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## CHAPTER 6

# Civil Rights

### LEARNING OBJECTIVES

- 6-1** Explain how Supreme Court rulings and federal legislation have attempted to end racial discrimination in the United States.
- 6-2** Explain how Supreme Court rulings and federal legislation have attempted to advance women's rights in the United States.
- 6-3** Discuss the evolution of affirmative-action programs after the Supreme Court and Congress ended racial segregation.
- 6-4** Discuss how Court doctrine and public opinion on gay rights have changed in the twenty-first century.
- 6-5** Summarize how American political institutions and public opinion have expanded civil rights.

**Civil rights** The rights of people to be treated without unreasonable or unconstitutional differences.

## THEN

In 1830, Congress passed a law requiring all Indians (they were so called in the law) east of the Mis-

issippi River to move to the Indian Territory west of the river, and the army set about implementing it. In the 1850s, a major political fight broke out in Boston over whether the police department should be obliged to hire an Irish officer. Until 1920, women could not vote in most elections. In the 1930s, the Cornell University Medical School had a strict quota limiting the number of Jewish students who could enroll. In the 1940s, President Franklin D. Roosevelt ordered that all Japanese Americans be removed from their homes in California and placed in relocation centers far from the coast. Until 1954, public schools in many states were required by law to be segregated by race. Until 1967, 16 states outlawed marriages between whites and nonwhites. Until 2003, 14 states outlawed consensual sexual relations between same-sex partners.

## NOW

Now it would be inconceivable that the army would forcibly relocate American Indians. No one can be denied entry into a police department by reason of race, ethnicity, or religion. Women not only have long had the right to vote, but actually now vote at higher rates than men do. Unlike during World War II, today no group of people can be forcibly relocated or held against their will en masse, and even suspected terrorists and “enemy combatants” cannot be detained indefinitely without having their day in court. The quotas that once limited Jews’ access to colleges and universities are history. State laws requiring segregated public schools and banning interracial marriage

are history, too. And, within just the last decade, state laws forbidding consensual sexual relations between same-sex partners have been eliminated, and the constitutions or statutes that in dozens of states outlaw same-sex marriages or other same-sex unions have been challenged both in courts of law and in the court of public opinion.

Still, then as now, if the government passes a law that treats different groups of people differently, that law is not necessarily unconstitutional.

**Civil rights** refer to cases in which some group, usually defined along racial or ethnic lines, is denied access to facilities, opportunities, or services that are available to other groups. The pertinent question regarding civil rights is not whether the government has the authority to treat different people differently; it is whether such differences in treatment are reasonable. Many laws and policies make distinctions among people—for example, the tax laws require higher-income people to pay taxes at a higher rate than lower-income people—but not all such distinctions are defensible. The courts have long held that classifying people on the basis of their income and taxing them at different rates is quite permissible because such classifications are not arbitrary or unreasonable and are related to a legitimate public need (i.e., raising revenue). Increasingly, however, the courts have said that classifying people on the basis of their race or ethnicity is unreasonable.<sup>1</sup> The tests the courts use are summarized in the box on page 135.

To explain the victimization of certain groups and the methods by which they have begun to overcome it, we start with racial classifications and the case of African Americans. The strategies employed by or on behalf of African Americans have typically set the pattern for the strategies employed by other groups. At the end of this chapter, we look at the issues of women’s rights and gay rights.

## 6-1 Race and Civil Rights

In July 2013, the National Urban League (NUL), led by its president, Marc H. Morial, the former mayor of New Orleans, came to Philadelphia for its annual conference. With the National Association for the Advancement of Colored People (NAACP), the NUL is among the nation’s most historic and important civil rights organizations. Its 2013 conference theme was “Redeem the Dream.” Fifty years earlier, in 1963, Reverend Dr. Martin Luther King, Jr. delivered his historic “I Have a Dream” speech in Washington, D.C. In its 2013 *State of Black America* report, the NUL credited civil rights laws (see the summary on page 124) for the progress made over the last half-century or so in closing white-black gaps in education and standards of living:

- The white-black high school completion rate gap has closed by 57 points; whereas only 25 percent of blacks graduated from high school in 1963, by 2013 the fraction had risen to 85 percent, and there had been a



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*In March 2015, President Barack Obama, former President George W. Bush, U.S. Representative John Lewis (who was one of the original protestors), and many others participated in the 50th anniversary of the civil rights march in Selma, Alabama.*





*U.S. Attorney General Loretta Lynch is the first African-American woman to hold the position.*

threefold increase in the number of blacks enrolled in college.

- The white-black poverty rate gap fell by 23 points; whereas 48 percent of blacks lived in poverty in 1963, by 2013 the fraction had fallen to 28 percent.
- There was a 14 percent increase in the number of black homeowners.

But the same report also documented numerous racial gaps and disparities in housing, education, health care, employment, and overall economic opportunity:

- In 2013, as in 1963, the black-white unemployment ratio was still 2-to-1, regardless of education, gender, region, or income level.
- In 2013, as in 1963, more than a third of all black children (38 percent) still lived in poverty.
- In 2013, as in 1963, blacks employed in the public sector earned less than whites in the same jobs, and a still-wider black-white wage disparity persisted in the private sector.

Citing the history surrounding Reverend Dr. King's "I Have a Dream" speech, Morial and other leaders called on all citizens to come together to eliminate these and other racial gaps and disparities in housing, education, employment, and other areas. As late as the mid-20th century, African Americans in many parts of the country could not vote, attend integrated schools, ride in the front seats of buses, or buy homes in white neighborhoods. Conditions were especially oppressive in those parts of the country, notably the Deep South, where blacks were often in the majority. There, the politically dominant white minority felt keenly the potential competition for jobs, land, public services, and living space posed by large numbers of people of another race. But even in the North, black gains often appeared to be at the expense of lower-income

whites who lived or worked near them, not at the expense of upper-status whites who lived in suburbs.

African Americans were not allowed to vote at all in many areas; they could vote only with great difficulty in others; and even in those places where voting was easy, they often lacked the material and institutional support for effective political organization. If your opponent feels deeply threatened by your demands and can deny you access to the political system that will decide the fate of those demands, you are, to put it mildly, at a disadvantage. Yet from the end of Reconstruction to the 1960s—for nearly a century—many blacks in the South found themselves in just such a position.

To the dismay of those who prefer to explain political action in terms of economic motives, people often attach greater importance to the intangible costs and benefits of policies than to the tangible ones. Thus, even though the average black represented no threat to the average white, antiblack attitudes—racism—produced some appalling actions. Between 1882 and 1946, 4,715 people, about three-fourths of them African Americans, were lynched in the United States.<sup>2</sup> Some of these brutalities were perpetrated by small groups of vigilantes acting with much ceremony, but others were the actions of frenzied mobs. In the summer of 1911, a black man charged with murdering a white man in Livermore, Kentucky, was dragged by a mob to the local theater, where he was hanged. The audience, which had been charged admission, was invited to shoot the swaying body (those in the orchestra seats could empty their revolvers; those in the balcony were limited to a single shot).<sup>3</sup>

Though the public in other parts of the country was shocked by such events, little was done because lynching was a local, not a federal, crime. It obviously would not require many such horrific killings for African Americans in these localities to decide it would be foolhardy to try to vote or enroll in a white school. And even in those states where black Americans did vote, popular attitudes were not conducive to blacks buying homes or taking jobs on an equal basis with whites. Even among those professing to support equal rights, a substantial portion opposed African Americans' efforts to obtain them and federal action to secure them. In 1942, a national poll showed that only 30 percent of white people thought black and white children should attend the same schools; in 1956, the proportion had risen, but only to 49 percent, still less than a majority. (In the South, white support for school integration was even lower—14 percent favored it in 1956, about 31 percent in 1963.) As late as 1956, a majority of Southern whites were opposed to integrated public transportation facilities. Even among whites who generally favored integration, there was in 1963 (*before* the inner-city riots that occurred later in the decade) considerable opposition to the black civil rights movement: nearly half of the whites classified in a survey



## HOW THINGS WORK

### Key Provisions of Major Civil Rights Laws

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| <p><b>1957</b> <b>Voting</b> Made it a federal crime to try to prevent a person from voting in a federal election. Created the Civil Rights Commission.</p>  | <p><b>1965</b> <b>Voter registration</b> Authorized appointment by the Civil Service Commission of voting examiners who would require registration of all eligible voters in federal, state, and local elections, general or primary, in areas where discrimination was found to be practiced or where less than 50 percent of voting-age residents were registered to vote in the 1964 election.</p> |
| <p><b>1960</b> <b>Voting</b> Authorized the attorney general to appoint federal referees to gather evidence and make findings about allegations that African Americans were deprived of their right to vote. Made it a federal crime to use interstate commerce to threaten or carry out a bombing.</p>  | <p><b>Literacy tests</b> Suspended use of literacy tests or other devices to prevent African Americans from voting.</p>   |
| <p><b>1964</b> <b>Voting</b> Made it more difficult to use devices such as literacy tests to bar African Americans from voting.</p> <p><b>Public accommodations</b> Barred discrimination on grounds of race, color, religion, or national origin in restaurants, hotels, lunch counters, gasoline stations, movie theaters, stadiums, arenas, and lodging houses with more than five rooms.</p> <p><b>Schools</b> Authorized the attorney general to bring suit to force the desegregation of public schools on behalf of citizens.</p> <p><b>Employment</b> Outlawed discrimination in hiring, firing, or paying employees on grounds of race, color, religion, national origin, or sex.</p> <p><b>Federal funds</b> Barred discrimination in any activity receiving federal assistance.</p> | <p><b>1968</b> <b>Housing</b> Banned, by stages, discrimination in sale or rental of most housing (excluding private owners who sell or rent their homes without the services of a real-estate broker).</p> <p><b>Riots</b> Made it a federal crime to use interstate commerce to organize or incite a riot.</p>  |
|  | <p><b>1972</b> <b>Education</b> Prohibited sex discrimination in education programs receiving federal aid.</p> <p><b>Discrimination</b> If any part of an organization receives federal aid, no part of that organization may discriminate on the basis of race, sex, age, or physical disability.</p>  |
|  | <p><b>1991</b> <b>Discrimination</b> Made it easier to sue over job discrimination and collect damages; overturned certain Supreme Court decisions. Made it illegal for the government to adjust, or “norm,” test scores by race.</p>   |

as moderate integrationists thought demonstrations hurt the black cause; nearly two-thirds disapproved of actions taken by the civil rights movement; and more than a third felt civil rights should be left to the states.<sup>4</sup>

In short, the political position in which African Americans found themselves until the 1960s made it difficult for them to advance their interests through a feasible legislative strategy; their opponents were aroused, organized, and powerful. Thus, if black interests were to be championed in Congress or state legislatures, blacks would have to have white allies. Though some such allies could be found, they were too few to make a difference in a political system that gives a substantial advantage to strongly motivated opponents of any new policy. For that to change, one or both of two things would have to happen: additional allies would have to be recruited (a delicate problem, given that many white integrationists

disapproved of aspects of the civil rights movement), or the struggle would have to be shifted to a policymaking arena in which the opposition enjoyed less of an advantage.

Partly by plan, and partly by accident, black leaders followed both of these strategies simultaneously. By publicizing their grievances and organizing a civil rights movement that (at least in its early stages) concentrated on dramatizing the denial to blacks of essential and widely accepted liberties, African Americans were able to broaden their base of support both among political elites and among the general public, thereby elevating the importance of civil rights issues on the political agenda. By waging a patient, prolonged, but carefully planned legal struggle, black leaders shifted decision-making power on key civil rights issues from Congress, where they had been stymied for generations, to the federal courts.



Everett Collection Historical/Alamy

Segregated water fountain in Oklahoma City (1939).

