legislation to end racial segregation in access to public accommodations and in employment in the public and private sectors



► The Voting Rights Act of 1965 was the most important voting legislation ever enacted by Congress. The legislation provided African Americans the right to vote without discrimination. (AP Photo)

### **de facto segregation**

Programs or facilities that are racially segregated by private choice or private discrimination, not because of law or public policy

### **de jure segregation**

Programs or facilities that are racially segregated because of law or public policy

## **The Continuing Effects of *Brown***

Supreme Court decisions about school integration since 1971 have come largely from states outside the South. Non-Southern school systems had segregated schools, but rarely had law segregated them recently. The racial composition of these schools reflected decades of residential segregation that had resulted from economic inequities and private discrimination. This kind of “unofficial” segregation was called **de facto segregation**; but in a pair of decisions from Ohio in 1979,<sup>71</sup> the Supreme Court decided that “racially identifiable schools” in any district probably resulted from school board policy. What many had thought to be de facto segregation was now considered **de jure segregation**: racial separation caused by government policy. Because of the 1979 ruling, local officials now have the affirmative duty of redrawing attendance zones and busing pupils from one part of town to another.

Busing itself remains controversial. Many parents, African American and white alike, object to having their children transported farther than seems necessary. Many prefer neighborhood schools. Aside from achieving integration, scholars disagree on the effects of busing and similar measures on the schoolchildren involved while debating whether integration improves the educational performance of African American students. Although integrated schools often mean that African American parents lose control over schools in African American neighborhoods, integrated education probably prepares all students better for living in a racially diverse society. Moreover, many believe that “green follows white”—that the presence of white students assures more generous economic support of a school by local officials. Nonetheless, the Supreme Court has now taken the position that



► Segregated drinking fountains symbolized the separate worlds of the South until the 1960s. (Library of Congress)

once a school district has eliminated segregation, the district may cease to be under a constitutional obligation to continue the policies that produced the integrated system, even if “re-segregation” might result.<sup>72</sup>

Whatever the progress with school integration, social segregation remains a fact in many areas of the nation. Even though the Civil Rights Acts of 1964 and 1968, respectively, prohibit racial discrimination in employment and in the sale or rental of housing (as do the laws in most states and hundreds of municipalities), African Americans remain the most segregated minority group—the group most isolated from whites.

## Affirmative Action

Many people believe that ending discrimination is not enough. They believe that positive steps called **affirmative action** are also needed to overcome the residual effects of generations of racial bias. Others oppose affirmative action if it involves preferential treatment for minorities. They argue that jobs and university scholarships, for example, are finite. To give to one means to withhold from someone else. The nonminority applicant who loses out because of race has been hurt just as much as a minority applicant in earlier years who was kept out because of race. One side says that two wrongs make a right; the other side answers that they do not.

If a national consensus has developed against racial discrimination in its old forms, no firm consensus exists on affirmative action. Even the Supreme Court has been divided, as *Regents of the University of California v. Bakke*<sup>73</sup> illustrates. In this landmark affir-

### affirmative action

Positive steps taken by public or private institutions to overcome the remaining effects of racial or sexual bias (Affirmative Action programs attempt to achieve equality of result)

mative action case, the Supreme Court invalidated the use of a racial quota for medical school admissions at the Davis campus of the University of California but said that race could still be taken into account. Admissions officers may use race as one of several criteria in evaluating the record of an applicant but may not admit or exclude solely on the basis of race. In 2003, twenty-five years after *Bakke*, the Court again took up the issue, holding that the University of Michigan's undergraduate admission system unfairly allowed race to play too decisive of a factor because it failed to treat applicants as individuals rather than merely group members.<sup>74</sup> On the other hand, the Court found Michigan's law school admission process acceptable because its use of race as affirmative criteria was narrowly tailored.<sup>75</sup> In other cases, the Court has allowed governments and private businesses wide latitude in personnel decisions. Title VII of the Civil Rights Act of 1964 bans job discrimination on the basis of "race, color, religion, sex, or national origin." Even with such sweeping language, the Court has reasoned that a law intended to end discrimination against racial minorities and women should not be used to prohibit programs designed to help those groups.<sup>76</sup>

