

Chapter 3



Rosa Parks Statue by AOC/USCapitol, US-PD via Wikimedia

Civil Liberties & Civil Rights

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Chapter Objectives

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

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

Civil rights are assurances that people are not penalized because of criteria (such as race or gender) that society decides should be irrelevant in making public policy. Yet, even after more than 240 years' experience as a nation, we continue to disagree over what liberty and equality mean in practice. Which rights and liberties do you exercise most frequently? Are there any that deserve more protection than they are currently afforded? What happens when civil rights and liberties come into conflict with one another?

The Bill of Rights: Securing the Blessings of Liberty

As explained in Chapter 1, when the Constitution left the hands of the framers in 1787 there appeared to be too few restrictions on what the national government could do, leaving individual liberty without sufficient protection. Several of the state conventions that ratified the proposed Constitution did so with the provision that a “bill of rights” would soon be added. In 1791, the Bill of Rights, comprising the first ten amendments, was ratified (see Table 3–1).

Table 3–1 Content of the Bill of Rights

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

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

3.1a Applying the Bill of Rights to the States

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

The Supreme Court was initially hesitant to use the Fourteenth Amendment as a vehicle through which to make the Bill of Rights applicable to the states. Within a century, however, the Court did just that. Without an additional formal amendment of the Constitution, the Court “incorporated” or absorbed the Bill of Rights into the Fourteenth Amendment in a series of about two dozen cases, beginning in 1897 and largely concluding in 1969. Then, in the first part of the twenty-first century, the Court lurched forward again with the incorporation process. First, in 2010, the Court incorporated the Second Amendment's right to bear arms.² Then, in a pair of 2019 decisions, the Court added two more previously unincorporated rights to the growing list. In the case *Timbs v. Indiana* a unanimous bench declared the Eighth Amendment's Excessive Fines Clause incorporated via the Fourteenth Amendment. In the civil forfeiture case, the state of Indiana had tried to seize a defendant's vehicle that was worth several times more than the maximum fine he could have received.³ Finally, a few months later, the Court declared that the Sixth Amendment's right to a trial by jury included a requirement of unanimous verdicts in state courts.⁴

Today almost all of the provisions in the first eight amendments—whether involving free speech or the rights thought necessary for a fair trial—apply with equal rigor to both state and national officials and the laws they make. Only the Sixth Amendment's stipulation about a trial's location, the Seventh's stipulation for a jury trial in most civil suits, the Eighth's ban on excessive bail, and the Third Amendment still apply only to the national government. Of these, only the Eighth is substantively important (the Ninth and Tenth Amendments, although part of the Bill of Rights, do not lend themselves to absorption into the Fourteenth Amendment).

3.1b The Fragility of Civil Liberties

Charters of liberty, like a bill of rights, are commonplace today in the constitutions of many governments. Yet even a casual observer of world affairs knows that civil liberties are more likely to be preserved (or suspended) in some countries than in others. Even in the United States, the liberties enshrined in the Bill of Rights have meant more in some years than in others because of changing interpretations by the Supreme Court. For example, the Fourth Amendment's ban on “unreasonable searches and seizures” did not apply for a long time to electronic surveillance unless police physically trespassed on a suspect's property. This meant that state and federal agents could eavesdrop electronically in many situations without fear of violating the Constitution. In 1967, however, the Court ruled that the Fourth Amendment covered most electronic searches too, as long as there was a “reasonable expectation of privacy.”⁵ In 2014, the Court specifically extended this privacy right to cover the data stored on cell phones.⁶ In 2018, the Court further noted that the location-tracking information

Fourteenth Amendment

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

that cell phones provide to carriers is private and can only be searched if a warrant is first secured.⁷ The words in the Bill of Rights have not changed, but the meaning attributed to those words has changed in the context of Supreme Court decisions.

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

3.2 Free Expression: Speech, Press, and Assembly

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

3.2a The Value of Free Expression

Free expression serves several important objectives. First, *free expression is necessary to the political process set up by the Constitution*. It is difficult to imagine government being responsive to a majority of the political community if the members of that community are afraid

of saying what they think. It is even more difficult to imagine members of a political minority trying to persuade the majority without the right to criticize political officeholders. For democratic politics to work, free speech must prevail.

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

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



(Adobe Stock)

Since the Bill of Rights was enacted, freedom of speech has been, and still remains, a subject of controversy.

First Amendment

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

government has the authority to define what kind of art is “acceptable,” other kinds will be discouraged or suppressed altogether. Freedom of expression does not guarantee success as a poet, artist, or composer, but it does guarantee each person’s right to try.

Free expression has its risks, however. There are no assurances that open debate and discussion will produce the “correct” answer or the wisest policy. Letting people speak their minds freely will surely stretch out the time it takes for a political community to decide what to do. Free speech can also threaten social and political stability. Although there are risks in silencing dissent, risks exist in permitting it, also. Nations in upheaval rarely tolerate vocal dissent against official policy. On balance, however, the American people—through their public officials and judges—seem willing to accept these risks most of the time.

3.2b The Test of Freedom

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

During World War I, Charles Schenck was found guilty of violating the Espionage Act by printing and circulating materials designed to protest and obstruct the draft. Announcing the **clear and present danger test**, Justice Oliver Wendell Holmes (1902–1932) ruled that the First Amendment provided no shield for Schenck’s words: “The question . . . is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”⁸

Although Schenck lost his case, Holmes’s reasoning remained important. Only when harmful consequences of speech were imminent could government act to suppress it. As Justice Louis Brandeis (1916–1939) later declared, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁹ Since 1969 the clear and present danger test has evolved into the **incitement test**, stressing the Court’s insistence that harmful consequences (such as a riot) be exceedingly imminent.¹⁰ The Court has also made clear that violent threats—even those made on social media—are not protected by the First Amendment.¹¹

Some settings and speech content also allow for limitations on First Amendment speech rights. In a 2007 case, the Supreme Court held that the characteristics of the school environment made it constitutionally permissible for school administrators to demand that students remove a banner reading “BONG HiTS 4 JESUS” from a public forum without infringing on the students’ speech rights.¹² On the other hand, the Court has held that concern about a lack of decency and respect in location choice does not limit free expression protections. In the 2011 case *Snyder v. Phelps*, the Court concluded that the hateful signs that members of the Westboro Baptist Church display at military funerals are protected from liability claims by the First Amendment.¹³ Of course, these guarantees only protect individuals from government constraints, not from private entities. The Court stressed this point in 2019 when it held that a corporation regulating public access television channels is not a government actor and, therefore, not subject to the requirements of the First Amendment.¹⁴

clear and present danger test

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

incitement test

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

3.2c Gags

Of the possible restrictions on speech today, the Court is least likely to approve a **prior restraint**. This is official censorship *before* something is said or published, or censorship that halts publication already under way. Prior restraints are especially dangerous to free expression because government does not have to go to the trouble of launching a prosecution and convicting someone at a trial. Even when the *New York Times* and the *Washington Post* reprinted verbatim parts of a purloined classified study of the Defense Department's decision-making on Vietnam, the Supreme Court (in the "Pentagon Papers" case) refused to ban further publication.¹⁵ Most of the justices admitted that the government could make it a crime to publish such materials, but concluded that there could be no restraints in advance. Likewise, the justices will only rarely approve a pretrial gag on media reports about a crime, even if such suppression would help protect another constitutional right: the right to a fair trial.