After this strategy had achieved some substantial successes—once blacks had become enfranchised and legal barriers to equal participation in political and economic affairs had been lowered—the politics of civil rights became more conventional. African Americans were able to assert their demands directly in the legislative and executive branches of government with reasonable (though scarcely certain) prospects of success. Civil rights became less a matter of gaining entry into the political system and more one of waging interest group politics within that system.

At the same time, the goals of civil rights politics broadened. The struggle to gain entry into the system had focused on the denial of fundamental rights (to vote, to organize, to obtain equal access to schools and public facilities); since then, dominant issues have included economic progress, professional advancement, and improvement of housing and neighborhoods. But these battles can reveal denial of fundamental legal rights as well. With housing, for example, both government agencies, such as the Federal Housing Authority, and private lenders have pursued strategies to make home ownership more difficult for black Americans, such as “redlining” neighborhoods, that is, either denying loans or making them more expensive. After the horrific, fatal injuries that Baltimore resident Freddie Gray, a 25-year-old African American man, received in police custody in 2015, riots ensued in the city. Its long-standing problems of segregation and poverty commanded national attention, particularly their roots, at least partly, in purposely discriminatory public policy.<sup>5</sup>

## The Campaign in the Courts

The Fourteenth Amendment was both an opportunity and a problem for black activists. Adopted in 1868, it seemed to guarantee equal rights for all: “No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The key phrase was “equal protection of the laws.” Read broadly, it might mean that the Constitution should be regarded as color-blind: No state law could have the effect of treating whites and blacks differently. Thus, a law segregating blacks and whites into separate schools or neighborhoods would be unconstitutional. Read narrowly, “equal protection” might mean only that blacks and whites had certain fundamental legal rights in common (such as the right to sign contracts, to serve on juries, or to buy and sell property), but otherwise they could be treated differently.

In a series of decisions beginning in the 1870s, the Supreme Court took the narrow view, albeit often by narrow majorities. Adopted in 1870, the Fourteenth Amendment had been proposed as a means to reinforce the civil rights Act of 1866. That Act was intended by Congress to ensure that former slaves’ citizenship rights would be respected not only by the federal government but also by the state governments, both North and South. But in its 5-to-4 majority decision in the *Slaughter-House Cases* (1873), the Court ruled that the “privileges and immunities” clause of the Fourteenth Amendment did not protect citizens from discriminatory actions by state governments. Though in 1880 it declared unconstitutional a West Virginia law requiring juries to be composed only of white males,<sup>6</sup> the Court decided in 1883 that it was unconstitutional for Congress to prohibit racial discrimination in public accommodations such as hotels.<sup>7</sup> The difference between the two cases seemed, in the eyes of the Court, to be this: Serving on a jury was an essential right of citizenship that the state could not deny to any person on racial grounds without violating the Fourteenth Amendment, but registering at a hotel was a convenience controlled by a private person (the hotel owner) who could treat blacks and whites differently if he or she wished.

The major decision that determined the legal status of the Fourteenth Amendment for more than half a century was *Plessy v. Ferguson*. Louisiana had passed a law requiring blacks and whites to occupy separate cars on railroad trains operating in that state. When Adolph Plessy, who was seven-eighths white and one-eighth black, refused to obey the law, he was arrested. He appealed his conviction to the Supreme Court, claiming that the law violated the Fourteenth Amendment. In 1896, the Court rejected his claim, holding that the law treated both races equally even though it required them to be separate. The equal protection clause guaranteed political and legal but not social



**separate-but-equal doctrine** The doctrine established in *Plessy v. Ferguson* (1896) that African Americans could constitutionally be kept in separate but equal facilities.

equality. “Separate-but-equal” facilities were constitutional because if “one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.”<sup>8</sup>

## “Separate But Equal”

Thus began the **separate-but-equal doctrine**. Three years later, the Court applied it to schools as well, declaring in *Cumming v. Richmond County Board of Education* that a decision in a Georgia community to close the black high school while keeping open the white high school was not a violation of the Fourteenth Amendment because blacks could always go to private schools. Here the Court seemed to be saying that not only could schools be separate, they could even be unequal.<sup>9</sup>

What the Court has made, the Court can unmake. But to get it to change its mind requires a long, costly, and uncertain legal battle. The NAACP was the main organization that waged that battle against the precedent of *Plessy v. Ferguson*. Formed in 1909 by a group of whites and blacks in the aftermath of a race riot, the NAACP did many things, including lobbying in Washington and publicizing black grievances (especially in the pages of *The Crisis*, a magazine edited by W. E. B. Du Bois). But its most influential role was played in the courtroom.

It was a rational strategy. Fighting legal battles does not require forming broad political alliances or changing public opinion, tasks that would have been very difficult for a small and unpopular organization. A court-based approach also enabled the organization to remain non-partisan. But it was a slow and difficult strategy. The Court had adopted a narrow interpretation of the Fourteenth Amendment. To get the Court to change its mind would require the NAACP to bring before it cases involving the strongest possible claims that a black had been unfairly treated—and under circumstances sufficiently different from those of earlier cases, so that the Court could find some grounds for changing its mind.

The steps in that strategy were these: First, persuade the Court to declare unconstitutional laws creating schools that were separate but obviously unequal. Second, persuade it to declare unconstitutional laws supporting schools that were separate but unequal in not-so-obvious ways. Third, persuade it to rule that racially separate schools were inherently unequal and hence unconstitutional.

## Can Separate Schools Be Equal?

The first step was accomplished in a series of court cases stretching from 1938 to 1948. In 1938, the Court held that

Lloyd Gaines had to be admitted to an all-white law school in Missouri because no black law school of equal quality existed in that state.<sup>10</sup> In 1948, the Court ordered the all-white University of Oklahoma Law School to admit Ada Lois Sipuel, a black woman, even though the state planned to build a black law school later. For education to be equal, it had to be equally available.<sup>11</sup> It still could be separate, however: The university admitted Ms. Sipuel but required her to attend classes in a section of the state capitol, roped off from other students, where she could meet with her law professors.

The second step was taken in two cases decided in 1950. Heman Sweatt, an African American man, was treated by the University of Texas Law School much as Ada Sipuel had been treated in Oklahoma: “admitted” to the all-white school but relegated to a separate building. Another African American man, George McLaurin, was allowed to study for his Ph.D. in a “colored section” of the all-white University of Oklahoma. The Supreme Court unanimously decided that these arrangements were unconstitutional because, by imposing racially based barriers on the black students’ access to professors, libraries, and other students, they created unequal educational opportunities.<sup>12</sup>

The third step, the climax of the entire drama, began in Topeka, Kansas, where Linda Brown wanted to enroll in her neighborhood school but could not because she was black and the school was by law reserved exclusively for whites. When the NAACP took her case to the federal district court in Kansas, the judge decided the black school Linda could attend was substantially equal in quality to the white school she could not attend and, therefore, denying her access to the white school was constitutional. To change that, the lawyers would have to persuade the Supreme Court to overrule the district judge on the grounds that racially separate schools were unconstitutional even if they were equal. In other words, the separate-but-equal doctrine would have to be overturned by the Court.

It was a risky and controversial step to take. Many states, Kansas among them, were trying to make their all-black schools equal to those of whites by launching expensive building programs. If the NAACP succeeded in getting separate schools declared unconstitutional, the Court might well put a stop to the building of these new schools. Blacks could win a moral and legal victory but suffer a practical defeat—the loss of these new facilities. Despite these risks, the NAACP decided to go ahead with the appeal.

## *Brown v. Board of Education*

On May 17, 1954, a unanimous Supreme Court, speaking through an opinion written and delivered by Chief Justice Earl Warren, found that “in the field of public education the doctrine of ‘separate but equal’ has no place” because “separate educational facilities are inherently unequal.”<sup>13</sup> *Plessy v. Ferguson* was overruled, and “separate but equal” was dead.



*Dorothy Counts, the first black student to attend Harding High School in Charlotte, North Carolina, tries to maintain her poise as she is taunted by shouting, gesticulating white students in September 1957.*

The ruling was a landmark decision, but the reasons for it and the means chosen to implement it were as important and as controversial as the decision itself. There were at least three issues. First, how would the decision be implemented? Second, on what grounds were racially separate schools unconstitutional? Third, what test would a school system have to meet in order to be in conformity with the Constitution?

**Implementation** The *Brown* case involved a class-action suit; that is, it applied not only to Linda Brown but to all others similarly situated. This meant that black children everywhere now had the right to attend formerly all-white schools. This change would be one of the most far-reaching and conflict-provoking events in modern American history. It could not be effected overnight or by the stroke of a pen. In 1955, the Supreme Court decided it would let local federal district courts oversee the end of segregation by giving them the power to approve or disapprove local desegregation plans. This was to be done “with all deliberate speed.”<sup>14</sup>

In the South, “all deliberate speed” turned out to be a snail’s pace. Massive resistance to desegregation broke out in many states. Some communities simply defied the Court; some sought to evade its edict by closing their public schools. In 1956, more than 100 Southern members of Congress signed a “Southern Manifesto” that

condemned the *Brown* decision as an “abuse of judicial power” and pledged to “use all lawful means to bring about a reversal of the decision.”

In the late 1950s and early 1960s, the National Guard and regular army paratroopers were used to escort black students into formerly all-white schools and universities. It was not until the 1970s that resistance collapsed and most Southern schools were integrated. The use of armed force convinced people that resistance was futile; the disruption of the politics and economy of the South convinced leaders that it was imprudent; and the voting power of blacks convinced politicians that it was suicidal. In addition, federal laws began providing financial aid to integrated schools and withholding it from segregated ones. By 1970, only 14 percent of Southern black schoolchildren still attended all-black schools.<sup>15</sup>

**The Rationale** As the struggle to implement the *Brown* decision continued, the importance of the rationale for that decision became apparent. The case was decided in a way that surprised many legal scholars.

The Court could have said that the equal protection clause of the Fourteenth Amendment makes the Constitution, and thus state laws, color-blind. Or it could have said that the authors of the Fourteenth Amendment meant to ban segregated schools. It did neither. Instead, it said segregated education is bad because it “has

## What Would You Do?

NEWS

### Memorandum

**To:** Justice Roberta Wilson

**From:** Robert Gilbert, law clerk

**Subject:** Affirmative action in higher education

Affirmative-action programs in higher education in the 21st century face strong political scrutiny. In the 1970s, the Supreme Court said such programs could be instituted as a means of overcoming institutional problems of past discrimination, but the Court has wrestled with the specifics of doing so. For example, it has said that diversity goals are permissible, but not quotas. In recent years, the Court has questioned whether the need for affirmative-action



programs still exists. The court needs to decide if affirmative-action programs are constitutional, so schools operate uniformly, and constitutionally, in their admissions decision making.

### Arguments for:

1. Diversity is an important goal in higher education, as numerous schools, including military academies, have said in briefs for earlier cases.
2. The effects of segregation and discrimination continue in American politics today, and affirmative-action programs provide a needed means of countering those problems.
3. Institutions of higher education grant preference to applicants for several reasons, including family ties to school. Taking race, ethnicity, or gender into account has the same goal of incorporating a range of interests and perspectives into an entering class.

### Arguments against:

1. Colleges and universities focus on higher learning and should seek intellectual, not individual, diversity.
2. Race is a suspect classification, and no state program that chiefly serves one race can be allowed.
3. Institutions of higher education should make admissions decisions on merit criteria, not on other considerations.

### Your decision

- Continue affirmative-action programs in higher education
- Ban affirmative-action programs in higher education





MPI/Getty Images

In 1963, Governor George Wallace of Alabama stood in the doorway of the University of Alabama to block the entry of black students. Facing him is U.S. Deputy Attorney General Nicholas Katzenbach.

a detrimental effect upon the colored children” by generating “a feeling of inferiority as to their status in the community” that may “affect their hearts and minds in a way unlikely ever to be undone.”<sup>16</sup> This conclusion was supported by a footnote reference to social science studies of the apparent impact of segregation on black children.