What, then, are the limits under the law to affirmative action? There is no clear answer to this question. Generally, policies by an employer to overcome the effects of its own past discrimination are permissible; indeed, they may be required. Even some policies by an employer to alleviate general "societal discrimination" for which the employer is not responsible are permissible. Policies that look like "quotas" have the best chance of being struck down.<sup>77</sup>

## Voting Rights

Two centuries ago most Americans were denied the right to vote. The Constitution left voting qualifications to the states, with the result that women, African Americans, and some white adult males were left out. Since the 1820s, the national trend has been to chip away at these restrictions so that today almost all adult citizens in the United States have the right to vote.

As late as 1964, however, African Americans in particular were systemically denied the right to vote in most parts of the South. The response to this situation was the **Voting Rights Act of 1965**, the most important voting legislation ever enacted by Congress. Besides removing many barriers to voting, the act requires that any change in a "standard, practice, or procedure with respect to voting" in certain parts of the United States (most of them being in the South) can take effect only after being cleared by the attorney general of the United States or by the United States District Court for the District of Columbia. The Supreme Court has interpreted "standard, practice, or procedure" to include any change in a locale's electoral system. This advance clearance requirement is satisfied only if the proposed change has neither the *purpose* nor the *effect* of "denying or abridging the right to vote on account of race or color." This means that African American voting power can in no way be weakened or diluted by any change in local election practices.

Congress made an important change in the law in 1982, banning existing electoral arrangements with a racially discriminatory effect anywhere in the United States. Conceiv-

### Voting Rights Act of 1965

Major legislation designed to overcome racial barriers to voting, primarily in the southern states, which was extended again in 2006 for twenty-five years

ably, this addition to the law may produce a realignment of political power in sections of the country in which African Americans and Latinos amount to at least a sizable minority of the population, and in which local political practices dilute the political influence of these minorities. More recently, the Court ruled in 1993 that reapportionment schemes may violate the equal protection clause if they are drawn based solely on race, even when the intent is to increase racial minority representation.<sup>78</sup> Evidence that the Voting Rights Act continues to be controversial can be found in the 2006 congressional debates over renewing the Act. Southern Republicans opposed extending the provisions requiring some states (mostly in the South) to obtain preclearance before altering their voting laws, and other legislators balked at extending requirements to provide ballots in multiple languages.<sup>79</sup> Ultimately, the Act was extended for another twenty-five years, with some portions being made permanent. President Bush signed the Reauthorization Act into law on July 27, 2006.

Provisions of this reauthorization faced legal challenges, though, and in 2009 the Supreme Court unanimously ruled that the law's "preclearance" provisions can be challenged by individual communities ("political subdivisions") seeking permanent exemption based on the argument that discrimination is no longer a concern in their locality.<sup>80</sup>

The Voting Rights Act has had a far-reaching impact. African Americans in the Southern states now vote at a rate approximating that of whites. In the 2012 election for the U.S. House of Representatives, voters nationally chose forty-four African American and twenty-eight Latino members, a number that amounts to about 17 percent of the chamber. There are currently no African Americans and two Latinos serving in the U.S. Senate. Of course, it goes without saying that the 2008 presidential election was a landmark for African Americans in electoral politics. Illinois Senator Barack Obama, the son of a black father and white mother, became the first African American identified presidential nominee of a major party when he was chosen as the Democratic nominee after a hard-fought primary season. He made history again in November 2008, when he was elected as the first African American president. One of the most significant acts of President Obama's first year in office was to appoint Sonia Sotomayor to the Supreme Court, making her the first Latina Supreme Court justice.

## Sexual Equality

Because the political system has been the battleground for so many years in the fight for racial equality, it is easy to suppose that sexual equality has occupied the attention of Congress and the courts for just as long. However, such has not been the case. Making the nation free of discrimination based on gender has been a national priority for only about four decades.