3.2d Obscenity and Libel

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

(a) "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest . . . (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁶

The target seems to be "hard-core" pornography. Within limits, the "community" to which the Court refers is local and not national, making the definition of obscenity variable. The policy thus allows one locale to suppress sexually explicit materials while another tolerates them. For example, the Court upheld a city ordinance that prohibited nudity in public places, including erotic-dancing establishments.¹⁷ Obscenity continues to trouble the nation. Films, videos, and magazines portraying explicit sex are big business. Many think the Supreme Court's definition is both too lax and insufficiently enforced. Although reluctant to advocate censorship, some people with feminist ideals object to obscenity because it degrades women and may even contribute to sexual crimes against women. The Court, however, continues to err on the side of liberty in this issue—even when ruling on a subject as universally condemned as child pornography. In a series of cases, the Court held that the federal Child Online Protection Act and its revisions (measures designed to restrict child pornography on the internet) were too sweeping, failing to meet the Court's "least restrictive means" test for limiting free speech.¹⁸ Moving beyond pornography, a majority of justices applied similar logic to video games in 2011 when they struck down a California law banning the sale of violent video games to minors.¹⁹ The Court held that video games are protected by the First Amendment, and that the law was not narrowly tailored and failed to provide a compelling state interest to limit their sale. Social media is another electronic front where the Court is still sketching out the reach of First Amendment rights. In 2017, a majority struck down a North Carolina law that prevented registered sex offenders from accessing social media sites that

prior restraint

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

obscenity

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

can be visited by minors, finding that the law forbade too vast a scope of speech and was not narrowly tailored to prevent crime.²⁰ Finally, even the seemingly mundane field of trademark law has become a battleground between obscenity and protected speech. In 2019, the Court found that a law seeking to prohibit registration of “immoral” or “scandalous” trademarks violated the First Amendment, siding with the owner of a clothing company called FUCT.²¹

Like obscenity, the First Amendment does not protect **libel**. Involving published defamation of a person’s character or reputation, libel may subject a publisher or television network to damage suits involving thousands or even millions of dollars. Beginning in 1964, however, the Supreme Court made it very difficult for public figures and public officials to bring successful libel suits against their critics because the court felt that the democratic process needs robust and spirited debate, which might be muted by threat of legal action. In such situations, public figures and officials initiating libel suits must be able to prove “actual malice”—that is, that the author published information knowing it was false or not caring whether it was true or false.²²

3.2e Freedom of Assembly and Symbolic Speech

People often convey ideas and attempt to build support for a cause by holding a meeting or a rally. This is an example of the freedom of assembly that the First Amendment protects. Sometimes assembly involves **symbolic speech** in which words, pictures, and ideas are not at issue, but action is. A person may *do* something to send a message, usually in a dramatic, attention-getting manner. It might be a sit-in at the mayor’s office to protest a budget cut, or a sit-down on a public road leading to an oil pipeline under construction. In some instances, demonstrators may be constitutionally punished for such nontraditional forms of expression—not because of the ideas expressed but because of the harm that results from the *mode* of expression. It is not the message but the medium that can be the basis of a legitimate arrest.

Yet in a 1989 decision that generated a storm of controversy, the Supreme Court overturned the conviction of Gregory Lee Johnson for burning the American flag in violation of a Texas law.²³ In a demonstration at Dallas City Hall during the Republican National Convention in 1984, protesters chanted, “America, the red, white, and blue, we spit on you,” as Johnson doused the flag with kerosene and set it ablaze. Short of a protest that sparks a breach of the peace or causes some other kind of serious harm, the Court held (5–4) that a state could not criminalize the symbolic act of flag burning. The Court’s reasoning was that government protects the physical integrity of the flag because the flag is a symbol of the nation. Just as people may verbally speak out against what they believe the nation “stands for,” they may also express the same thought by defacing or destroying the symbol of the nation. The following year, the Court held that the First Amendment also barred Congress from criminalizing flag burning, a decision that sparked a renewed drive to amend the Constitution.²⁴ The drive failed in 1990 when Congress failed to pass a constitutional amendment by the required two-thirds vote in both houses.

libel

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

symbolic speech

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



(AP Photo / Marcio Jose Sanchez, File)

In 2016, several professional athletes protested during the United States national anthem. The protests began in the National Football League (NFL), after Colin Kaepernick of the San Francisco 49ers sat during the anthem, as opposed to the tradition of standing, before his team’s third preseason game of 2016.



(Everett Collection / Shutterstock)

The Supreme Court has overturned lower court rulings that outlawed certain forms of symbolic hate speech, such as cross burnings.

The Court has also invalidated a city ordinance that outlawed cross burning and other forms of symbolic hate speech directed against certain minorities.²⁵ The ordinance was defective because it was content-based. Some, not all, hate messages were banned. The decision may be far-reaching because it calls into question the constitutionality of similar bans at public universities. In 2014, the Court struck down a Massachusetts law that attempted to limit speech near women's health clinics. The Court held that the law's attempt to create a buffer zone around the clinics was overbroad and violated the speech rights of those wishing to make known their views on abortion.²⁶ On the other hand, the Court has also held that a state does not have to aid citizens in promoting speech that it finds hateful. In 2015, the justices upheld the refusal of the state of Texas

to create specialty license plates featuring the Confederate battle flag, which had been requested by a heritage group.²⁷

3.3

Religious Freedom

Guarantees of religious freedom form the first lines of the First Amendment. Ahead of other protections are an assurance of free exercise of religion and a prohibition of an established religion. Removing religion from the reach of political majorities reflected practical needs in 1791. The United States was already one of the world's most religiously diverse countries.

3.3a Religion and the Constitution

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

The United States is even more religiously diverse today. About three-quarters of the population identifies with a particular religious tradition.²⁸ About twenty distinct religious groups claim more than one million members each, with dozens more having smaller memberships.²⁹ Within this context, the religion clauses have the same objectives, but they work in different ways. The **free exercise clause** preserves a sphere of religious practice free of interference by government. The idea is that people should be left to follow their own dictates of belief or nonbelief. The **establishment clause** keeps government from becoming the tool of one religious group against others. Government cannot be a prize in a nation of competing faiths.

Even though both religion clauses work to guard religious freedom, they concern different threats and so at times seem to pull in opposite directions. Rigorous protection of free exercise may appear to create an established religion. Rigorous enforcement of the ban on establishment may seem to deny free exercise.³⁰

free exercise clause

Provision of the First Amendment guaranteeing religious freedom

establishment clause

Provision of the First Amendment barring government support of religion

3.3b Aid to Sectarian Schools

The Supreme Court has never limited the First Amendment's ban on the literal establishment of an official state church. How much involvement between church and state is too much, however? Coins, for example, display the motto "In God We Trust." A troublesome area for over a half-century has been public financial support for sectarian schools. The current standard for determining when government has violated the establishment clause in this context dates from a 1971 decision by the Supreme Court.³¹ To pass scrutiny under the **Lemon test**, a law must have, first of all, a *secular purpose*. Second, the primary effect of the law must be *neutral*, neither hindering nor advancing religion. Third, the law must not promote *excessive entanglement* between church and state by requiring government to become too closely involved in the affairs of a religious institution. Using these criteria, the Court has upheld some, but not most, forms of state aid that have been challenged. Generally, direct grants of money from a government agency to a religious institution are the least likely to be found acceptable under the Constitution. However, that prohibition has shrunk in recent years. In 2011—drawing a distinction between direct and indirect state contributions—the Supreme Court let stand an Arizona law that provided tax credits for individual contributions to religiously affiliated schools.³² In 2017, the Court used the free exercise clause to determine that Missouri had improperly found a Lutheran preschool ineligible for a grant for playground materials that had been made available to nonreligious schools.³³ In 2020 the Court heard a case where one side argued the free exercise clause required a law to be repealed while the other side argued that the establishment clause required the law to remain in place. At issue was Montana's private school scholarship program, which forbade the use of funds going to religion-based schools. The Court sided with the free exercise advocates, concluding that if a state chose to create such a program, it had to treat all schools equally regardless of religious mission.³⁴ The Court expanded that message in 2022 when it struck down a Maine law pertaining to state tuition assistance for students to attend private, nonsectarian schools, but not religious ones, stating that such a practice was an impermissible "discrimination against religion."³⁵

Lemon test

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

3.3c Prayer in Public Schools

Whether or not religious observances can take place in public schools is another thorny issue. Even though we don't tend to think of schools as part of the government, public schools are funded through tax dollars and are governed by elected school boards—they are government-run institutions. Because of strong emotions on both sides of the prayer in schools issue, the Court's decisions have stirred up controversy. In 1962, the justices outlawed a nondenominational prayer prescribed by the Board of Regents for opening daily exercises in the public schools of New York State. The following year, a Pennsylvania statute mandating daily Bible readings in public schools met a similar fate.³⁶ Reactions in Congress and the nation to these decisions were anything but dispassionate. After the New York prayer case, the U.S. House of Representatives unanimously passed



(Adobe Stock)

The Supreme Court has held that state-sponsored religious activities in public schools are unconstitutional.

a resolution to have the motto “In God We Trust” placed behind the Speaker’s desk in the House chamber. The motto is still there for all to see during televised sessions of Congress.