Why did the Court rely on social science as much as or more than the Constitution in supporting its decision? Apparently for two reasons. One was the justices’ realization that the authors of the Fourteenth Amendment may *not* have intended to outlaw segregated schools. The schools in Washington, D.C., were segregated when the amendment was proposed, and when this fact was mentioned during the debate, it seems to have been made clear that the amendment was not designed to abolish this segregation. When Congress debated a civil rights act a few years later, it voted down provisions that would have ended segregation in schools.<sup>17</sup> The Court could not easily base its decision on a constitutional provision that had, at best, an uncertain application to schools.

The other reason grew out of the first. On so important a matter, the chief justice wanted to speak for a unanimous court. Some justices did not agree that the Fourteenth Amendment made the Constitution color-blind. In the interests of harmony, the Court found an ambiguous rationale for its decision.

### Desegregation versus Integration

That ambiguity led to the third issue. If separate schools were inherently unequal, what would “unseparate” schools look like? Since the Court had not said race was irrelevant, an “unseparate” school could be either one that blacks and whites were free to attend if they chose or one that blacks and whites in fact attended whether they wanted to or not. The first might be called a desegregated school, and the latter an integrated school. Think of the *Topeka* case. Was it enough that there was now no barrier to Linda Brown’s attending the white school in her neighborhood? Or was it necessary that there be black children (if not Linda, then some others) actually going to that school together with white children?

As long as the main impact of the *Brown* decision lay in the South, where laws had prevented blacks from attending white schools, this question did not seem important. Segregation by law (*de jure* segregation) was now clearly unconstitutional. But in the North, laws

#### *suspect classification*

Classifications of people based on their race or ethnicity; laws so classifying people are subject to “strict scrutiny.”

#### *strict scrutiny*

The standard by which “suspect classifications” are judged. To be upheld, such a classification must be related to a “compelling government interest,” be “narrowly tailored” to achieve that interest, and use the “least restrictive means” available.

*de jure* segregation Racial segregation that is required by law.



## CONSTITUTIONAL CONNECTIONS

### Suspect Classifications

Beginning with the *Brown* case, virtually every form of racial segregation imposed by law has been struck down as unconstitutional. Race has become a **suspect classification** such that any law making racial distinctions is now subject to **strict scrutiny**. To be upheld as constitutional, a suspect classification must be related to a “compelling government interest,” be “narrowly tailored” to achieve that interest, and use the “least restrictive means” available. But the Court has also determined that

though race is a suspect classification, the Constitution is not “color-blind,” and so the government may make racial distinctions for the purpose of remedying past racial discrimination. Later in this chapter we discuss affirmative action—the laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.

**de facto segregation**

Racial segregation that occurs in schools, not as a result of the law, but as a result of patterns of residential settlement.

had not kept blacks and whites apart; instead, all-black and all-white schools were the result of residential segregation, preferred living patterns, informal social forces, and administrative practices (such as drawing school district lines so as to produce single-race schools). This often was called segregation in fact (**de facto segregation**).

In 1968, the Supreme Court settled the matter. In New Kent County, Virginia, the school board had created a “freedom-of-choice” plan under which every pupil would be allowed without legal restriction to attend the school of his or her choice. As it turned out, all the white children chose to remain in the all-white school, and 85 percent of the black children remained in the all-black school. The Court rejected this plan as unconstitutional because it did not produce the “ultimate end,” which was a “unitary, nonracial system of education.”<sup>18</sup> In the opinion written by Justice William Brennan, the Court seemed to be saying that the Constitution required actual racial mixing in the schools, not just the repeal of laws requiring racial separation.

This impression was confirmed three years later when the Court considered a plan in North Carolina under which pupils in Mecklenburg County (which includes Charlotte) were assigned to the nearest neighborhood school without regard to race. As a result, about half the black children now attended formerly all-white schools, with the other half attending all-black schools. The federal district court held that this was inadequate and ordered some children to be bused into more distant schools in order to achieve a greater degree of integration. The Supreme Court, now led by Chief Justice Warren Burger, upheld the district judge on the grounds that the court plan was necessary to achieve a “unitary school system.”<sup>19</sup>

This case—*Swann v. Charlotte-Mecklenburg Board of Education*—pretty much set the guidelines for all subsequent cases involving school segregation. The essential features of those guidelines are as follows:

- To violate the Constitution, a school system, by law, practice, or regulation, must have engaged in discrimination. Put another way, a plaintiff must show intent to discriminate on the part of the public schools.
- The existence of all-white or all-black schools in a district with a history of segregation creates a presumption of intent to discriminate.
- The remedy for past discrimination will not be limited to freedom of choice, or what the Court called “the walk-in school.” Remedies may include racial quotas

in the assignment of teachers and pupils, redrawn district lines, and court-ordered busing.

- Not every school must reflect the social composition of the school system as a whole.

Relying on *Swann*, district courts have supervised redistricting and busing plans in localities all over the nation, often in the face of bitter opposition from the community. In Boston, the control of the city schools by a federal judge, W. Arthur Garrity, lasted for more than a decade and involved him in every aspect of school administration. One major issue not settled by *Swann* was whether busing and other remedies should cut across city and county lines. In some places, the central-city schools had become virtually all black. Racial integration could be achieved only by bringing black pupils to white suburban schools or moving white pupils into central-city schools. In a series of split-vote decisions, the Court ruled that court-ordered intercity busing could be authorized only if it could be demonstrated that the suburban areas as well as the central city had in fact practiced school segregation. Where that could not be shown, such intercity busing would not be required. The Court was not persuaded that intent had been proved in Atlanta, Detroit, Denver, Indianapolis, and Richmond, but it was persuaded that it had been proved in Louisville and Wilmington.<sup>20</sup>

The importance the Court attaches to intent means that if a school system that was once integrated becomes all black as a result of white residents moving to the suburbs, the Court will not require that district lines constantly be redrawn or new busing plans be adopted to adjust to the changing distribution of the population.<sup>21</sup> This in turn means that as long as blacks and whites live in different neighborhoods for whatever reason, there is a good chance that some schools in both areas will be heavily of one race. If mandatory



*In the 1970s, antibusing protestors picketed against sending children out of neighborhoods to desegregate schools.*

busing plans or other integration measures cause whites to move out of a city at a faster rate than they otherwise would (a process often called “white flight”), then efforts to integrate the schools may in time create more single-race schools. Ultimately, integrated schools will exist only in integrated neighborhoods or where the quality of education is so high that both blacks and whites want to enroll in the school even at some cost in terms of travel and inconvenience.

Mandatory busing to achieve racial integration has been a deeply controversial program and has generated considerable public opposition. Surveys show that a majority of people oppose it.<sup>22</sup> As recently as 1992, a poll showed that 48 percent of whites in the Northeast and 53 percent of Southern whites felt it was “not the business” of the federal government to ensure “that black and white children go to the same schools.”<sup>23</sup> Presidents Richard Nixon, Gerald Ford, and Ronald Reagan opposed busing; all three supported legislation to prevent or reduce it, and Reagan petitioned the courts to reconsider busing plans. The courts refused to reconsider, and Congress has passed only minor restrictions on busing.

The reason why Congress has not followed public opinion on this matter is complex. It has been torn between the desire to support civil rights and uphold the courts and the desire to represent the views of its constituents. Because it faces a dilemma, Congress has taken both sides of the issue simultaneously. By the late 1980s, busing was a dying issue in Congress, in part because no meaningful legislation seemed possible and in part because popular passion over busing had somewhat abated.

Then, in 1992, the Supreme Court made it easier for local school systems to reclaim control over their schools from the courts. In DeKalb County, Georgia (a suburb of Atlanta), the schools had been operating under court-ordered desegregation plans for many years. Despite this effort, full integration had not been achieved, largely because the county’s neighborhoods had increasingly become either all black or all white. The Court held that local schools could not be held responsible for segregation caused solely by segregated living patterns and so the courts would have to relinquish their control over the schools. In 2007, the Court said race could not be the decisive factor in assigning students to schools that had either never been segregated (as in Seattle) or where legal segregation had long since ended (as in Jefferson County, Kentucky).<sup>24</sup>

## The Campaign in Congress

The campaign in the courts for desegregated schools, though slow and costly, was a carefully managed effort to alter the interpretation of a constitutional provision. But



## LANDMARK CASES

### Civil Rights

- **Dred Scott case, *Scott v. Sanford* (1857):** Congress had no authority to ban slavery in a territory. A slave was considered a piece of property.
- ***Plessy v. Ferguson* (1896):** Upheld separate-but-equal facilities for white and black people on railroad cars.
- ***Brown v. Board of Education* (1954):** Said separate public schools are inherently unequal, thus starting racial desegregation.
- ***Green v. County School Board of New Kent County* (1968):** Banned a freedom-of-choice plan for integrating schools, suggesting blacks and whites must actually attend racially mixed schools.
- ***Swann v. Charlotte-Mecklenburg Board of Education* (1971):** Approved busing and redrawing district lines as ways of integrating public schools.

to get new civil rights laws out of Congress required a far more difficult and decentralized strategy, one that was aimed at mobilizing public opinion and overcoming the many congressional barriers to action.

The first problem was to get civil rights on the political agenda by convincing people that something had to be done. This could be achieved by dramatizing the problem in ways that tugged at the conscience of whites who were not racist but were ordinarily indifferent to black problems. Brutal lynching of blacks had shocked these whites, but the practice of lynching was on the wane in the 1950s.

Civil rights leaders could, however, arrange for dramatic confrontations between blacks claiming some obvious right and the whites who denied it to them. Beginning in the late 1950s, these confrontations began to occur in the form of sit-ins at segregated lunch counters and “freedom rides” on segregated bus lines. At about the same time, efforts were made to get blacks registered to vote in counties where whites had used intimidation and harassment to prevent it.

The best-known campaign occurred in 1955–1956 in Montgomery, Alabama, where blacks, led by a young minister named Martin Luther King, Jr., boycotted the local bus system after it had a black woman, Rosa Parks, arrested because she refused to surrender her seat on a bus to a white man.



**civil disobedience** Opposing a law one considers unjust by peacefully disobeying it and accepting the resultant punishment.

These early demonstrations were based on the philosophy of **civil disobedience**—that is, peacefully violating a law, such as one requiring blacks to ride

in a segregated section of a bus, and allowing oneself to be arrested as a result.

But the momentum of protest, once unleashed, could not be centrally directed or confined to nonviolent action. A rising tide of anger, especially among younger blacks, resulted in the formation of more militant organizations and the spontaneous eruption of violent demonstrations and riots in dozens of cities across the country. From 1964 to 1968, there were in the North as well as the South several “long, hot summers” of racial violence.

The demonstrations and rioting succeeded in getting civil rights on the national political agenda, but at a cost: many whites, opposed to the demonstrations or appalled by the riots, dug in their heels and fought against making any concessions to “lawbreakers,” “troublemakers,” and “rioters.” In 1964 and again in 1968, more than two-thirds of the whites interviewed in opinion polls said the civil rights movement was pushing too fast, had hurt the black cause, and was too violent.<sup>25</sup>

In short, a conflict existed between the agenda-setting and coalition-building aspects of the civil rights movement. This was especially a problem since conservative Southern legislators still controlled many key congressional committees that had for years been the graveyard of civil rights legislation. The Senate Judiciary Committee was dominated by a coalition of Southern Democrats and conservative Republicans, and the House Rules Committee was under the control of a chairman hostile to civil rights bills, Howard Smith of Virginia. Any bill that passed the House faced an almost certain filibuster in the

Senate. Finally, President John F. Kennedy was reluctant to submit strong civil rights bills to Congress.