## The Legacy

Until recently the legal status of women in the United States was one of substantial inequality. Legally a wife had no existence apart from her husband. Without his consent,



► The Nineteenth Amendment prohibits state and federal governments from denying citizens the right to vote because of their gender. (iStockphoto)

### Nineteenth Amendment

Amendment ratified in 1920 that prohibits limitations on voting based on sex

### comparable worth

An employment policy, designed to overcome the economic inequities of sexual discrimination, that mandates persons holding jobs of equal responsibility and skill be paid the same

she could make no contracts that bound either of them. In response to such attitudes, the first convention on women's rights was held in 1848 in Seneca Falls, New York. Change in attitudes came slowly, however. Even the Fourteenth Amendment spoke of "male inhabitants." The **Nineteenth Amendment**, extending the franchise to women, was not ratified until 1920, after a long and turbulent suffrage movement. Not until 1971 did the Supreme Court first invalidate a law because it discriminated against women,<sup>81</sup> and as late as 1973 there were nine hundred gender-based federal laws still on the books.

## Gender to the Forefront

Attacks on racial discrimination during the 1950s helped to turn attention to laws that penalized women because they were women. Sex discrimination became a political issue few politi-

cians could ignore after publication of books such as Betty Friedan's *Feminine Mystique* in 1963 and Kate Millett's *Sexual Politics* in 1971 and after the formation of the National Organization for Women (NOW) in 1966. At about the same time, the female half of the postwar "baby boom" entered college, graduate schools, and the work force. There were more women than ever before at an age and place in their lives and careers for whom questions of gender discrimination were very important.

Responding to inequities that had become obvious, Congress passed the Equal Pay Act in 1963, which commanded "equal pay for equal work." Title VII of the Civil Rights Act of 1964 outlawed sexual (as well as racial) bias in employment and promotion practices. Title IX of the 1972 Educational Amendments banned sex discrimination in education programs and activities at colleges receiving federal financial aid. (Title IX remains contentious because of its applicability to how universities allocate dollars between male and female athletic teams.)

As a result of changes in both laws and attitudes, sex-based retirement plans, for example, may no longer require women to make higher contributions or to receive lower monthly benefits than men just because women as a group live longer than men as a group.<sup>82</sup> States may no longer operate single-sex schools of nursing (and probably any other kind), even if coeducational public nursing schools also exist.<sup>83</sup> In the workplace, not only has sexual harassment been judged to be a violation of Title VII but the Supreme Court also holds employers responsible under the law for not taking steps to prevent it.<sup>84</sup> Despite such remedies, sexual harassment continues to be a problem in many settings, as the reaction to Anita Hill's accusations against Supreme Court nominee Clarence Thomas in 1991 revealed (see Chapter 11).

Many people believe that real economic equality between the sexes will not be achieved without **comparable worth** (equal pay for jobs of equal value), a policy not required by federal law. Otherwise, they say, full-time female workers will continue to earn on average no more than about two-thirds the pay of full-time male workers.



## Other Americans and Civil Rights

Discrimination against women and African Americans has occupied a prominent place on the public agenda in recent years, but discrimination has claimed other victims as well. American Indians, Latinos, immigrants, and Americans with disabilities have all demanded, with varying degrees of success, that public officials take steps to remedy years of neglect and unequal treatment. Sexual orientation has also been the basis for discrimination by governments, businesses, and individuals, and was discussed as an aspect of privacy earlier in this chapter.

### American Indians

From an estimated sixteenth-century population of perhaps two million or more<sup>85</sup> (no one knows for certain), American Indians (also called Native Americans) numbered barely a half million in 1900 as war, disease, and systematic slaughter took their toll. Today, there are over 3.1 million, about 1 percent of the total U.S. population. As a group, American Indians suffer disproportionately high rates of sickness, poverty, illiteracy, and unemployment. Not until 1924 did Congress recognize them as citizens and not until 1948 were they granted the right to vote in state and local elections.

Many American Indians have understandably resisted assimilation into the rest of the population, insisting instead on preserving their culture and heritage. Approximately half live on 275 semiautonomous reservations and, in Alaska, in 223 native villages under the supervision of the Bureau of Indian Affairs in the Department of the Interior. The Indian Self-Determination and Education Assistance Act of 1975 granted American Indians greater control over their own affairs, and the In-



► In 1924, Congress recognized Native Americans as citizens. (iStockphoto)

dian Bill of Rights of 1968 gave American Indians living on reservations protections similar to those found in the Constitution.