Of course, the Supreme Court has never said that students cannot pray in school—students have been doing that before exams for years—but the Court has remained firm in its opposition to state-sponsored religious activities in public schools. For example, an Alabama statute authorizing a period of silence at the start of the school day for “meditation or voluntary prayer” was seen by most justices as constitutionally defective because the law endorsed religion as a preferred activity.³⁷ A bare majority of the Court even found an invocation offered by a rabbi at a public middle school commencement constitutionally objectionable. Although student attendance at the ceremony was optional, the prayer nonetheless carried “a particular risk of indirect coercion” of religious belief, according to Justice Anthony Kennedy.³⁸ For the four dissenters, Justice Antonin Scalia asserted that the nation’s long tradition of prayer at public ceremonies was a compelling argument that the school had not violated the establishment clause. In 2000, the Court maintained course by finding a student-led prayer played over a public address system prior to a school football game to be in violation of the establishment clause.³⁹

3.3d Religious Observances in Official Settings

Because of the impressionable nature of children, the Court has been quickest to strike down religious influences in elementary and secondary schools. Elsewhere, the justices sometimes look the other way. In 1983, the Court approved Nebraska’s practice of paying the state legislature’s chaplain out of public funds.⁴⁰ In a narrowly decided 2014 case, the Court upheld ceremonial invocations at the beginning of local government meetings—even though plaintiffs in the case objected to the specifically Christian nature of most of these prayers.⁴¹ (Both houses of the United States Congress also have chaplains who pray at the beginning of each day’s session.) In 1984, a bare majority allowed city officials in Pawtucket, Rhode Island, to erect a municipally owned Christmas display, including a crèche, in a private park. However, the Court has placed some limits on official observances of religious holidays, finding unacceptable a privately owned crèche displayed in the county courthouse in Pittsburgh, Pennsylvania. Above the crèche was a banner proclaiming “*Gloria in Excelsis Deo*” (Latin for “Glory to God in the highest”). Yet in the same case, the Court found acceptable a nearby display that combined an eighteen-foot menorah and a forty-five-foot tree decorated with holiday ornaments. The justices explained that the crèche and banner impermissibly “endorsed” religion, but that the menorah and tree only “recognized” the religious nature of the winter holidays.⁴²

In 2004, a Californian named Michael Newdow brought suit on behalf of his daughter to oppose the recitation of the Pledge of Allegiance and its phrase “under God” in a public school setting. Although the Court dismissed the case without deciding its merits, the issue sparked renewed public debate over the boundaries of church and state.⁴³ In 2005 the Court held that a display of the Judeo-Christian Ten Commandments in a Kentucky courthouse violated the establishment clause because it violated the requirement of government neutrality. Employing the *Lemon* test, the majority of justices found that the display lacked a primary secular purpose.⁴⁴ On the same day, however, the Court handed down another decision in which it found acceptable a display of the Ten Commandments at the Texas state capitol.⁴⁵ The justices found the passive nature of the display and its location and historical presence to be the key factors distinguishing it from the Kentucky case. The *Lemon* test was in the news again in 2019 when the Court found that a large memorial cross that had stood on public land in Maryland for nearly a century did not violate the Constitution because its

primary purpose was to commemorate soldiers who died during World War I, not to advance religion.⁴⁶ Such varied decisions point to the difficulty in deciding how much separation the establishment clause commands between government and religion.

3.3e Free Exercise of Religion

Contemporary free exercise problems typically arise from the application of a law that by its own words has nothing to do with religion, yet that causes hardship for some religious groups by commanding them to do something that their faith forbids (or by forbidding them to do something that their faith commands). This kind of conflict often occurs with small separatist groups whose interests are overlooked when laws are made. Relying on the free exercise clause, they ask to be exempted on religious grounds from obeying the law. For example, a nearly unanimous bench in 1972 exempted members of the Old Order Amish and the Conservative Amish Mennonite churches from Wisconsin's compulsory school attendance law.⁴⁷ Like most states, Wisconsin required school attendance until age sixteen. The Amish were religiously opposed to formal schooling beyond the eighth grade. The justices found a close connection between the faith of the Amish and their simple, separatist way of life. The law not only compelled them to do something at odds with their religious tenets but also threatened to undermine the Amish community. On balance, in the Court's view, the danger to religious freedom outweighed the state's interest in compulsory attendance.

At other times, however, the Court has been less hospitable to free exercise claims. In 1990, the justices ruled against two members of the American Indian Church who were fired from their jobs as drug counselors in a clinic in Oregon after they ingested peyote (a hallucinogen) as part of a religious ritual. Oregon officials then denied them unemployment compensation because their loss of employment resulted from "misconduct." Under state law, peyote was a "controlled substance" and its use was forbidden. The two ex-counselors cited scientific and anthropological evidence that the sacramental use of peyote was an ancient practice and was not harmful. The Court, however, decided that Oregon had not violated the First Amendment. When action based on religious belief runs afoul of criminal law, the latter prevails.⁴⁸ Even though Congress attempted to reverse this ruling with the Religious Freedom Restoration Act in 1993, the Court found that this act exceeded congressional authority.⁴⁹

More recently, the Court defended the free exercise rights of a private company when it decided the case *Burwell v. Hobby Lobby*.⁵⁰ In a 5–4 decision, the Court ruled that the Affordable Care Act could not compel businesses to provide employees with insurance coverage for certain types of contraception over the religious objections of the business owners. In 2015, the Court held that corrections officials in Arkansas violated the free exercise of religion when they forbade Muslim inmates from growing beards.⁵¹ In the much anticipated 2018 case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court held that Colorado was impermissibly biased against a baker's religious beliefs when it sanctioned him for refusing to make a cake for a same-sex wedding.⁵² The Court found Colorado in violation of the First Amendment again in 2023 when a graphic designer successfully argued that the state's Anti-Discrimination Act could not compel her to design wedding websites that defied her religious beliefs about marriage.⁵³ Finally, in 2023, a postal worker who did not work on Sundays for religious reasons successfully challenged the U.S. Postal Service for failing to accommodate him. The Court held that religious accommodation must be made unless an employer can demonstrate this would result in substantial increased costs.⁵⁴

Fundamentals of American Criminal Justice

The system of criminal justice in the US insists not simply that a person be proved guilty but that the guilt is proved in the legally prescribed way. This is the concept of **legal guilt**, inherent in the idea of “a government of laws and not of men.”⁵⁵ Courts sit not just to make sure that wrongdoers are punished but also to see that law enforcement personnel obey the commands of the Bill of Rights. The precise meaning of these commands at a given time represents the prevailing judgment on the balance to be struck between two values: the liberty and the safety of each citizen. The first focuses on fairness to persons accused of crimes and emphasizes that preservation of liberty necessitates tight controls on law enforcement officers, even if some guilty persons go unpunished. The second focuses on crime control, emphasizing that too many rules hamstring police and judges, give lawbreakers the upper hand, and do disservice to honest citizens. Tension between the two values persists.