Several developments made it possible to break the deadlock. First, public opinion was changing. From the mid-1950s to the mid-1990s, surveys found that the proportion of whites who were willing to have their children attend a school that was half black increased sharply (though the proportion of whites willing to have their children attend a school that was predominantly black increased by much less). About the same change could be found in white attitudes toward allowing blacks equal access to hotels and buses.<sup>26</sup> Of course, support in principle for these civil rights measures was not necessarily the same as support in practice; nonetheless, clearly a major shift was occurring in popular approval of at least the principles of civil rights. At the leading edge of this change were young, college-educated people.<sup>27</sup>

Second, certain violent reactions by white segregationists to black demonstrators were vividly portrayed by the media (especially television) in ways that gave the civil rights cause a powerful moral force. In May 1963, the head of the Birmingham police, Eugene “Bull” Connor, ordered his men to use attack dogs and high-pressure fire hoses to repulse a peaceful march by African Americans demanding desegregated public facilities and increased job opportunities. The pictures of that confrontation (such as the one on page 133) created a national sensation and contributed greatly to the massive participation—by whites and blacks alike—in the “March on Washington” that summer. About a quarter of a million people gathered in front of the Lincoln Memorial to hear the Reverend Dr. Martin Luther King, Jr. deliver the aforementioned “I Have a Dream” speech, which is now widely regarded as one of the most significant public addresses in American history, and which today is read, studied, or memorized in whole or in part by millions of schoolchildren each year. The following summer in Neshoba County, Mississippi,



Bettman/Corbis



AP Images/Bob Jordan

*In 1960, black students from North Carolina Agricultural and Technical College staged the first “sit-in” when they were refused service at a lunch counter in Greensboro (left). Twenty years later, graduates of the college returned to the same lunch counter (right). Though prices had risen, the service had improved.*

three young civil rights workers (two white and one black) were brutally murdered by Klansmen aided by the local sheriff. When the FBI identified the murderers, the effect on national public opinion was galvanic; no white Southern leader could any longer offer persuasive opposition to federal laws protecting voting rights when white law enforcement officers had killed students working to protect those rights. And the next year, a white woman, Viola Liuzzo, was shot and killed while driving a car used to transport civil rights workers. Her death was the subject of a presidential address.

Third, President John F. Kennedy was assassinated in Dallas, Texas, in November 1963. Many people originally (and wrongly) thought he had been killed by a right-wing conspiracy. Even after the assassin had been caught and shown to have left-wing associations, the shock of the president's murder—in a Southern city—helped build support for efforts by the new president, Lyndon B. Johnson (a Texan), to obtain passage of a strong civil rights bill as a memorial to the slain president.

Fourth, the 1964 elections not only returned Johnson to office with a landslide victory but also sent a huge Democratic majority to the House and retained the large Democratic margin in the Senate. This made it possible for Northern Democrats to outvote or outmaneuver Southerners in the House.

The cumulative effect of these forces, as well as other significant events, led to the enactment of five civil rights laws between 1957 and 1968. Three (1957, 1960, and 1965) were chiefly directed at protecting the right to vote; one (1968) was aimed at preventing discrimination in housing; and one (1964), the most far-reaching of all, dealt with voting, employment, schooling, and public accommodations.

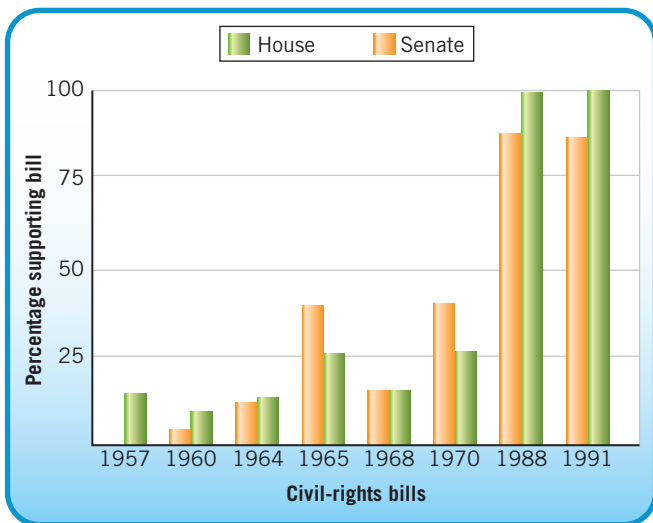
The passage of the 1964 act was the high point of the legislative struggle. Liberals in the House had drafted a bipartisan bill, but it was now in the House Rules Committee, where such proposals had often disappeared without a trace. In the wake of Kennedy's murder, a discharge petition was filed—with President Johnson's support—to take the bill out of committee and bring it to the floor of the House. But the Rules Committee, without waiting for a vote on the petition (which it probably realized it would lose), sent the bill to the floor, where it passed overwhelmingly. In the Senate, an agreement between Republican minority leader Everett Dirksen and President Johnson smoothed the way for passage in several important respects. The House bill was sent directly to the Senate floor, thereby bypassing the Southern-dominated Judiciary Committee. Nineteen Southern senators began an eight-week filibuster against the bill. On June 10, 1964, by a vote of 71 to 29, cloture was invoked and the filibuster ended—the first time in history that a filibuster aimed at blocking civil rights legislation had been broken.



AP Images/Bill Hudson

*This picture of a police dog lunging at a black man during a racial demonstration in Birmingham, Alabama, in May 1963 was one of the most influential photographs ever published. It was widely reprinted throughout the world and was frequently referred to in congressional debates on the civil rights bill of 1964.*

Since the 1960s, congressional support for civil rights legislation has grown. Indeed, while once calling a bill a civil rights measure would have been the kiss of death, today that is no longer the case. For example, in 1984 the Supreme Court decided the federal ban on discrimination in education applied only to the “program or activity” receiving federal aid and not to the entire school or university.<sup>28</sup> In 1988, Congress passed a bill to overturn this decision by making it clear that antidiscrimination rules applied to the entire educational institution and not just to that part (say, the physics lab) receiving federal money. When President Reagan vetoed the bill (because, in his view, it would diminish the freedom of church-affiliated schools), Congress overrode the veto. In the override vote, every Southern Democrat in the Senate and almost 90 percent of those in the House voted for the bill. This was a dramatic change from 1964, when more than 80 percent of the Southern Democrats in Congress voted against the civil rights Act (see Figure 6.1). This change partly reflected the growing political strength of Southern blacks. In 1960, less than one-third of voting-age blacks in the South were registered to vote; by 1971 more than half were, and by 1984 two-thirds were.

**FIGURE 6.1** Increase in Support among Southern Democrats in Congress for Civil Rights Bills, 1957–1991

**Source:** Congressional Quarterly, *Congress and the Nation*, vols. 1, 2, 3, 7, 8.

In 2008, Barack Obama was elected president and became the first African American to hold the nation's highest elected office. That monumental historic moment, which included Obama winning two Southern states, was preceded by four decades of growth in the number of black elected officials at all levels of government. Between 1970 and 2010, the total number of black elected officials rose from fewer than 1,500 to more than 10,000 (see Table 6.1) In the presidential elections of 2008 and 2012, voter turnout rates among African Americans equaled or exceeded that of whites. Such parity in voter turnout rates and the aforementioned increase in the number of black elected officials could not have happened without civil rights laws like the Voting Rights Act (VRA) of 1965. In 2006, following more than 20 public hearings, and with support from then President George W. Bush, Congress reauthorized the VRA's key



Reverend Dr. Martin Luther King, Jr. delivers his “I Have a Dream” speech on the Washington, D.C., mall in 1963.

**TABLE 6.1** Increase in Number of Black Elected Officials

	1970	2010
Federal Office	10	43
State Office	169	642
Local Office	1,290	9,800

**Source:** “A Time to Reflect: Charting the Quality of Life for Black Americans: Politics,” *USA Today*, February 21, 2011.

provisions for another quarter-century, including the section (Section 4) designating the “preclearance” formula used to determine which state or local jurisdictions must have any major changes to their voting laws or procedures approved in advance by the U.S. Department of Justice or by a federal court. Along with the need to remain vigilant in checking any recurrence of old methods of discrimination, the bill’s bipartisan backers also cited concerns about “racial gerrymandering,” the proliferation of “voter identification” laws, and other measures that could adversely and disproportionately affect minority participation in the electoral process.

But, in 2013, in the case of *Shelby County v. Holder*, the Supreme Court struck down the VRA’s preclearance formula as unconstitutional. Writing for the Court’s five-to-four majority, Chief Justice John Roberts declared that “things have changed dramatically” in the South since 1965; he also issued a statement from the bench indicating that Congress “may draft another formula based on current conditions.” Writing for the four dissenting justices, Justice Ruth Bader Ginsburg declared that the majority had “failed to grasp why the VRA has proven effective”; she also issued a statement from the bench stressing that in 2006 Congress “found that 40 years has not been sufficient time to eliminate the vestiges of discrimination following 100 years of disregard for the Fifteenth Amendment.” President Obama issued a statement in which he observed that the decision “upsets decades of well-established practices that help to make sure voting is fair, especially in places where voting discrimination has been historically prevalent”; he also called on Congress to pass new voting rights legislation.

## 6-2 Women and Equal Rights

The political and legal efforts to secure civil rights for African Americans were accompanied by efforts to expand the rights of women. There was an important difference between the two movements, however: whereas African Americans were arguing against a legal tradition that explicitly aimed to keep them in a subservient status, women had to argue against a tradition that claimed to be protecting them. For example, in 1908 the Supreme



Court upheld an Oregon law that limited female laundry workers to a 10-hour workday against the claim that it violated the Fourteenth Amendment. The Court justified its decision with this language:

*The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing ... the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.<sup>29</sup>*

The origin of the movement to give more rights to women was probably the Seneca Falls Convention held in 1848. Its leaders began to demand the right to vote for women. Though this was slowly granted by several states, especially in the West, it was not until 1920 that the Nineteenth Amendment made it clear that no state may deny the right to vote on the basis of sex. The great change in the status of women, however, took place during World War II when the demand for workers in our defense plants led to the employment of millions of women, such as “Rosie the Riveter,” in jobs they had rarely held before. After the war, the feminist movement took flight with the publication in 1963 of *The Feminine Mystique* by Betty Friedan.

Congress responded by passing laws that required equal pay for equal work, prohibited discrimination on the basis of sex in employment and among students in any school or university receiving federal funds, and banned discrimination against pregnant women on the job.<sup>30</sup>

At the same time, the Supreme Court was altering the way it interpreted the Constitution. The key passage was the Fourteenth Amendment, which prohibits any state from denying to “any person” the “equal protection of the laws.” For a long time the traditional standard, as we saw in the 1908 case, was a kind of protective paternalism. By the early 1970s, however, the Court had changed its mind. In deciding whether the Constitution bars all, some, or no sexual discrimination, the Court had a choice among three standards.

The first standard is the *reasonableness* standard. This says that when the government treats some classes of people differently from others—for example, applying statutory rape laws to men but not to women—the different treatment must be reasonable and not arbitrary.

The second standard is *intermediate scrutiny*. When women complained that some laws treated them unfairly, the Court adopted a standard somewhere between the reasonableness and strict scrutiny tests. Thus, a law that treats men and women differently must be more than merely reasonable, but the allowable differences need not meet the strict scrutiny test.

And so, in 1971, the Court held that an Idaho statute was unconstitutional because it required that males be preferred over females when choosing people to administer the



## HOW THINGS WORK

### How the Court Decides If You Discriminate

The Supreme Court has produced three different tests to decide if a government policy produces unconstitutional discrimination. Don't be surprised if you find it a bit hard to tell them apart.