Recent policy reflects resurgent ethnic pride and new political awareness asserted by activist groups such as the National Indian Youth Council and the American Indian Movement. Such groups have not only protested inadequate national assistance and the plight of the reservation population but also have attempted, with some success, to recover through litigation, ancient tribal fishing and land rights, sometimes worth millions of dollars. Over the last two decades, several American Indian tribes have been granted state authorization to operate gaming facilities on reservation land, providing an important source of revenue for their communities.

## Latinos

Numbering more than 50 million and making up about 16 percent of the population, Latinos are the nation's fastest-growing minority. In the 2010 census, the number of Americans identifying themselves as Latino was larger than the number identifying as African American. A majority originally came from Mexico; most of the others came from Puerto Rico, South America, and parts of Central America. Mexican Americans reside mainly in the Southwest, Cuban Americans in Florida, and Puerto Ricans in the Northeast.

For decades, Latinos have encountered the same discriminations in voting, education, housing, and employment that have confronted African Americans, compounded by a language barrier. Amendments to the Voting Rights Act of 1965 require ballots to be printed in Spanish as well as English in areas in which Spanish-speaking people number more than 5 percent of the population. Partly as a result of this act, Latino voter registration jumped 52 percent nationwide between 1972 and 2010, rising to over 51 percent of Latino eligible voters; yet Latinos are still less likely than African Americans and whites to register to vote.<sup>86</sup> Moreover, Title VI of the Civil Rights Act of 1964 requires public schools to provide bilingual instruction to students deficient in English. Both education and political participation are important to any group seeking to maintain ethnic identity in a diverse culture. Policies to lower language barriers have sparked a backlash among those who see non-English-speaking (particularly Spanish-speaking) persons as a threat to an American cultural identity.

The American Civil Liberties Union is a nonprofit and nonpartisan organization that fights vigorous court battles to defend the civil rights and liberties guaranteed by the Constitution. To find out more about the organization and the issues they are currently addressing, visit this website.



<http://www.aclu.org>

## Immigrants

The Statue of Liberty signifies that America is a land of immigrants, but some have been more welcome than others. Until 1921 entry into the United States was virtually unlimited, but in that year Congress established the first of a series of ceilings on immigration that discriminated against persons from Eastern Europe and Asia, a bias not eliminated until 1965. Today the law sets a ceiling of 675,000 immigrants per year, including those admitted because of job skills and family rela-



► The number of immigrants entering the United States was virtually unlimited until 1921. (*Library of Congress*)

tionships. Exceptions to the ceiling for refugees and others mean that the total number of immigrants admitted annually easily exceeds one million.

Thousands more—no one knows the exact number—successfully enter the country illegally, putting pressure on public services and, some, taking jobs from citizens and others who legally reside in the United States. In response to these issues, Congress passed the Immigration Reform and Control Act in 1986. Among other things, the law requires employers to verify the American citizenship or legal status of all job applicants and provides stiff penalties for employers who hire illegal aliens. The 1986 law has had an unintended consequence: discrimination against persons of Latino or Asian descent. A study by the General Accounting Office (an investigatory agency of Congress) found that one in five of the 4.6 million employers surveyed admitted that the law encouraged them to discriminate against job applicants who were “foreign-appearing” or “foreign-

sounding.”<sup>87</sup> Arizona sparked immigration controversy in 2010 when it passed a law requiring law enforcement officials to determine the immigration status of anyone they reasonably suspect of being an illegal alien. Supporters argued that this misdemeanor offense merely enforces existing federal law, while opponents contended it would lead to discriminatory racial profiling.<sup>88</sup> The continued influx of immigrants guarantees that “immigration reform” will continue to be an important political topic for the foreseeable future.

## Americans with Disabilities

One of the nation’s largest minority groups consists of the more than 43 million Americans with a physical or mental disability. The Civil Rights Act of 1964, the most comprehensive anti-discrimination legislation ever enacted by Congress, did not cover disabled Americans—long victims of bias in both the public and private sectors.