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

3.4a Presumption of Innocence and Notice of Charges

legal guilt

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

presumption of innocence

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

ex post facto laws

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

bill of attainder

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

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

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

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

3.4b Limits on Searches and Arrests

The **Fourth Amendment** denies police unbounded discretion to arrest and search people and their possessions. Many searches and some arrests cannot take place at all until a judge has issued a **warrant**, or official authorization. To obtain a warrant, the police must persuade a judge that they have very good reason (called **probable cause**) for believing that someone has committed a crime or that evidence exists in a particular location. Warrantless searches of arrested suspects or automobiles are permitted in certain circumstances, but police officers who have made a warrantless search must still convince a judge afterward that they had probable cause to act. In 2009, the Court clarified that warrantless automobile searches are permissible only if there are safety concerns or if there is a reasonable belief that the car contains evidence relevant to the specific crime for which the suspect is being arrested.⁵⁶ In 2013, the Court concluded that the use of a trained police dog (for the purpose of detecting narcotics) on a person's front porch was also the type of search that required a warrant.⁵⁷ A pair of 2018 cases concluded that warrants are generally needed for searching vehicles parked near a private residence and for rental vehicles, even when being driven by unauthorized drivers.⁵⁸ And a 2019 case found that subjecting an unconscious driver to a blood test to determine their blood alcohol concentration was a constitutionally acceptable warrantless search due to the "exigent circumstances" involved.⁵⁹ In other words, the evidence of the crime—driving while impaired—would have disappeared had the officers waited to obtain a warrant.

Electronic surveillance is usually considered to be a search, in the constitutional sense. Under current law, practically all such "bugging" must be done on the authority of a warrant—except for exceptional situations involving agents of foreign powers.⁶⁰ Advances in surveillance technology continue to push the boundaries of the Fourth Amendment. In 2001, the Court held that heat-sensing equipment that detects whether a private home is radiating abnormal levels of heat (which might indicate the use of heat lamps for growing marijuana plants) could not be used without a warrant.⁶¹ Similarly, in 2012 a Court majority held that police could not install a GPS device on a vehicle in order to track its owner without a warrant.⁶²

Once a valid arrest has been made, however, police have a right to search a detained individual. In a 2012 case, the Court ruled that a man arrested for failing to appear at a court hearing to pay a fine could be subjected to a strip search.⁶³ This search was found acceptable in order to ensure the safety of the correctional facility where he was being detained, regardless of the reason for the initial arrest. The following year the Court extended the logic of diminished privacy rights for those held in custody when it upheld the constitutionality of a Maryland law that allows officers to collect DNA samples from those charged with violent crimes.⁶⁴

Fourth Amendment

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

warrant

Official authorization for government action

probable cause

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



(Adobe Stock)

Advances in surveillance technology continue to push the boundaries of the Fourth Amendment.

What happens when a judge concludes that police officers have acted improperly when making an arrest or conducting a search? In such instances, the **exclusionary rule** may come into play. This judge-made rule puts teeth into the Fourth Amendment by denying government, in many situations, the use of evidence gained as a result of the violation of the suspect's rights. The rule lies at the heart of the clash between the values of fairness and crime control.⁶⁵

3.4c Assistance of Counsel and Protection Against Self-Incrimination

Other constitutional restraints are at work in the police station and in the courtroom. As interpreted by the Supreme Court, the Fifth Amendment denies government the authority to coerce confessions from suspects or to require suspects to testify at their own trials. These restraints conform to presumption of innocence. The state must make its case—it may not compel the suspect to do its work. Under *Miranda v. Arizona*,⁶⁶ judges exclude almost all confessions, even if no physical coercion is present, unless police have first performed the following actions:

1. Advised the suspect of their right to remain silent (that is, the right not to answer questions)
2. Warned the suspect that statements they make may be used as evidence at a trial
3. Informed the suspect of their right to have a lawyer present during the interrogation
4. Offered the services of a lawyer free of charge during the interrogation to suspects financially unable to retain one

If a suspect refuses to talk to the police, the police may not continue the interrogation. If a suspect waives these **Miranda rights** and agrees to talk, the state must be prepared to show to a judge's satisfaction that the waiver was done "voluntarily, knowingly, and intelligently." As it is, many defendants decide that it is in their interest to accept a **plea bargain**—a deal with the prosecutor to obtain fewer or lesser charges or a lighter sentence in exchange for a guilty plea. Guilty pleas allow most criminal cases to be settled without going to trial, so the legal use of confessions continues. In 2010, the Court clarified that simply remaining silent for a period of time is not the same as invoking the right to remain silent; therefore, law enforcement can continue to question a suspect even if the suspect does not initially respond.⁶⁷

For a long time, the **Sixth Amendment's** assurance of counsel, or legal assistance, remained more promise than substance. Many defendants simply could not afford to hire an attorney, and some courts provided free counsel for people in poverty only in **capital cases** (cases in which the death penalty might be imposed). Until the 1970s, for example, 75 percent of people accused of **misdemeanors** (less serious offenses, punishable by a jail term of less than one year) went legally unrepresented. Since the 1930s the Supreme Court has greatly expanded the Sixth Amendment right. Today all persons accused of **felonies** (serious offenses, punishable by more than one year in jail) and all accused of misdemeanors for which a jail term is imposed must be offered counsel, at the government's expense if necessary.⁶⁸

The ongoing war on terrorism has led to a reexamination of several of these criminal defense concerns. In 2004, the Court handed down a series of decisions that among other things, concluded that the government may detain enemy combatants indefinitely during times of war, but that those being held, whether US citizens or foreign nationals, must be given the opportunity to challenge their detention in court.⁶⁹ In 2008 the Court exercised its

exclusionary rule

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

Miranda rights

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

plea bargain

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

Sixth Amendment

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

capital case

A criminal proceeding in which the defendant is on trial for their life

misdemeanor

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

felony

A serious criminal offense, usually punishable by not more than one year in prison

power of judicial review in finding that parts of the Detainee Treatment Act of 2005 and the Military Commissions Act had unconstitutionally denied the writ of habeas corpus to foreign nationals detained in the American facilities at Guantanamo Bay.⁷⁰ In 2019 the Court dismissed a case that again sought to challenge indefinite detention, allowing the remaining Guantanamo prisoners—some of whom had already been held for over seventeen years—to remain imprisoned without formal charge.⁷¹ The ongoing and contentious nature of these cases speaks to the currency and importance of establishing clear and fair rules for the criminally accused.

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



(Photo courtesy of Shane T. McCoy, U.S. Navy, via Wikimedia)

The Supreme Court found that the foreign nationals detained at the Guantanamo Bay facilities were unconstitutionally denied the writ of habeas corpus.

3.4d Limits on Punishment

Guilty verdicts by juries or through guilty pleas usually result in the punishment of the accused. Generally the Constitution leaves the particulars of the sentence to legislators and judges, subject to the **Eighth Amendment’s** prohibition of “**cruel and unusual punishment**.” In the Supreme Court’s view, this means first that certain kinds of penalties (torture, for example) may not be imposed at all; second, that certain acts or conditions (such as alcoholism) may not be made criminal;⁷² and third, that penalties may not be imposed capriciously. Indeed, the Eighth Amendment comes into play most frequently when someone has been sentenced to death. In only a few noncapital cases has the Court overturned a sentence because it was too extreme.⁷³ Most recently, in 2012, the Court found that sentencing a juvenile to life in prison without parole violated the Eighth Amendment.⁷⁴ More typically, though, the Court is reluctant to find the length of sentences to be cruel and unusual; in 2003 the Court upheld the use of “three strikes” laws (by which criminals are given long sentences, such as twenty-five years to life) for a third felony offense, regardless of its severity.⁷⁵

Between 1930 and mid-2024 there were approximately 5,454 legal executions in the United States, with about 71 percent of these occurring before 1972. Today, twenty-seven of the fifty states—as well as the federal government—allow capital punishment; however, states vary widely in terms of the number of executions carried out, as Figure 3–1 shows. The US government executed ten people in 2020, marking the first federal executions in seventeen years. Nationally, about 2,262 persons were on “death row” as of mid-2024.⁷⁶ Opponents of the death penalty would like the Supreme Court to impose more restrictions on the states, as they find it inherently cruel and increasingly unusual. Death penalty opponents claimed a rare victory in 2005 when the Court held that the execution of defendants under the age of eighteen was a cruel and unusual punishment.⁷⁷ Even if executions are not inherently “cruel and unusual,” many believe that they are racially discriminatory because African Americans are more likely than White people in the US to be sentenced to die, as are killers of White people versus killers of African Americans.⁷⁸ In 2016, the Court overturned a death penalty conviction on the grounds that prosecutors had improperly used race as a reason to exclude African American