1. **Rational basis** If the policy uses reasonable means to achieve a legitimate government goal, it is constitutional.  
**Examples:** If the government says you can't buy a drink until you are age 21, this meets the rational basis test: the government wants to prevent children from drinking, and age 21 is a reasonable means to define when a person is an adult. And a state can ban advertising on trucks unless the ad is about the truck owner's own business.
2. **Intermediate scrutiny** If the policy “serves an important government interest” and is “substantially related” to serving that interest, it is constitutional.

**Examples:** Men can be punished for statutory rape even if women are not punished because men and women are not “similarly situated.” And men can be barred from entering hospital delivery rooms even though (obviously) women are admitted.

3. **Strict scrutiny** To be constitutional, the discrimination must serve a “compelling government interest,” it must be “narrowly tailored” to attain that interest, and it must use the “least restrictive means” to attain it.

**Examples:** Distinctions based on race, ethnicity, religion, or voting must pass the strict scrutiny test. You cannot bar black children from a public school or black adults from voting, and you cannot prevent one religious group from knocking on your door to promote its views.

estates of deceased children. To satisfy the Constitution, a law treating men and women differently “must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of legislation so that all persons similarly circumstanced shall be treated alike.”<sup>31</sup> In later decisions, some members of the Court wanted to make classifications based on sex inherently suspect and subject to the strict scrutiny test, but no majority has yet embraced this position.<sup>32</sup>

The third standard is *strict scrutiny*. This says that some instances of drawing distinctions between different groups of people—for example, by treating whites and blacks differently—are inherently suspect; thus, the Court will subject them to strict scrutiny to ensure they are clearly necessary to attain a legitimate state goal.

But sexual classifications can also be judged by a different standard. The civil rights Act of 1964 prohibits sex discrimination in the hiring, firing, and compensation of employees. The 1972 civil rights Act bans sex discrimination in local education programs receiving federal aid. These laws apply to *private*, and not just government, actions. The Lilly Ledbetter Fair Pay Act of 2009 extends the time period for workers to file a lawsuit against their employer alleging pay discrimination.<sup>33</sup>

## Women’s Rights and the Supreme Court

Over the years, the Court has decided many cases involving sexual classification. The following lists provide several examples of illegal sexual discrimination (violating either the Constitution or a civil rights act) and legal sexual distinctions (violating neither).

### Illegal Discrimination

- A state cannot set different ages at which men and women legally become adults.<sup>34</sup>
- A state cannot set different ages at which men and women are allowed to buy beer.<sup>35</sup>
- Women cannot be barred from jobs by arbitrary height and weight requirements.<sup>36</sup>
- Employers cannot require women to take mandatory pregnancy leaves.<sup>37</sup>
- Girls cannot be barred from Little League baseball teams.<sup>38</sup>
- Business and service clubs, such as the Junior Chamber of Commerce and Rotary Club, cannot exclude women from membership.<sup>39</sup>
- Though women as a group live longer than men, an employer must pay them monthly retirement benefits equal to those received by men.<sup>40</sup>
- High schools must pay the coaches of girls’ sports the same as they pay the coaches of boys’ sports.<sup>41</sup>

## Decisions Allowing Differences Based on Sex

- A law that punishes males but not females for statutory rape is permissible; men and women are not “similarly situated” with respect to sexual relations.<sup>42</sup>
- All-boy and all-girl public schools are permitted if enrollment is voluntary and quality is equal.<sup>43</sup>
- States can give widows a property-tax exemption not given to widowers.<sup>44</sup>
- The navy may allow women to remain officers longer than men without being promoted.<sup>45</sup>

The lower federal courts have been especially busy in the area of sexual distinctions. They have said that public taverns may not cater to men only and that girls may not be prevented from competing against boys in noncontact high school sports; on the other hand, hospitals may bar fathers from the delivery room. Women may continue to use their maiden names after marriage.<sup>46</sup>

In 1996, the Supreme Court ruled that women must be admitted to the Virginia Military Institute, until then an all-male state-supported college that had for many decades supplied what it called an “adversative method” of training to instill physical and mental discipline in cadets. In practical terms, this meant the school was very tough on students. The Court said that for a state to justify spending tax money on a single-sex school, it must supply an “exceedingly persuasive justification” for excluding the other gender. Virginia countered by offering to support an all-female training course at another college, but this was not enough.<sup>47</sup> This decision came close to imposing the strict scrutiny test, and so it has raised important questions about what could happen to all-female or traditionally black colleges that accept state money.



## LANDMARK CASES

### Women’s Rights

- **Reed v. Reed (1971):** Gender discrimination violates the equal protection clause of the Constitution.
- **Craig v. Boren (1976):** Gender discrimination can be justified only if it serves “important governmental objectives” and is “substantially related to those objectives.”
- **Rostker v. Goldberg (1981):** Congress can draft men without drafting women.
- **United States v. Virginia (1996):** State may not finance an all-male military school.

Perhaps the most far-reaching cases defining the rights of women have involved the draft and abortion. In 1981, the Court held in *Rostker v. Goldberg* that Congress may require men but not women to register for the draft without violating the due process clause of the Fifth Amendment.<sup>48</sup> In the area of national defense, the Court will give great deference to congressional policy. For many years, women could be pilots and sailors but not on combat aircraft or combat ships. The issue played a role in preventing the ratification of the Equal Rights Amendment to the Constitution because of fears that it would reverse *Rostker v. Goldberg*. But in 1993, the secretary of defense opened air and sea combat positions to all persons regardless of gender; only ground-troop combat positions were still reserved for men. Two decades later the ban on women serving in combat was lifted as well, and in the summer of 2015, for the first time, two women graduated from Ranger School, the Army's elite combat training and leadership course.

## Sexual Harassment

When Paula Corbin Jones accused President Bill Clinton of sexual harassment, the judge threw the case out of court because she had not submitted enough evidence such that, if the jury believed her story, she would have made a legally adequate argument that she had been sexually harassed.

What, then, is sexual harassment? Drawing on rulings by the Equal Employment Opportunities Commission, the Supreme Court has held that harassment can take one of two forms. First, it is illegal for someone to request sexual favors as a condition of employment or promotion. This is the “quid pro quo” rule. If a person does this, the employer is “strictly liable.” Strict liability means the employer can be found at fault even if he or she did not know a subordinate was requesting sex in exchange for hiring or promotion.

Second, it is illegal for an employee to experience a work environment that has been made hostile or intimidating by a steady pattern of offensive sexual teasing, jokes, or obscenity. But employers are not strictly liable in this case; they can be found at fault only if they were “negligent”—that is, they knew about the hostile environment but did nothing about it.

In 1998, the Supreme Court decided three cases that made these rules either better or worse, depending on your point of view. In one, it determined that a school system was not liable for the conduct of a teacher who seduced a female student because the student never reported the actions. In a second, it held that a city was liable for a sexually hostile work environment confronting a female lifeguard even though she did not report this to her superiors. In the third, it decided that a female employee who was not promoted after having rejected the sexual advances of her boss could recover financial damages from the firm. But, it added, the firm could have avoided paying this bill if it had put in place an “affirmative defense”

against sexual exploitation, although the Court never said what such a policy might be.<sup>49</sup>

Sexual harassment is a serious matter, but because there are few federal laws governing it, we are left with somewhat vague and often inconsistent court and bureaucratic rules to guide us.

**police powers** State power to effect laws promoting health, safety, and morals.

## Privacy and Sex

Regulating sexual matters has traditionally been left up to the states, which do so by exercising their **police powers**. These powers include more than the authority to create police departments; they include all laws designed to promote public order and secure the safety and morals of the citizens. Some have argued that the Tenth Amendment to the Constitution, by reserving to the states all powers not delegated to the federal government, meant that states could do anything not explicitly prohibited by the Constitution. But that changed when the Supreme Court began expanding the power of Congress over business and when it started to view sexual matters under the newly discovered right to privacy.

Until that point, it had been left up to the states to decide whether and under what circumstances a woman could obtain an abortion. For example, New York allowed abortions during the first 24 weeks of pregnancy, while Texas banned it except when the mother's life was threatened. That began to change in 1965 when the Supreme Court held that the states could not prevent the sale of contraceptives because by so doing it would invade a “zone of privacy.” Privacy is nowhere mentioned in the Constitution, but the Court argued that it could be inferred from “penumbras” (literally, shadows) cast off by various provisions of the Bill of Rights.<sup>50</sup>

Eight years later the Court, in its famous *Roe v. Wade* decision, held that a “right to privacy” is “broad enough to encompass a woman's decision whether or not to terminate a pregnancy.”<sup>51</sup> The case, which began in Texas, produced this view: During the first three months (or trimester) of pregnancy, a woman has an unfettered right to an abortion. During the second trimester, states may regulate abortions but only to protect the mother's health. In the third trimester, states might ban abortions.

In reaching this decision, the Court denied that it was trying to decide when human life began—at the moment of conception, at the moment of birth, or somewhere in between. But that is not how critics of the decision saw things. To them, life begins at conception, and so the human fetus is a “person” entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment. People having this view began to use the slogans “right to life” and “pro-life.” Supporters of the Court's action





## LANDMARK CASES

### Privacy and Abortion

- ***Griswold v. Connecticut (1965)***: Found a “right to privacy” in the Constitution that would ban any state law against selling contraceptives.
- ***Roe v. Wade (1973)***: State laws prohibiting abortion were unconstitutional.
- ***Webster v. Reproductive Health Services (1989)***: Allowed states to ban abortions from public hospitals and permitted doctors to test to see if fetuses were viable.
- ***Planned Parenthood v. Casey (1992)***: Reaffirmed *Roe v. Wade* but upheld certain limits on its use.
- ***Gonzales v. Carhart (2007)***: Federal law may ban certain forms of partial-birth abortion.

**equality of results** Making certain that people achieve the same result.

**equality of opportunity** Giving people an equal chance to succeed.

saw matters differently. In their view, no one can say for certain when human life begins; what one *can* say, however, is that a woman is entitled to choose whether or not to have a baby.

These people took the slogans “right to choose” and “pro-choice.”

Almost immediately, the congressional allies of pro-life groups introduced constitutional amendments to overturn *Roe v. Wade*, but none passed Congress. Nevertheless, abortion foes did persuade Congress, beginning in 1976, to bar the use of federal funds to pay for abortions except when the life of the mother is at stake. This provision is known as the Hyde Amendment, after its sponsor, Representative Henry Hyde. The chief effect of the amendment has been to deny the use of Medicaid funds to pay for abortions for low-income women.

Despite pro-life opposition, the Supreme Court for 16 years steadfastly reaffirmed and even broadened its decision in *Roe v. Wade*. It struck down laws requiring, before an abortion could be performed, a woman to have the consent of her husband, an “emancipated” but underage girl to have the consent of her parents, or a woman to be advised by her doctor as to the facts about abortion.<sup>52</sup>

But in 1989, under the influence of justices appointed by President Reagan, the Court began in the *Webster* case to uphold some state restrictions on abortions. When that happened, many people predicted that in time *Roe v. Wade* would be overturned, especially if President

George H. W. Bush was able to appoint more justices. He appointed two (Souter and Thomas), but *Roe* survived. The key votes were cast by Justices O’Connor, Souter, and Kennedy. In 1992, in its *Casey* decision, the Court by a vote of five-to-four explicitly refused to overturn *Roe*, declaring that there was a right to abortion. At the same time, however, it upheld a variety of restrictions imposed by the state of Pennsylvania on women seeking abortions. These included a mandatory 24-hour waiting period between the request for an abortion and the performance of it, the requirement that teenagers obtain the consent of one parent (or, in special circumstances, of a judge), and a requirement that women contemplating an abortion be given pamphlets about alternatives to it. Similar restrictions had been enacted in many other states, all of which looked to the Pennsylvania case for guidance as to whether they could be enforced. In allowing these restrictions, the Court overruled some of its own earlier decisions.<sup>53</sup> On the other hand, the Court did strike down a state law that would have required married women to obtain the consent of their husbands before having an abortion.