In 1990, Congress passed the Americans with Disabilities Act, which bans discrimination in employment (in businesses with more than fifteen employees) and in places of public accommodation (including not only restaurants and hotels but also establishments as varied as physicians’ offices, zoos, sports arenas, and dry cleaners). Called a bill of rights for Americans with disabilities, the law also stipulates that newly manufactured buses and railroad cars be accessible to persons in wheelchairs and that telephone companies provide service for those with hearing and speech impairments. The law’s definition of Americans with disabilities goes beyond those who rely on wheelchairs or who have difficulty seeing or hearing—it includes people with mental disorders and those with AIDS (Acquired Immune Defi-

ciency Syndrome) and HIV (the virus that causes AIDS), but not those who use illegal drugs or who abuse legal drugs such as alcohol. Although in 2001 the Supreme Court ruled that the Americans with Disabilities Act required the PGA to allow disabled persons to use golf carts during the PGA tour, the Act suffered a major setback when the Court held that state employees could not sue states for failing to comply with the Act.<sup>89</sup>

## **Liberties and Rights in the Constitutional Framework**

Civil rights and liberties, the subjects of this chapter, are part of the framework of American constitutional government. Freedoms of political and religious expression, limits on the police, protection of privacy—all examples of civil liberties—are not only essential components of the political process but also help to define the quality of life Americans enjoy. Civil rights in turn are inspired by the bold assertion of the Declaration of Independence that “all men are created equal.” Against a legacy of toleration of inequality, much of what government and private citizens have done in recent decades has been driven by an intolerance of inequality. Through application of constitutional provisions, laws, and policies, many people have tried to make the Declaration’s words a reality, for women as well as men, for African Americans as well as whites. Their efforts employ the tools of politics and the major institutions of government, described in the chapters that follow.

# CHAPTER REVIEW

## *Wrapping it up*

1. Civil liberties are freedoms, protected by law, to act or not to act and to be free from unwarranted governmental intrusion in one's life. Civil rights encompass participation in society on an equal footing with others.
2. Initially the Bill of Rights restrained only the national government; however, using the Fourteenth Amendment, the Supreme Court has applied most of the protections of the Bill of Rights to the states.
3. Free expression is necessary to the democratic political process. Only in rare instances today will the Court approve restrictions on the content of what a person says.
4. The free exercise and establishment clauses have two main objectives: separation of church and state and toleration of different religious faiths.
5. Other parts of the Bill of Rights guard liberty by placing limits on what officials may do in the process of fighting crime.
6. By interpretation, the Constitution includes a right of privacy, giving people the right to make basic decisions about procreation without undue interference by government. Abortion continues to be a divisive national issue.
7. Only since the landmark case of *Brown v. Board of Education of Topeka* in 1954 has the nation made significant progress toward removing discrimination on the basis of race from American life. The Voting Rights Act of 1965 has enabled African Americans (as well as others) to participate more equally in the political process.
8. Most discrimination based on sex is generally forbidden by statute and by the Supreme Court's interpretation of the Fourteenth Amendment.
9. LGBTQ individuals, American Indians, Latinos, immigrants, and Americans with disabilities are other groups who face discrimination and present special needs.

# KEY TERMS

TERM	PAGE	TERM	PAGE
affirmative action .....	132	free exercise clause .....	113
bill of attainder .....	117	incitement test .....	110
<i>Brown v. Board of Education of Topeka</i> .....	130	legal guilt .....	116
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## Readings for Further Study

*The Bill of Rights* by Irving Brant (American Council of Learned Societies History E-Book Project, 2008) remains one of the best treatments of the origins of the liberties protected in the Constitution.

The rapidly changing field of criminal procedure and criminal justice can be followed in *CJ: Realities and Challenges*, 2nd Edition, by Ruth Masters, Lori Beth Way, Phyllis B. Gerstenfeld, Bernadette T. Muscat, Michael Hooper, John P.J. Dussich, Lester Pincu, and Candice A. Skrapec (New York: McGraw-Hill, 2012).