Eighth Amendment

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

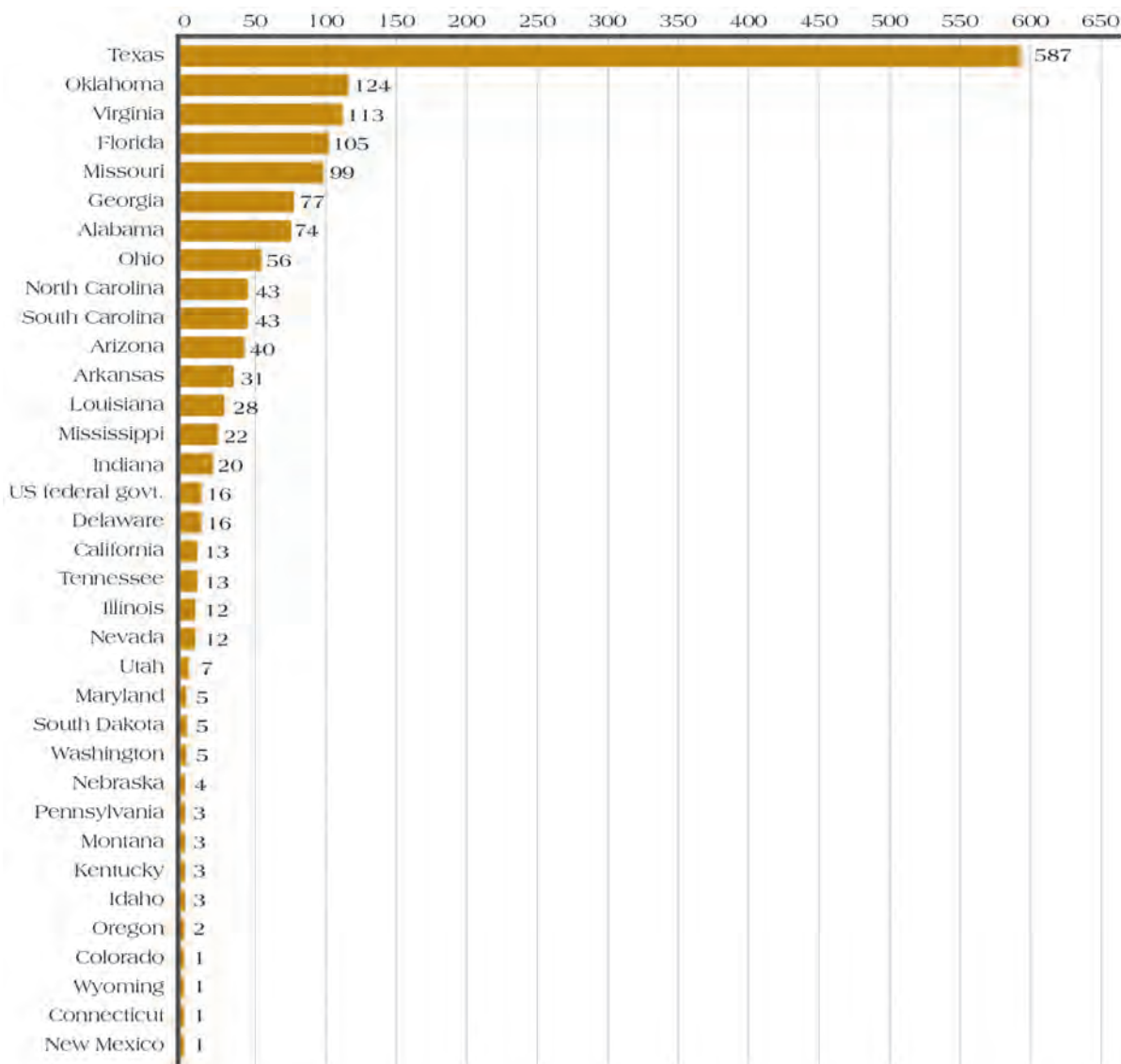
cruel and unusual punishment

Prohibited by the Eighth Amendment—at issue in capital cases

jurors.⁷⁹ Other death penalty critics conclude that the sentencing process is fundamentally flawed because it results in caprice. One study found little or no difference between the facts of murder cases in which the death penalty was imposed and in which it was not.⁸⁰

Figure 3-1 Executions by State, 1976–2024*

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court ruled 5–4 that the death penalty, as then administered, was cruel and unusual punishment in violation of the Eighth Amendment. Too much discretion in the hands of juries and judges had made application of the death penalty capricious. Most states then reinstated capital punishment (as did Congress for aircraft hijacking) with more carefully drawn statutes to meet the Court's objections in *Furman*. In *Gregg v. Georgia*, 428 U.S. 152 (1976), a majority of the Supreme Court concluded that the death penalty was not inherently cruel and unusual and upheld a two-step sentencing scheme designed to set strict standards for trial courts. A jury would first decide the question of guilt and then in a separate proceeding impose punishment. Of the twenty-eight states that now permit capital punishment, one (Kansas) executed no one between 1976 and 2020. Texas, Virginia, Oklahoma, and Florida accounted for approximately 60 percent of the executions during that time span. Twenty states executed 98 convicted capital felons in 1999—the largest number of executions in a single year since 1951, when 105 persons were put to death.



*Data are current through June 12, 2024.

Source: Data from Death Penalty Information Center.

The constitutionality of capital punishment remains a contentious issue. In 2008, the Court rejected an argument that lethal injection as a method of capital punishment subjected the condemned to cruel and unusual punishment. The justices extended this reasoning in 2015 when they concluded that lethal injection is not cruel and unusual even when the drugs injected cause extreme pain.⁸¹ However, the Court overturned a Louisiana law that allowed for the death penalty as a punishment for the rape of a child because “evolving standards of decency” preclude death as a punishment for a crime that does not itself cause a death.⁸² Opinions about the death penalty remain mixed. About 53 percent of the public favors it, though 50 percent believe it is applied unfairly.⁸³ Thirty-six percent of Americans think the death penalty is the best punishment for murder, while 60 percent think life imprisonment with no possibility of parole is better.⁸⁴

3.5

A Right to Privacy

Some liberties people in the US enjoy are not specifically mentioned in the Constitution, as the **Ninth Amendment** cautions. One such judicially discovered civil liberty is the right to privacy, announced in 1965.⁸⁵ With far-reaching implications, this decision invalidated a Connecticut statute that prohibited the use of birth control devices.

3.5a The Abortion Controversy

Several decisions that followed led to *Roe v. Wade*,⁸⁶ the landmark abortion case. Throwing out the abortion laws of almost all the states, the Court recognized a woman’s interest in terminating her pregnancy, the state’s interest in protecting her health, and the state’s interest in protecting “prenatal life.” According to the seven-justice majority, the Constitution prohibited virtually all restrictions on abortions during the first trimester of pregnancy, allowed reasonable medical regulations to guard the woman’s health in the second trimester (but no outright prohibitions of abortion), and permitted the state to ban abortions only in the third trimester after the point of fetal “viability” (except when the pregnancy endangered the woman’s life). For fifteen years after *Roe*, Congress and some state legislatures tried to limit the availability of abortion and to discourage its use; however, the Supreme Court invalidated most restrictions, reasoning that the right to an abortion was a fundamental right, and thus the government had to show compelling reasons when the right was curtailed.

In 1989, opponents of abortion won a significant victory in the Supreme Court. In a case from Missouri, five justices upheld (among other things) a requirement for fetal viability testing prior to the twenty-fourth week of pregnancy—something the Court previously would doubtlessly have struck down.⁸⁷ Moreover, the Court discarded *Roe*’s trimester-based analysis of the abortion right, but stopped short of overruling *Roe*. In 1992, the Court upheld parts of a Pennsylvania statute that imposed several conditions before a woman could obtain an abortion.⁸⁸ These included informed consent provisions, a twenty-four-hour waiting period, parental consent for minors, and record-keeping regulations for medical personnel. However, the Court refused to accept a requirement for spousal notification because it imposed an “undue burden” on the abortion right.