After a long political and legal struggle, the Court in 2007 upheld a federal law that bans certain kinds of partial-birth abortions. The law does not allow an abortion in which the fetus, still alive, is withdrawn until its head is outside the mother and then it is killed. But the law does not ban a late-term abortion if it is necessary to protect the physical health of the mother or if it is performed on an already dead fetus, even if the doctor has already killed it.<sup>54</sup>

The debate over abortion continues today, especially at the state level, as we mentioned in Chapter 3. Between 2011 and 2013, there were 205 new abortion laws passed, many of them seeking to restrict access to abortion (in contrast, between 2001 and 2010, only 189 new laws were passed).<sup>55</sup> Many of these laws put restrictions on the facilities where abortions can be performed, though others restrict how and when doctors and other health care providers can perform abortions. Such laws have been challenged in the courts, but whether they ultimately survive remains to be seen.

There is one irony in all of this: “Roe,” the pseudonym for the woman who started the suit that became *Roe v. Wade*, never had an abortion and many years later, using her real name, Norma McCorvey, became an evangelical Christian who published a book and started a ministry to denounce abortions.

## 6-3 Affirmative Action

A common thread running through the politics of civil rights is the argument between **equality of results** and **equality of opportunity**. These concepts are central to the debate over affirmative action as a means of attaining equal rights for Americans regardless of race or gender.

## Equality of Results

One view, expressed by some civil rights and feminist organizations, is that the burdens of racism and sexism can be overcome only by taking race or sex into account in designing remedies. It is not enough that people be given rights; they also must be given benefits. If life is a race, everybody must be brought up to the same starting line (or possibly even to the same finish line). This means that the Constitution is not and should not be color-blind or sex-neutral. In education, this implies that the races must actually be mixed in the schools, by busing if necessary. In hiring, it means that affirmative action must be used in the hiring process. **Affirmative action** refers to laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership. It means that it is not enough that women should simply be free to enter the labor force; they should be given the material necessities (e.g., free daycare) that will help them enter it. On payday, workers' checks should reflect not just the results of competition in the marketplace, but the results of plans designed to ensure that people earn comparable amounts for comparable jobs. Of late, affirmative action has been defended in the name of diversity or multiculturalism—the

view that every institution (firm, school, or agency) and every college curriculum should reflect the cultural (i.e., ethnic) diversity of the nation.

## Equality of Opportunity

The second view holds that if it is wrong to discriminate *against* African Americans and women, it is equally wrong to give them preferential

treatment over other groups. To do so constitutes **reverse discrimination**. The Constitution and laws should be color-blind and sex-neutral.<sup>56</sup> In this view, allowing children to attend the school of their choice is sufficient; busing them to attain a certain racial mixture is wrong. Eliminating barriers to job opportunities is right; using numerical “targets” and “goals” to place minorities and women in specific jobs is wrong. If people wish to compete in the market, they should be satisfied with the market verdict concerning the worth of their work.

### **Affirmative action**

Laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.

### **reverse discrimination**

Using race or sex to give preferential treatment to some people.



## HOW THINGS WORK

### Becoming a Citizen

For persons born in the United States, the rights of U.S. citizenship have been ensured, in constitutional theory if not in everyday practice, since the passage of the Fourteenth Amendment in 1868 and the civil rights laws of the 1960s. The Fourteenth Amendment conferred citizenship upon “all persons born in the United States . . . and subject to the jurisdiction thereof.” Subsequent laws also gave citizenship to children born outside the United States to parents who are American citizens.

But immigrants, by definition, are not born with the rights of U.S. citizenship. Instead, those seeking to become U.S. citizens must, in effect, assume certain responsibilities in order to become citizens. The statutory requirements for naturalization, as they have been broadly construed by the courts, are as follows:

- Five years' residency, or three years if married to a citizen.
- Continuous residency since filing of the naturalization petition.

- Good moral character, which is loosely interpreted to mean no evidence of criminal activity.
- Attachment to constitutional principles. This means that potential citizens have to answer basic factual questions about American government (e.g., “Who was the first president of the United States?”) and publicly denounce any and all allegiance to their native country and its leaders (e.g., Italy and the king of Italy), but devotion to constitutional principles is now regarded as implicit in the act of applying for naturalization.
- Being favorably disposed to “the good order and happiness of the United States.”\*

Today, about 97 percent of aliens who seek citizenship are successful in meeting these requirements and becoming naturalized citizens of the United States.

\*8 U.S.C. 1423, 1427 (1970); *Girouard v. United States* 328 U.S. 61 (1946).

Each of these views is intertwined with other deep philosophical differences. Supporters of equality of opportunity tend to have orthodox beliefs; they favor letting private groups behave the way that they want (and so may defend the right of a men's club to exclude women). Supporters of the opposite view are likely to be progressive in their beliefs and insist that private clubs meet the same standards as schools or business firms. Adherents to the equality-of-opportunity view often attach great importance to traditional models of the family and so are skeptical of subsidized daycare and federally funded abortions. Adherents to the equality-of-results view prefer greater freedom of choice in lifestyle questions and so take the opposite position on daycare and abortion.

Of course, the debate is more complex than this simple contrast suggests. Take, for example, the question of affirmative action. Both the advocates of equality of opportunity and those of equality of results might agree that there is something odd about a factory or university that hires no African Americans or women, and both might press it to prove that its hiring policy is fair. Affirmative action in this case can mean *either* looking hard for qualified women and minorities and giving them a fair shot at jobs *or* setting a numerical goal for the number of women and minorities that should be hired and insisting that that goal be met. Persons who defend the second course of action call these goals “targets”; persons who criticize that course call them “quotas.”



## HOW THINGS WORK

### The Rights of Aliens

America is a nation of immigrants. Some have arrived legally, others illegally. A person residing in this country who is not a citizen is referred to as an *alien*. An illegal, or undocumented, alien is subject to deportation. With the passage in 1986 of the Immigration Reform and Control Act, illegal aliens who have resided in this country continuously since before January 1, 1982, are entitled to amnesty—that is, they can become legal residents. However, the same legislation stipulated that employers (who once could hire undocumented aliens without fear of penalty) must now verify the legal status of all newly hired employees; if they knowingly hire an illegal alien, they face civil and criminal penalties.

Aliens cannot vote or run for office. Nevertheless, they must pay taxes just as if they were citizens. And they are entitled to many constitutional rights, even if they are in this country illegally. This is because most of the rights mentioned in the Constitution refer to “people” or “persons,” not to “citizens.” For example, the Fourteenth Amendment bars a state from depriving “*any person* of life, liberty, or property, without due process of law” and from denying “to *any person* within its jurisdiction the equal protection of the laws” [emphasis added]. As a result, the courts have held that:

- The children of illegal aliens cannot be excluded from the public school system.<sup>1</sup>
- Legally admitted aliens are entitled to welfare benefits.<sup>2</sup>
- Illegal aliens cannot be the object of reprisals if they attempt to form a labor union where they work.<sup>3</sup>
- The First Amendment rights of free speech, religion, press, and assembly and the Fourth Amendment

protections against arbitrary arrest and prosecution extend to aliens as well as to citizens.<sup>4</sup>

- Aliens are entitled to own property.

The government can make rules that apply to aliens only, but they must justify the reasonableness of the rules. For example:

- The Immigration and Naturalization Service has broader powers to arrest and search illegal aliens than police departments have to arrest and search citizens.<sup>5</sup>
- States can limit certain jobs, such as police officer and schoolteacher, to citizens.<sup>6</sup>
- The president or Congress can bar the employment of aliens by the federal government.<sup>7</sup>
- States can bar aliens from serving on a jury.<sup>8</sup>
- Illegal aliens are not entitled to obtain a Social Security card.

<sup>1</sup>*Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>2</sup>*Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>3</sup>*Sure-Tan v. National Labor Relations Board*, 467 U.S. 883 (1984).

<sup>4</sup>*Chew v. Colding*, 344 U.S. 590 (1953).

<sup>5</sup>*United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *INS v. Delgado*, 466 U.S. 210 (1984); *INS v. Lopez-Mendoza*, 486 U.S. 1032 (1984).

<sup>6</sup>*Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978); *Amblach v. Norwick*, 441 U.S. 68 (1979).

<sup>7</sup>*Hampton v. Mow Sun Wong*, 436 U.S. 67 (1976).

<sup>8</sup>*Schneider v. New Jersey*, 308 U.S. 147 (1939).



The issue has largely been fought in the courts. Between 1978 and 1990, about a dozen major cases involving affirmative-action policies were decided by the Supreme Court; in about half the policies were upheld, and in the other half they were overturned. The different outcomes reflect two things: the differences in the facts of the cases and the arrival on the Court of three justices (Kennedy, O'Connor, and Scalia) appointed by a president, Ronald Reagan, who was opposed to (at least) the broader interpretation of affirmative action. As a result of these decisions, the law governing affirmative action is now complex and confusing.

Consider one issue: Should the government be allowed to use a quota system to select workers, enroll students, award contracts, or grant licenses? In the *Bakke* decision in 1978, the Court said the medical school of the University of California at Davis could not use an explicit

numerical quota in admitting minority students but could “take race into account.”<sup>57</sup> So no numerical quotas, right? Wrong. Two years later, the Court upheld a federal rule that set aside 10 percent of all federal construction contracts for minority-owned firms.<sup>58</sup> All right, maybe quotas can't be used in medical schools, but they can be used in the construction industry. Not exactly. In 1989, the Court overturned a Richmond, Virginia, law that set aside 30 percent of its construction contracts for minority-owned firms.<sup>59</sup> Well, maybe the Court just changed its mind between 1980 and 1989. No. One year later it upheld a federal rule that gave preference to minority-owned firms in the awarding of broadcast licenses.<sup>60</sup> Then in 1993, it upheld the right of white contractors to challenge minority set-aside laws in Jacksonville, Florida.<sup>61</sup>

It is too early to try to make sense of these twists and turns, especially since a deeply divided Court is still



## HOW THINGS WORK

### The Rights of the Disabled

In 1990, the federal government passed the Americans with Disabilities Act (ADA), a sweeping law that extended many of the protections enjoyed by women and racial minorities to disabled persons.

#### Who Is a Disabled Person?

Anyone who *has* a physical or mental impairment that substantially limits one or more major life activities (e.g., holding a job), anyone who has a *record* of such impairment, or anyone who is *regarded* as having such an impairment is considered disabled.

#### What Rights Do Disabled Persons Have?

##### Employment

Disabled persons may not be denied employment or promotion if, with “reasonable accommodation,” they can perform the duties of that job. (Excluded from this protection are people who currently use illegal drugs, gamble compulsively, or are homosexual or bisexual.) Reasonable accommodation need not be made if this would cause “undue hardship” on the employer.

##### Government Programs and Transportation

Disabled persons may not be denied access to government programs or benefits. New buses, taxis, and trains must be accessible to disabled persons, including those in wheelchairs.

##### Public Accommodations

Disabled persons must enjoy “full and equal” access to hotels, restaurants, stores, schools, parks, museums, auditoriums, and the like. To achieve equal access, owners of existing facilities must alter them “to the maximum extent feasible”; builders of new facilities must ensure they are readily accessible to disabled persons, unless this is structurally impossible.

##### Telephones

The ADA directs the Federal Communications Commission to issue regulations to ensure telecommunications devices for hearing- and speech-impaired people are available “to the extent possible and in the most efficient manner.”