Efforts to achieve racial equality are fully described in Richard Kluger's *Simple Justice* (New York: Vintage, 2004).

A great resource for tracing the statistical history of minority politics is Mart Martin's *The Almanac of Women and Minorities in American Politics 2002* (Boulder, CO: Westview Press, 2001).

Lisa Garcia Bedolla examines Latino politics in *Introduction to Latino Politics in the U.S.* (Boston: Polity, 2010) and Kim Geron provides another useful account in *Latino Political Power* (Boulder, CO: Lynne Rienner, 2005).

American Indian politics is discussed in John M. Meyer, ed., *American Indians and U.S. Politics* (Westport, CT: Praeger, 2002) and *American Indian Politics and the American Political System*, 3rd Edition, by David E. Wilkins and Heidi Kiiwetinepinesiiik Stark (Lanham, MD: Rowman & Littlefield, 2010).

The emerging field of sexual diversity and politics is well-covered in *The Politics of Gay Rights*, by Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox, eds. (Chicago: University of Chicago Press, 2000); in *Courting Justice: Gay Men and Lesbians v. the Supreme Court* by Joyce Murdoch and Deb Price (New York: Basic Books, 2002); and in *Victory: The Triumphant Gay Revolution*, by Linda Hirshman (New York: HarperCollins, 2012).

## Notes

1. *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833).
2. *McDonald v. Chicago*, 561 U.S. 3025 (2010).
3. *Katz v. United States*, 389 U.S. 347 (1967), overruling *Olmstead v. United States*, 277 U.S. 438 (1928).
4. *Schenck v. United States*, 249 U.S. 47 (1919).
5. *Whitney v. California*, 274 U.S. 357, 377 (1927), Justice Brandeis concurring.
6. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
7. *Morse v. Frederick*, 551 U.S. 393 (2007).
8. *Snyder v. Phelps*, 562 U.S. \_\_\_\_ (2011).
9. *New York Times Co. v. United States*, 403 U.S. 713 (1971).
10. *Miller v. California*, 413 U.S. 5, 8 (1973).
11. *Erie v. Pap's A.M.*, 529 U.S. 277 (2000).
12. *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).
13. *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_\_ (2011).
14. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
15. *Texas v. Johnson*, 491 U.S. 397 (1989).
16. *United States v. Eichman*, 496 U.S. 310 (1990).
17. *R.A.V. v. City of St. Paul*, 505 U.S.L.W. 377 (1992).
18. The Gallup Organization, "Christianity Remains Dominant Religion in the United States," 23 December 2011.
19. *Statistical Abstract of the United States*, 2012.
20. For example, see *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).
21. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
22. *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. \_\_\_\_ (2011).
23. *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).
24. *Wallace v. Jaffree*, 472 U.S. 38 (1985).
25. *Lee v. Weisman*, 505 U.S. 577 (1992).
26. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).
27. *Marsh v. Chambers*, 463 U.S. 783 (1983).
28. *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989).
29. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005).
30. *Van Orden v. Perry*, 545 U.S. 677 (2005).
31. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
32. *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990).
33. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