The legal back-and-forth continued for the next few decades. In 2000 the Court further defined the scope of legislative restrictions by ruling unconstitutional a Nebraska statute that criminalized late-term abortions that used a specific medical procedure (called “partial

Ninth Amendment

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

Roe v. Wade

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



(stock_photo_world / Shutterstock)

Anti-abortion protesters march around the Texas capitol on January 23, 2016.

birth” by its opponents).⁸⁹ In a follow-up case in 2007, however, the Court refused to strike down a more narrowly worded federal law banning the procedure.⁹⁰ The right to choose abortion again came into play in 2010, when antiabortion legislators threatened to block passage of the health-care reform bill until they were assured that limits on federal funding of abortion would be kept in place.⁹¹ In 2020 the Court struck down a Louisiana law that required abortion-providing doctors to have admitting privileges at a local hospital. The Court majority concluded that the law was politically, rather than medically, motivated and would have had the effect of closing every abortion-providing clinic in the state, effectively denying women in the state the constitutional protection established in *Roe*.⁹²

Despite this legal seesaw, things did not change in a fundamental manner until 2022. In that year, the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*⁹³ explicitly overturned the constitutional protection of abortion rights during the first two trimesters of a pregnancy that had been established in *Roe v. Wade* nearly fifty years earlier. The Court’s decision in *Dobbs* was a defining statement of law. Justice Alito, writing for the majority, began his opinion with a clear statement of the issue at hand:

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman’s right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.⁹⁴

Alito then went on to state explicitly that *Roe* was overturned, that the Constitution provided no right to abortion, and that any state law restricting abortion access need merely have a rational basis to be valid.

The political ramifications of the Court’s decision were widespread and immediate. Thirteen states had passed **trigger laws** in anticipation of *Roe* being overturned someday. This meant that the Court’s *Dobbs* decision triggered abortion restrictions to automatically go into effect—in some cases immediately, or within 30 days. For example, in Missouri a proclamation by the governor and state attorney general made all non-medically necessary abortions illegal on the very day the *Dobbs* decision was released. Several more (largely conservative) states without trigger laws took up new abortion restriction legislation in 2022, while other (largely liberal) states took legislative steps to add additional abortion protections. Because each of these laws is worded differently, and since they involve a variety of types of restrictions and protections, it is likely that legal challenges over the next several years will continue to define and clarify what reproductive health actions are allowed, and where.

The years following the *Dobbs* decision have seen continued efforts to modify abortion laws at both the state and federal levels. At the end of the day, women’s reproductive health remains a divisive issue in American politics. Though this division is unlikely to change in the near future, a majority of US adults held these views in 2024: 54 percent identified

trigger law

A law passed by a legislature that states certain rules or regulations will go into effect based upon a stated external factor, such as a Court decision or economic indicator

as pro-choice, 52 percent considered abortion morally acceptable, and 61 percent thought overturning *Roe* was a bad thing.⁹⁵ In a representative democracy, however, we elect leaders to make decisions about a very wide variety of issues. So, the majorities listed above do not directly translate into policy outcomes. Indeed, just 28 percent of those polled said they would only vote for a candidate who shared their views on abortion.⁹⁶ For good or ill, this is a defining facet of a pluralist democracy.

Political Controversies

How Much Affirmative Action?

Suppose that a school board and a teachers union agree to increase the number of minority faculty members in public schools. In this district there has been no prior racial discrimination; the union and the school officials simply conclude that it is good publicity to hire more minority teachers. Suppose, also, that the agreement protects minority teachers by providing that if layoffs become necessary, the percentage of minority teachers would not be reduced. Next assume that budget reductions force layoffs, with the result that White teachers with greater seniority are laid off before minority teachers with less. In a 1986 case with similar facts from Jackson, Michigan,¹ the Supreme Court ruled that racially preferential firing was not permissible unless identifiable victims of past discrimination were being protected. Most justices thought the Michigan plan went too far by imposing undue burdens on particular individuals in order to achieve the laudable objective of racial equality. Yet, a majority believed that racially preferential hiring was

permissible under certain circumstances. According to Justice Sandra Day O'Connor, "A public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals."

In another situation, suppose that a city government requires contractors receiving city business to subcontract out a certain percentage of the dollar amount of each contract to one or more minority-owned businesses. Called a set-aside quota, the plan is designed to assist minorities by overcoming their exclusion in past years from the construction trade. Modeling its program on a 10 percent set-aside mandated by Congress and upheld by the Supreme Court in 1980,² the city council in Richmond, Virginia, adopted a 30 percent set-aside plan in 1983. In 1989, however, the Supreme Court ruled that the quota violated the Fourteenth Amendment's equal protection clause.³ According to Justice O'Connor, "To accept Richmond's claim that past societal discrimination alone can serve as a basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of

equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." The ruling in the *Richmond* case has had a widespread impact—36 states and 190 cities had similar remedial programs.

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

1. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).
2. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
3. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

3.5b Personal Autonomy, Sexual Identity, and LGBTQ Rights

For many people, the principle of personal autonomy, which lies at the heart of privacy cases, suggests that government should leave people alone in their choices about sexual relations and gender. Nonetheless, all states today have laws regulating private behavior and personal relations to some extent. Sexual privacy has been an issue of particular concern among members of the LGBTQ community (those who identify as lesbian, gay, bisexual, or transgender), which has been the group most frequently affected by state forays into sexual privacy. In some locales, same-sex couples could not adopt or have legal custody of children. While over half of the states and numerous cities banned at least some discrimination based on gender identity and/or sexual orientation, it remained legal in many places to engage in sexual-orientation discrimination in housing and employment practices.⁹⁷ These discriminatory practices were dealt a serious blow, however, in 2020. In the case *Bostock v. Clayton County* the Court ruled 6–3 that discrimination based on sexual orientation or gender identity was inherently discrimination based on sex—a practice outlawed by the federal government in Title VII of the 1964 Civil Rights Act.⁹⁸ This sweeping ruling is likely to result in additional legal challenges to discriminatory practices against LGBTQ individuals in years to come.

Historically, the two most salient issues regarding government regulation of sexual orientation were anti-sodomy laws and laws recognizing or banning same-sex marriages and domestic partnerships. Before 2003, five states outlawed sodomy (oral or anal sex) between persons of the same gender, and twelve more states outlawed sodomy regardless of gender. Although the Supreme Court found such policies acceptable under the Constitution in 1986, ten years later it found that a Colorado constitutional amendment that prohibited laws barring discrimination against homosexuals was in violation of the equal protection clause of the Fourteenth Amendment.⁹⁹ In 2003, the Court went a step further, directly overturning the 1986 decision and declaring that laws prohibiting sexual acts between same-sex partners violated the due process clause of the Fourteenth Amendment.¹⁰⁰

Regarding same-sex marriage, in 1996 Congress passed the Defense of Marriage Act, which provided a federal definition of marriage that specifically excluded same-gender couples. Forty-one states passed similar laws, many of which were challenged in the courts.¹⁰¹ In 2004, the Massachusetts Supreme Judicial Court brought more attention to this controversy when it held that a proposed state law creating civil unions for same-sex couples was discriminatory and that the state must give same-sex couples the same marriage rights as opposite-sex couples. In reaction to this decision, eleven states modified their statutes or constitutions in November 2004 to specifically forbid same-sex marriage. In May 2008, the California Supreme Court found the state's ban on same-sex marriage to be unconstitutional, and the state began issuing marriage licenses to same-sex couples in June of that year. However, in November 2008, California voters went to the polls and a narrow majority voted for a ballot initiative that revised the state constitution in order to reinstitute the ban. The initiative was subsequently challenged in federal court on the grounds that it served no legitimate state interest and that gays and lesbians should be treated as a protected class with constitutional protections from discrimination. The trial court decided that the law was unconstitutional, and when the governor and attorney general refused to defend the law, the Supreme Court held that the district court decision must stand, making same-sex marriage legal in the nation's largest state.¹⁰²