##### Congress

The rights under this law apply to employees of Congress.

##### Rights Compared

The ADA does not enforce the rights of disabled persons in the same way as the Civil Rights Act enforces the rights of African Americans and women. Racial or gender discrimination must end *regardless of cost*; denial of access to disabled persons must end unless “undue hardship” or excessive costs would result.

wrestling with these issues and Congress (as with the civil rights Act of 1991) is modifying or superseding some earlier Court decisions. But a few general standards seem to be emerging. In simplified form, they are as follows:

- The courts will subject any quota system created by state or local governments to “strict scrutiny” and will look for a “compelling” justification for it.
- Quotas or preference systems cannot be used by state or local governments without first showing that such rules are needed to correct an actual past or present pattern of discrimination.<sup>62</sup>
- In proving there has been discrimination, it is not enough to show that African Americans (or other minorities) are statistically underrepresented among employees, contractors, or union members; the actual practices that have had this discriminatory impact must be identified.<sup>63</sup>
- Quotas or preference systems created by *federal* law will be given greater deference, in part because Section 5 of the Fourteenth Amendment gives to Congress powers not given to the states to correct the effects of racial discrimination.<sup>64</sup>
- It may be easier to justify in court a voluntary preference system (e.g., one agreed to in a labor-management contract) than one that is required by law.<sup>65</sup>
- Even when you can justify special preferences in *hiring* workers, the Supreme Court is not likely to allow racial preferences to govern who gets *laid off*. A worker laid off to make room for a minority worker loses more than a worker not hired in preference to a minority applicant.<sup>66</sup>

Complex as they are, these rulings still generate a great deal of passion. Supporters of the decisions barring certain affirmative-action plans hail these decisions as steps back from an emerging pattern of reverse discrimination. In contrast, civil rights organizations have denounced those decisions that have overturned affirmative-action programs.

In thinking about these matters, most Americans distinguish between compensatory action and preferential treatment. They define *compensatory action* as “helping disadvantaged people catch up, usually by giving them extra education, training, or services.” A majority of the public supports this. They define preferential treatment as “giving minorities preference in hiring, promotions, college admissions, and contracts.” Large majorities oppose this.<sup>67</sup> These views reflect an enduring element in American political culture—a strong commitment to individualism (“nobody should get something without deserving it”) coupled with support for help for the disadvantaged (“somebody who is

suffering through no fault of his or her own deserves a helping hand”).

Where does affirmative action fit into this culture? Polls suggest that if affirmative action is defined as “helping,” people will support it, but if it is defined as “using quotas,” they will oppose it. On this matter, blacks and whites sometimes see things differently. Blacks think they should receive preferences in employment to create a more diverse workforce and to make up for past discrimination; whites oppose using goals to create diversity or to remedy past ills. In sum, the controversy over affirmative action depends in part on what you mean by it and on your racial identity.<sup>68</sup>

A small construction company named Adarand tried to get a contract to build guardrails along a highway in Colorado. Though it was the low bidder, it lost the contract because of a government policy that favors small businesses owned by “socially and economically disadvantaged individuals”—that is, by racial and ethnic minorities. In a five-to-four decision, the Court agreed with Adarand and sent the case back to Colorado for a new trial.

The essence of the Court’s decision was that *any* discrimination based on race must be subject to strict scrutiny, even if its purpose is to help, not hurt, a racial minority. Strict scrutiny means two things:

- Any racial preference must serve a “compelling government interest.”
- The preference must be “narrowly tailored” to serve that interest.<sup>69</sup>

To serve a compelling governmental interest, it is likely that any racial preference will have to remedy a clear pattern of past discrimination. No such pattern had been shown in Colorado.

This decision prompted a good deal of political debate about affirmative action. In California, an initiative was put on the 1996 ballot to prevent state authorities from using “race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group” in public employment, public education, or public contracting. When the votes were counted, it passed. Michigan, Nebraska, and Washington have adopted similar measures, and other states may do so.

But the *Adarand* case and the passage of the California initiative did not mean affirmative action was dead. Though the federal Court of Appeals for the Fifth Circuit had rejected the affirmative-action program of the University of Texas Law School,<sup>70</sup> the Supreme Court did not take up that case. It waited for several more years to rule on a similar matter arising from the University of Michigan. In 2003, the Supreme Court overturned the admissions policy of the University of Michigan that had given to every African American, Hispanic, and Native



## LANDMARK CASES

### Affirmative Action

- ***Regents of the University of California v. Bakke (1978)***: In a confused set of rival opinions, the decisive vote was cast by Justice Powell, who said that a quota-like ban on Bakke's admission was unconstitutional but that "diversity" was a legitimate goal that could be pursued by taking race into account.
- ***United Steelworkers v. Weber (1979)***: Despite the ban on racial classifications in the 1964 Civil Rights Act, this case upheld the use of race in an employment agreement between the steelworkers union and steel plant.
- ***Richmond v. Croson (1989)***: Affirmative-action plans must be judged by the strict scrutiny standard that requires any race-conscious plan to be narrowly tailored to serve a compelling interest.
- ***Grutter v. Bollinger and Gratz v. Bollinger (2003)***: Numerical benefits cannot be used to admit minorities into college, but race can be a "plus factor" in making those decisions.
- ***Parents v. Seattle School District (2007)***: Race cannot be used to decide which students may attend especially popular high schools because this was not "narrowly tailored" to achieve a "compelling" goal.
- ***Schuetz v. Coalition to Defend Affirmative Action (2014)***: Public institutions of higher education may not give preference in admission based on race, sex, color, ethnicity, or national origin.

American applicant a bonus of 20 points out of the 100 needed to guarantee admission to the University's undergraduate program.<sup>71</sup> This policy was not "narrowly tailored." In rejecting the bonus system, the Court reaffirmed its decision in the *Bakke* case made in 1978 in which it had rejected a university using a "fixed quota" or an exact numerical advantage to the exclusion of "individual" considerations.

But that same day, the Court upheld the policy of the University of Michigan Law School that used race as a "plus factor" but not as a numerical quota.<sup>72</sup> It did so even though using race as a plus factor increased by threefold the proportion of minority applicants who were admitted. In short, admitting more minorities serves a "compelling state interest," and doing so by using race as a plus factor is "narrowly tailored" to achieve that goal. But, in 2006, Michigan voters approved a ballot measure banning the use of race as a consideration in

academic admissions, public employment, and government contracting. In 2012, a U.S. Circuit Court struck down the ban, but only in relation to academic admissions; two years later, the U.S. Supreme Court upheld the ban for academic admissions.<sup>73</sup> In *Fisher v. University of Texas* (2013), the Court, in a seven-to-one decision, sent another affirmative-action case involving college admissions back to the Fifth Circuit Court of Appeals for reconsideration. Invoking the *Bakke* (1978) and *Grutter* (2003) decisions (see Landmark Cases box above), the majority declared that the lower court had failed to apply the strict scrutiny test.

## 6-4 Gay Rights

At first, the Supreme Court was willing to let states decide how many rights gay individuals should have. Georgia, for example, passed a law banning sodomy (i.e., any sexual contact involving the sex organs of one person and the mouth or anus of another). In *Bowers v. Hardwick* (1986), the Supreme Court decided, by a five-to-four majority, that there was no reason in the Constitution to prevent a state from having such a law. There was a right to privacy, but it was designed simply to protect "family, marriage, or procreation."<sup>74</sup>

But 10 years later, the Court seemed to take a different position. The voters in Colorado had adopted a state constitutional amendment that made it illegal to pass any law to protect persons based on their "homosexual, lesbian, or bisexual orientation." The law did not penalize gays and lesbians; instead, it said they could not become the object of specific legal protection of the sort that had traditionally been given to racial or ethnic minorities. (Ordinances to give specific protection to homosexuals had been adopted in some Colorado cities.) The Supreme Court struck down the Colorado constitutional amendment because it violated the equal protection clause of the federal Constitution.<sup>75</sup>

Now we faced a puzzle: a state can pass a law banning homosexual sex, as Georgia did, but a state cannot adopt a rule preventing cities from protecting homosexuals, as Colorado did. The matter was finally put to rest in 2003. In *Lawrence v. Texas*, the Court, again by a five-to-four vote, overturned a Texas law that banned sexual contact between persons of the same sex. The Court repeated the language it had used earlier in cases involving contraception and abortion. If "the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion" into sexual matters. The right of privacy means the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." It specifically overruled *Bowers v. Hardwick*.<sup>76</sup>

In 2003, the same year as the *Lawrence* decision, the Massachusetts Supreme Judicial Court decided,





## LANDMARK CASES

### Gay Rights

- **Boy Scouts of America v. Dale (2000):** A private organization may ban gays from its membership.
- **Lawrence v. Texas (2003):** State law may not ban sexual relations between same-sex partners.
- **United States v. Windsor (2013):** Gay couples married in states where same-sex marriage is legal must receive the same federal health, tax, and other benefits that heterosexual married couples receive.
- **Obergefell v. Hodges (2015):** Same-sex couples have a constitutional right to marry.

by a four-to-three vote, that gays and lesbians must be allowed to be married in the state.<sup>77</sup> In response, the Massachusetts legislature passed a bill that would amend that state's constitution to ban gay marriage. But that amendment required another ratification vote, which took place in 2007, and the amendment was defeated. In the mid-2000s, while Massachusetts legalized same-sex marriage and officials in other states considered doing the same, 13 states amended their state constitutions to prohibit or further restrict it. State by state, a complicated set of political and legal actions and counter-actions

had begun. For instance, in California, the mayor of San Francisco began issuing marriage licenses to hundreds of gay couples. In 2004, the California Supreme Court overturned the mayor's decisions. The next year, the state legislature voted to make same-sex marriages legal, but Governor Arnold Schwarzenegger vetoed the bill. In 2008, the state's voters approved a ballot measure, Proposition 8, banning gay marriage. But, in 2010, a federal district judge overturned that vote. After a federal appeals court put the lower federal court's decision on hold, a case concerning Proposition 8 made its way before the U.S. Supreme Court.

In March 2013, the Court heard oral arguments in each of two same-sex marriage cases. In *Hollingsworth v. Perry*, the central issue was the constitutionality of California's Proposition 8: Does the Proposition 8 ban on same-sex marriage violate the Constitution's "equal protection" or other provisions? In *United States v. Windsor*, the central issue was the constitutionality of the Defense of Marriage Act (DOMA), a 1996 federal law that bars the federal government from recognizing same-sex marriage couples in relation to health, tax, and other benefits that it affords to heterosexual married couples: Does the DOMA violate the Constitution by depriving all persons that are legally married under the laws of their respective states the same recognition, benefits, and rights, and is same-sex marriage a fundamental right that all states must respect?

In June 2013, the Court issued opinions that in each case were widely understood as victories for same-sex marriage proponents, but that also in each case left the



*Proposition 8 opponents celebrate the ruling to overturn the proposition, which denied same-sex couples the right to marry in the state of California.*

central constitutional questions for another day. In the Proposition 8 case, the Court, by a five-to-four majority, held that the private parties that brought the suit did not have standing to defend the law in federal court after California state officials had declined to do so. The practical effect was to let stand the lower federal court's decision striking down Proposition 8 as unconstitutional, and to thereby overturn the ban on same-sex marriage in California without, however, affecting laws in other states that prohibit same-sex marriage. In the more significant DOMA case, the Court, by a five-to-four majority, held that the 1996 law was unconstitutional because it deprived gay couples married in states where same-sex marriage is legal of the same federal health, tax, and other benefits that heterosexual married couples receive. But the Court stopped far short of declaring that same-sex marriage is a fundamental right that all states must respect. Still, in the months following the Court's decisions on Proposition 8 and the DOMA, new legal challenges to laws banning same-sex marriage were launched in a half-dozen states. In 2015, the Court ruled, 5–4, in *Obergefell v. Hodges* that gay marriage is constitutional.