34. This phrase was popularized by John Adams shortly before the Revolutionary War and was later incorporated into the Massachusetts Constitution, the oldest of the American state constitutions still in force.
35. *Arizona v. Gant*, 556 U.S. 332 (2009).
36. *United States v. U.S. District Court*, 407 U.S. 297 (1972).
37. *Kyllo v. United States*, 533 U.S. 27 (2001).
38. *U.S. v. Jones*, 566 U.S. \_\_\_\_ (2012).
39. *Florence v. Board of Chosen Freeholders*, 566 U.S. \_\_\_\_ (2012).
40. See *Mapp v. Ohio*, 367 U.S. 643 (1961), and *United States v. Leon*, 468 U.S. 897 (1984).
41. 384 U.S. 436 (1966). See also *Dickerson v. United States*, 530 U.S. 428 (2000).
42. *Berghuis v. Thompson*, 560 U.S. \_\_\_\_ (2010).
43. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Scott v. Illinois*, 440 U.S. 367 (1979).
44. *Boumediene v. Bush*, 553 U.S. 723 (2008).
45. *Robinson v. California*, 370 U.S. 660 (1962).
46. *Weems v. United States*, 217 U.S. 349 (1910); *Solem v. Helm*, 463 U.S. 277 (1983). *Harmelin v. Michigan*, 501 U.S. 957 (1991), which upheld a mandatory sentence of life imprisonment without the possibility of parole for possession of more than 650 grams of a substance containing cocaine, means that legislatures have almost complete discretion in setting punishments for noncapital offenses.
47. *Miller v. Alabama*, 567 U.S. \_\_\_\_ (2012).
48. Death Penalty Information Center, "Facts About the Death Penalty," 28 June 2012.
49. *Roper v. Simmons*, 543 U.S. 551 (2005).
50. David C. Baldus, George Woodworth, and Charles Pulanski, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74 (1983): 661; see *McCleskey v. Kemp*, 481 U.S. 279 (1987).
51. Victor L. Streib, "Executions under the Post-Furman Capital Punishment Statutes," *Rutgers Law Journal* 15 (1984): 443.
52. *Baze v. Rees*, 553 U.S. 35 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
53. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
54. 410 U.S. 113 (1973).
55. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
56. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
57. *Stenberg v. Carhart*, 530 U.S. 914 (2000).
58. *Gonzales v. Carhart*, 550 U.S. 124 (2007).
59. CNN.com, "Obama Signs Executive Order on Abortion Funding Limits," March 24, 2010.
60. Wayne van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* (Washington, D.C.: National Gay and Lesbian Task Force, 2000); National Gay and Lesbian Task Force, "State Nondiscrimination Laws in the U.S.," January 20, 2012.
61. *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Romer v. Evans*, 517 U.S. 620 (1996).
62. *Lawrence v. Texas* 539 U.S. 558 (2003).
63. National Gay and Lesbian Task Force, "Anti-Gay Marriage Measures in the U.S." (11 July 2008).
64. *Perry v. Brown*, 10-16696 (9th Cir. 2012).
65. CNN/ORC Poll, 6 June 2012.
66. 163 U.S. 537 (1896).
67. *Guinn v. United States*, 238 U.S. 347 (1915).
68. *Smith v. Allwright*, 321 U.S. 649 (1944).
69. 347 U.S. 483 (1954).
70. *Brown v. Board of Education of Topeka* (II), 349 U.S. 294 (1955).
71. *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).
72. *Freeman v. Pitts*, 503 U.S. 467 (1992).
73. 438 U.S. 265 (1978).



74. *Gratz v. Bollinger* 539 U.S. 244 (2003).
75. *Grutter v. Bollinger* 539 U.S. 306 (2003).
76. For example, see *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).
77. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
78. *Shaw v. Reno*, 509 U.S. 630 (1993).
79. Associated Press, "House delays vote on Voting Rights Act renewal" June 21, 2006, <http://www.cnn.com/2006/POLITICS/06/21/voting.rights.act.ap/index.html> (21 June 2006).
80. *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009).
81. *Reed v. Reed*, 404 U.S. 71 (1971).
82. *Los Angeles v. Manhart*, 435 U.S. 702 (1978); *Arizona v. Norris*, 463 U.S. 1073 (1983).
83. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).
84. *Mentor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
85. *Historical Atlas of the United States* (Washington, D.C.: National Geographic Society, 1988), p. 34.
86. Mark Hugo Lopez, *The Latino Electorate in 2010: More Voters, More Non-Voters*, Washington, D.C.: Pew Hispanic Center, 26 April 2011.
87. Paul M. Barrett, "Immigration Law Found to Promote Bias by Employers," *Wall Street Journal*, March 30, 1990, p. A18.
88. CNN.com, "Thousands Descend on Phoenix to Protest Immigration Law," May 29, 2010, <http://www.cnn.com/2010/US/05/29/arizona.immigration.march/> (8 June 2010).
89. *PGA TOUR, Inc. v. Martin*, 532 U.S. 355 (2001); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).