In 2011, New York joined New Hampshire, Massachusetts, Connecticut, Iowa, and Vermont as states legalizing same-sex marriage. President Barack Obama (2009–2017) made headlines in May 2012 when he became the first president to take a public position in favor of same-sex marriage. Then, in 2013, a big change occurred. In the case *United States v. Windsor*, the

Supreme Court held the federal Defense of Marriage Act unconstitutional.¹⁰³ Finding that this law resulted in discrimination against a class of persons that many states sought to protect, the Court majority concluded that it must be invalidated on equal protection grounds. Although that case settled the federal question, it left standing more than a dozen state laws that prevented the performance and recognition of same-sex marriages. The issue was finally put to rest nationwide in 2015, when a Court majority held in *Obergefell v. Hodges* that marriage is a fundamental right and that both the equal protection and due process clauses of the Fourteenth Amendment guarantee a right of same-sex couples to marry and have their marriages recognized throughout the United States.¹⁰⁴ The case had immediate and practical impacts, with the percentage of cohabitating same-sex couples who were legally married rising from 38 percent to 61 percent within two years of the decision.¹⁰⁵

As a growing majority of Americans now believe same-sex marriages should be recognized by the law as valid, and as other states and the federal government grapple with their own laws and constitutional amendments, this issue promises to be one of evolving debate in the years to come. It also appears to be an issue of generational divide. While 71 percent of people in the US overall support legal same-sex marriage, that figure rises to 87 percent among the eighteen- to thirty-four-year-old demographic.¹⁰⁶

Unless foes of equality can muster the support for a constitutional amendment—which seems unlikely—the marriage issue seems to be a settled one. That being said, the fight for equality and acceptance continues for LGBTQ individuals, a community that comprises approximately 7.6 percent of the overall US adult population, and 22.3 percent of Generation Z adults.¹⁰⁷ In 2016, the state of North Carolina passed a law to prevent transgender people from using public restrooms that do not correspond to their biological sex. Although the federal government warned the state that it was in violation of federal law, the persistence of state-level efforts to discriminate against members of LGBTQ communities—particularly in the area of gender identity, where opinions are much more varied—suggests that this area of civil rights will continue to face challenges as people in the US struggle with fully realizing the demands of equality and equal protection under the law.



Today, same-sex couples may adopt and have legal custody of children throughout the country.

(Adobe Stock)

3.6

Racial Equality

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

equality of opportunity

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

equality of condition

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

equality of result

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

Thirteenth Amendment

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

equal protection clause

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

3.6a Equality: A Concept in Dispute

A word like *equality* can mean different things to different people. For believers in **equality of opportunity**, it is enough if government removes barriers of discrimination that have existed in the past. If life is like a marathon, all people should be allowed to participate by having a number and a place at the starting line. Others think government should promote **equality of condition**. To do this, policies should seek to reduce or even eliminate handicaps that certain runners face because of the lingering effects of past discriminations. The marathon can hardly be fair, they say, if some runners start out with their shoelaces tied together or have to wear ill-fitting shoes. Accordingly, the government will have to redistribute income and resources, collecting from those who have more and giving to those who have less. Head Start programs for preschool children and need-based scholarships for college students are obvious devices intended to further equality of condition. Some find such policies inadequate. The effects of inequality, whether of wealth or race or gender, are too strong and pervasive. Government must, therefore, pursue **equality of result**. In the marathon, government may have to carry some runners to the finish line if they are to get there at all. Some affirmative action programs are aimed at achieving equality of result.

3.6b The Legacy: Slavery and Third-Class Citizenship

Shortly after the Civil War ended, in 1865, ratification of the **Thirteenth Amendment** banished slavery and “involuntary servitude” from the country. Following quickly were ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870 and passage of several civil rights acts. Collectively these conferred rights of citizenship on the newly freed slaves and officially removed race as a criterion for voting. Especially significant was the **equal protection clause** of the Fourteenth Amendment: “Nor shall any State deny to any person within its jurisdiction the equal protection of the laws” (see Table 3–2).

Table 3–2 Chronology of Major Civil Rights Decisions, Laws, and Amendments

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

Year	Major Civil Right Decision, Law, or Amendment
1865	Thirteenth Amendment abolishes slavery and “involuntary servitude”
1868	Fourteenth Amendment prohibits state action denying any person “the equal protection of the laws”
1870	Fifteenth Amendment removes race as a qualification for voting
1875	Civil Rights Act bans racial discrimination in places of public accommodation
1883	Civil Rights cases hold 1875 statute unconstitutional
1896	<i>Plessy v. Ferguson</i> upholds constitutionality of state law requiring racial segregation on trains in “separate but equal” facilities
1920	Nineteenth Amendment extends franchise to women
1954	<i>Brown v. Board of Education of Topeka</i> declares unconstitutional racially segregated public schools; <i>Plessy v. Ferguson</i> reversed
1957	Congress establishes the Civil Rights Commission

Year	Major Civil Right Decision, Law, or Amendment
1963	Congress passes the Equal Pay Act
1964	Congress passes the Civil Rights Act: Title II outlaws racial discrimination in places of public accommodation; Title IV allows the Justice Department to sue school districts on behalf of African American students seeking integrated education; Title VI bans racial discrimination in federally funded programs; Title VII prohibits most forms of discrimination (on the basis of race or gender) in employment and creates the Equal Employment Opportunity Commission; Twenty-fourth Amendment eliminates poll taxes in federal elections
1965	Congress passes the Voting Rights Act; President Johnson bans racial discrimination by federal contractors
1968	Civil Rights Act's Title VIII prohibits most forms of discrimination in sale or rental of housing
1971	Twenty-sixth Amendment lowers national voting age to 18
1972	Congress submits Equal Rights Amendment to states for ratification
1978	<i>Regents v. Bakke</i> invalidates a medical school admissions program that reserved a specific number of seats for minority applicants
1979	<i>Steelworkers v. Weber</i> upholds legality of a voluntary affirmative action plan for industrial apprenticeships that gives preference to African American workers over White workers with greater seniority
1982	Ratification of Equal Rights Amendment fails; Congress extends and amends Voting Rights Act; Title IX of Educational Amendments bars sex discrimination in "any education program or activity receiving Federal financial assistance"
1989	<i>Richmond v. J. A. Croson Co.</i> invalidates a municipally mandated 30 percent set-aside quota for racial minorities
1990	Congress enacts the National Hate Crimes Statistics Act, which requires the Justice Department to gather data on crimes motivated by prejudice about race, religion, ethnicity, or sexual orientation; the Americans with Disabilities Act becomes law
1991	Congress enacts a civil rights bill designed to modify several 1989 Supreme Court decisions that had made on-the-job discrimination more difficult to prove, and affirmative action plans easier to challenge in court
2003	The Supreme Court finds the University of Michigan's law school admission process, which uses race as affirmative criteria, acceptable because it is narrowly tailored
2006	Congress reauthorizes the Voting Rights Act for an additional twenty-five years
2011	President Obama certifies the congressional act repealing the military's "Don't Ask, Don't Tell" policy (This allows gay men, lesbians, and bisexuals to serve openly in the military for the first time.)
2015	<i>Obergefell v. Hodges</i> establishes marriage as a fundamental right and guarantees marriage equality for same-sex couples

By the end of the nineteenth century, however, it was clear that the nation had abandoned the promise of full citizenship for the former slaves. Enforcement of civil rights laws became lax, and the Supreme Court made it clear that the Constitution would not stand in the way of racially discriminatory policies. In *Plessy v. Ferguson*, for example, the Court announced the **separate-but-equal doctrine** in upholding a Louisiana law that required racial segregation on trains.¹⁰⁸ As long as racially separate facilities were "equal," the Court maintained, the Constitution had not been violated.

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

separate-but-equal doctrine

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



(Courtesy of Robert L. Knudsen, White House Photograph Office, National Archives, via Wikimedia)

Lady Bird Johnson, the First Lady, reading to children enrolled in Project Head Start at Kemper School in Washington, DC.

including riots and lynchings. Segregated neighborhoods became fixtures in the North and South alike.