Thus far, the Court has continued to treat sexual orientation cases involving private groups differently from the way that it has treated such cases involving government agencies or benefits. The Court has maintained that private groups are free to exclude homosexuals from their membership. For example, in 2000, by a five-to-four vote, the Court decided that the Boy Scouts of America could exclude gay men and boys because that group had a right to determine its own membership.<sup>78</sup> In May 2013, following more than a decade of controversy over the decision and the policy, the Boy Scouts of America made public a plan that would have the organization admit openly gay boys but continue to exclude openly gay men from leadership and membership in the organization. Two years later, though, the organization announced that it would lift this ban.

Overall, such changes reflect not only an evolving understanding of the Constitution and other laws, but also broad shifts in social norms and mores. A generation ago, the American Psychological Association classified homosexuality as a mental disorder (that practice was ended in 1973), and openly gay individuals were extremely rare in most parts of the country. Today, not only are many leading Americans openly gay, but society has become far more accepting of gays and lesbians in nearly all walks of life. As we discuss in Chapter 7, there has been a sea change in public opinion on gay rights, and now many rights for gays and lesbians—including the right to marry—have majority support in the U.S. public. While the Supreme Court does not always respond to public opinion, it does reflect these sorts of broad social shifts in norms and attitudes.

## 6-5 Looking Back—and Ahead

The civil rights movement in the courts and in Congress profoundly changed the nature of African American participation in politics by bringing Southern blacks into the political system so they could become an effective interest



### HOW WE COMPARE

#### Same-Sex Marriages at Home and Abroad

As of 2015, 20 nations grant legal recognition to same-sex marriages.

##### Country (Year Legalized Gay Marriage)

The Netherlands (2000)

Belgium (2003)

Canada (2005)

Spain (2005)

South Africa (2006)

Norway (2009)

Sweden (2009)

Argentina (2010)

Iceland (2010)

Portugal (2012)

Denmark (2012)

Brazil (2013)

England and Wales (2013)

France (2013)

New Zealand (2013)

Uruguay (2013)

Scotland (2014)

Luxembourg (2014)

Finland (2015)

United States (2015)

As of 2015, in one other nation, same-sex marriage is legal in some, but not all, parts of the country:

Mexico (2009)

**Source:** Pew Forum on Religion and Public Life, *Gay Marriage around the World*, December 19, 2013; updated March 9, 2015; Robert Barnes, “Supreme Court Rules Gay Couples Nationwide Have a Right to Marry,” *Washington Post*, June 26, 2015.



## POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

### Same-Sex Marriage: On the Way to Majoritarianism?

Some ideas about public policy grab media attention, garner political support, and go on to become public laws; other ideas never even make it on to the “public agenda.” Political scientists have many different theories, taxonomies, and models about the policy process. In Chapter 1, we outlined our way of classifying and explaining the politics of different issues: majoritarian politics, client politics, interest group politics, and entrepreneurial politics (see Chapter 1, pages 13–15).

First, take a moment now to reflect on what you have learned so far in the present chapter about the policy dynamics surrounding the civil rights laws that have affected all Americans, most especially African Americans, other minorities, and women. How might you begin to characterize the politics of the changes in law and policy that expanded civil rights for each group?

Next, how might you explain the still-unfolding politics of gay rights, including but not limited to the politics of same-sex marriage laws? This much seems clear: the politics of the issue have changed in recent years. For example, when President Clinton tried lifting the ban on gays in the military in 1993, the political reaction among both the public at large and leaders in both parties caused him in the first instance to back off the plan, and in the next instance to support not only the “Don’t Ask, Don’t Tell” (DADT) policy for the military, but also to support the Defense of Marriage Act (DOMA) of 1996. When he came to office in 2009, President Obama supported both DADT and DOMA. But, by 2013, he had lifted the ban on gays in the military and supported the repeal of the DOMA. In June 2013, the Supreme Court declared that the DOMA was unconstitutional, and in June 2015, it declared that gay marriage was legal (see pages 144–145).

Gallup polls show public support for same-sex marriage has increased from 35 percent in 1999 (62 percent opposed) to 55 percent in 2014 (42 percent opposed). In 2014, 78 percent of all 18- to 29-year-olds supported same-sex marriage, and more than 40 percent of all voting age groups polled in 2014 (18–29, 30–49, 50–64, 65+) said same-sex marriage should be legal. In 2012, Tammy Baldwin (D-WI), a seven-term member of the U.S. House of Representatives, became the first openly gay politician elected to the U.S. Senate.

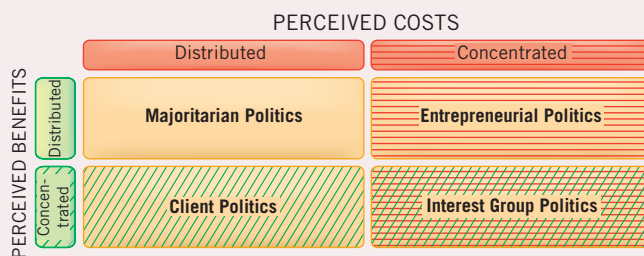
Are the policy dynamics of gay rights in general and same-sex marriage in particular migrating quickly, as it were, to the majoritarian politics box? Politically, are these issues now becoming less like “culture war” issues featuring battles



Chip Somodevilla/Staff/Getty Images

*U.S. Senator Tammy Baldwin from Wisconsin is the first openly gay person to win election to Congress (in both chambers—she was elected to two terms in the U.S. House of Representatives before running successfully for the Senate in 2012).*

between diametrically opposed interest groups and more like majoritarian issues such as Social Security or Medicare? Would you suppose that policy entrepreneurs, some inside government and others outside it, played a major role in repealing the military’s DADT policy? And what, if any, role did the media, the two major parties, the courts, and other institutions play in the Supreme Court’s 2015 ruling that same-sex marriage is constitutional?



**Sources:** Justin McCarthy, “Same-Sex Marriage Support Reaches New High at 55%,” *Gallup Inc.*, May 21, 2014; Berkeley Center for Religion, Peace and World Affairs, Georgetown University, *Diverse, Disillusioned, and Divided: Millennial Values and Voter Engagement in the 2012 Election*, October 4, 2012; Pew Forum on Religion and Public Life, *Changing Attitudes on Gay Marriage*, June 2011; Emanuella Grinberg, “Wisconsin’s Tammy Baldwin Is First Openly Gay Person Elected to Senate,” *CNN.com*, November 7, 2012; Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: Thomas Dunne Books, 2009); Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con* (New York: Vintage, 2004).



group. The decisive move was to enlist Northern opinion in this cause, a job made easier by the Northern perception that civil rights involved simply an unfair contest between two minorities: Southern whites and Southern blacks. That perception changed when it became evident the court rulings and legislative decisions would apply to the North as well as the South, leading to the emergence of Northern opposition to court-ordered busing and affirmative-action programs.

By the time this reaction developed, the legal and political system had been changed sufficiently to make it difficult—if not impossible—to limit the application of civil rights laws to the special circumstances of the South or to alter by legislative means the decisions of federal courts. Though the courts can accomplish little when they have no political allies (as revealed by the massive resistance to early school-desegregation decisions), they can accomplish a great deal, even in the face of adverse public opinion, when they have some organized allies. The feminist movement has paralleled in organization and tactics many aspects of the black civil rights movement, but with important differences. Women sought to repeal or reverse laws and court rulings that in many cases were ostensibly designed to protect rather than subjugate them. The conflict between protection and liberation was

sufficiently intense to defeat the effort to ratify the Equal Rights Amendment.

Among the most divisive civil rights issues in American politics are abortion and affirmative action. From 1973 to 1989, the Supreme Court seemed committed to giving constitutional protection to all abortions within the first trimester; since 1989, it has approved various state restrictions on the circumstances under which abortions can be obtained.

There has been a similar shift in the Court's view of affirmative action. Though it will still approve some quota plans, it now insists they pass strict scrutiny to ensure they are used only to correct a proven history of discrimination, they place the burden of proof on the party alleging discrimination, and they are limited to hiring and not extended to layoffs. Congress has modified some of these rulings with new civil rights legislation.

Finally, while it remains to be seen whether both court doctrines and legislative initiatives on gay rights will follow patterns like those that expanded civil rights protections for African Americans, other minorities, and women, it is clear that the policy dynamics surrounding same-sex marriage are quite different from what they were only a dozen years ago (see *Policy Dynamics: Inside/Outside the Box*, page 146).

## LEARNING OBJECTIVES .....

### **6-1 Explain how the national government has attempted to end racial discrimination in the United States.**

After the Supreme Court ruled that school segregation was unconstitutional, Congress and the executive branch debated over how they would implement the decision. But in time, these institutions began spending federal money and using federal troops and law enforcement officials in ways that greatly increased the rate of integration.

### **6-2 Explain how the national government has attempted to advance women's rights in the United States.**

While court rulings and laws state that treating men and women differently in several areas, such as pay and membership in professional organizations, is discrimination, the Supreme Court

also says a difference in treatment can be justified constitutionally if the difference is fair, reasonable, and not arbitrary. Sex differences need not meet the "strict scrutiny" test. It is permissible to punish men for statutory rape, to create single-sex public schools (so long as they meet certain requirements), and to draft men without drafting women.

### **6-3 Discuss the evolution of affirmative-action programs after the national government ended racial segregation.**

To overcome the effects of past discrimination, many institutions, including businesses, schools, and the federal government, have created programs that specifically aim to increase the number of minorities or women in their organization. In some cases, the Supreme Court has upheld affirmative-action programs, but more recent Court rulings have overturned such programs, or said they may not be necessary in the near future.

#### 6-4 Discuss how Court doctrine and public opinion on gay rights have changed in the 21st century.

As late as 1986, the Supreme Court upheld a state law forbidding certain homosexual acts. But, in 2003, the Court struck down state laws banning consensual sexual relations between same-sex partners. In the 2000s, while some states legalized same-sex marriage and other states outlawed it, public opinion shifted in favor of allowing gays and lesbians to marry, rising from 35 percent, a minority, in favor in 2001 to 47 percent, a plurality, in favor in 2012.

In 2013, the Court struck down as unconstitutional the federal Defense of Marriage Act, declaring that the federal government must provide gay couples married in states where same-sex

marriage is legal with the same health, tax, and other benefits that heterosexual married couples receive.

In 2015, the Supreme Court ruled that same-sex marriage is constitutional.

#### 6-5 Summarize how American political institutions and public opinion have expanded civil rights.

American civil rights have expanded through the joint efforts of political institutions and public opinion. In some areas, public opinion has mobilized the national government to act, while in other areas, court rulings and legislation have spurred public reaction.

## TO LEARN MORE

Court cases: [www.law.cornell.edu](http://www.law.cornell.edu)

Department of Justice: [www.usdoj.gov](http://www.usdoj.gov)

Martin Luther King, Jr., "I Have A Dream" speech, Lincoln Memorial, Washington, D.C., August 28, 1963: <http://www.archives.gov/press/exhibits/dream-speech.pdf>

Civil rights organizations:

National Association for the Advancement of Colored People: [www.naacp.org](http://www.naacp.org)

National Organization for Women: [www.now.org](http://www.now.org)

National Gay and Lesbian Task Force: [www.thetaskforce.org](http://www.thetaskforce.org)

National Council of La Raza: [www.nclr.org](http://www.nclr.org)

National Urban League: <http://nul.iamempowered.com>

American Arab Anti-Discrimination Committee: [www.adc.org](http://www.adc.org)

Anti-Defamation League: [www.adl.org](http://www.adl.org)

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