Second, Southern politicians systematically excluded African Americans from the political process. To get around the Fifteenth Amendment, legislatures turned to devices such as poll taxes, good-character tests, and literacy tests to keep African Americans away from the ballot box. Until its use was declared unconstitutional by the Supreme Court,¹⁰⁹ the “grandfather clause” allowed White people to vote who would otherwise have been disfranchised by those same barriers. Of all the discriminatory devices, the White primary was probably the most effective. Because one party (the Democrats) was dominant in the region after 1900, the real electoral choices in state, local, and

congressional races were made in the primary—not in the general election. White Democrats thus excluded African Americans from meaningful political participation by adopting party rules that allowed only White people to vote in the Democratic primaries. Even though the White primary seems an affront to the Fifteenth Amendment, it was not until 1944 that the Supreme Court ruled that such deception violated the Constitution.¹¹⁰ Still, for two decades afterward most African Americans were kept from voting in many places.

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

3.6c The Counterattack

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

Thus, the counterattack against racism looked to the federal judiciary and was led principally by the National Association for the Advancement of Colored People. Known by its initials, the **NAACP** was founded in 1909 to improve the social, economic, and political condition of African Americans. A separate division for litigation, called the Legal Defense Fund (LDF), began work in 1939 and had the primary responsibility of pressing the desegregation drive in courtrooms in the 1940s, 1950s, and 1960s. One prominent African American attorney in the LDF was Thurgood Marshall, later the first African American justice on the Supreme Court (1967–1991).

The assault on racial segregation reached a climax in the landmark decision of May 17, 1954: ***Brown v. Board of Education of Topeka***.¹¹¹ “Does segregation of children in public

NAACP

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

Brown v. Board of Education of Topeka

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

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

<http://www.bvtlab.com/3833V>

schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?” asked Chief Justice Earl Warren (1953–1969). “We believe that it does. . . . In the field of public education,” he concluded, “the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Plessy* was overruled.

3.6d Putting *Brown* to Work: The Law and Politics of Integration

The Court had made its decision. What was to happen? Rather than order an immediate end to segregation, the justices announced that integration was to proceed “with all deliberate speed.”¹¹² In most places “deliberate speed” proved to be a turtle’s pace. A decade after the Court’s historic pronouncement, less than 1 percent of the African American children in the states of the old Confederacy were attending public school with White children. In six border states and the District of Columbia the figure was much higher: 52 percent.

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

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



Segregated drinking fountains symbolized the separate worlds of the South until the 1960s.

3.6e The Continuing Effects of *Brown*

Supreme Court decisions about school integration since 1971 have come largely from states outside the South. Non-Southern school systems had segregated schools, but rarely had law segregated them recently. The racial composition of these schools reflected decades of residential segregation that had resulted from economic inequities and private discrimination.

Civil Rights Act of 1964

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

This kind of “unofficial” segregation was called **de facto segregation**; but in a pair of decisions from Ohio in 1979,¹¹³ the Supreme Court decided that “racially identifiable schools” in any district probably resulted from school board policy. What many had thought to be de facto segregation was now considered **de jure segregation**: racial separation caused by government policy. Because of the 1979 ruling, local officials now have the affirmative duty of redrawing attendance zones and busing pupils from one part of town to another.

Busing itself remains controversial. Many parents—African American and White alike—object to having their children transported farther than seems necessary. Many prefer neighborhood schools. Aside from achieving integration, scholars disagree on the effects of busing and similar measures on the schoolchildren involved, debating whether integration improves the educational performance of African American students. Although integrated schools often mean that African American parents lose control over schools in African American neighborhoods, integrated education probably better prepares all students for living in a racially diverse society. Moreover, many believe that “green follows White”—that the presence of White students assures more generous economic support of a school by local officials. Nonetheless, the Supreme Court has now taken the position that once a school district has eliminated segregation, the district ceases to be under a constitutional obligation to continue the policies that produced the integrated system, even if “re-segregation” might result.¹¹⁴

Whatever the progress has been with school integration, social segregation remains a fact in many areas of the nation. Even though the Civil Rights Acts of 1964 and 1968, respectively, prohibit racial discrimination in employment and in the sale or rental of housing (as do the laws in most states and hundreds of municipalities), African Americans remain the most segregated minority group—the group most isolated from White people. This ongoing segregation in many metropolitan areas and elsewhere continues to have a negative economic impact—measured by income, crime rates, and educational attainment—on all residents of the racially segregated regions, regardless of race.¹¹⁵

3.6f Affirmative Action

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

If a national consensus has developed against racial discrimination in its old forms, no firm consensus exists on affirmative action. Polls have indicated that 61 percent of people in the US favor affirmative action programs for racial minorities, but 30 percent oppose them; however, only 31 percent of people in the US believe race should be taken into account in college admissions.¹¹⁶ Even the Supreme Court has been divided, as *Regents of the University of California v. Bakke*¹¹⁷ illustrates. In this landmark affirmative action case, the Supreme Court invalidated the use of a racial quota for medical school admissions at the Davis campus of the University of California, but it said that race could still be taken into account. Admissions officers could use race as one of several criteria in evaluating the record of an applicant but could not admit or exclude solely on the basis of race. In 2003, twenty-five years after *Bakke*, the Court again took up the issue, holding that the University of Michigan’s undergraduate admission system unfairly allowed race to play too decisive a role because it failed to treat applicants as individuals rather than merely group members.¹¹⁸ On the other hand, the Court found Michigan’s law school admission process

de facto segregation

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

de jure segregation

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

affirmative action

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

acceptable because its use of race as affirmative criteria was narrowly tailored.¹¹⁹ In two additional cases, the Court has held that admissions policies can consider race only if the university can meet the “strict scrutiny” standard of showing a compelling state interest; moreover, it is permissible for a state constitutional amendment to ban the use of race-conscious admissions policies entirely.¹²⁰ Next, in a University of Texas case in 2016, the Court approved of the university’s admission policy, which considers academic performance alone in a first round of admissions and then considers academics and race among several factors in a second round.¹²¹ The Court majority determined that the policy did not violate the equal protection clause because its pursuit of a diverse student body served a compelling interest for the state. Finally, in the 2023 case *Students for Fair Admissions v. Harvard*, the Supreme Court closed the door entirely on race-based affirmative action programs in college admissions, overturning decades of previous decisions and finding that such programs violated the Equal Protection clause.¹²² Though a majority of White and Asian Americans supported this decision, larger percentages of Latinx and African Americans opposed it.¹²³ It remains to be seen how this shift in policy will affect college populations over time.

In other cases, the Court has allowed governments and private businesses wide latitude in personnel decisions. Title VII of the Civil Rights Act of 1964 bans job discrimination on the basis of “race, color, religion, sex, or national origin.” The Court has reasoned that a law intended to end discrimination against racial minorities and women should not be used to prohibit programs designed to help those groups.¹²⁴ What, then, are the limits to affirmative action under the law? There is no clear answer to this question. Generally, policies by an employer to overcome the effects of its past discrimination are permissible; indeed, they may be required. Even some policies by an employer to alleviate general “societal discrimination” for which the employer is not responsible are permissible. Hiring policies that look like “quotas” have the greatest chance of being struck down.¹²⁵

Political Controversies

Race and (In) Justice: Law Enforcement, Homicide, and Change

Seven minutes and forty-six seconds on May 25, 2020, transformed the focus of American politics in the summer of 2020, leading to a racial justice movement that called for significant and permanent change to our society. This is how long a White police officer in Minneapolis, Minnesota, knelt on the

neck of handcuffed African American George Floyd (who was suspected of using a counterfeit \$20 bill), causing his death. While an outrageous act by itself, its presence as part of a larger pattern of abuse of African Americans at the hands of law enforcement officers made it even more significant. The event crystallized for many the ongoing struggles and tensions our nation experiences when it comes to race. In the days and months following the killing of George Floyd, peaceful protests and demands for justice took place in cities throughout the country. There were also curfews, clashes between citizens and law enforcement, accusations, and frustrations. While some people caused damage to local businesses or committed violent acts, the actions by most were by-and-large lawful, focused, and well-received—with 65

percent of people in the US stating their support of the racial justice protests.

Dozens of major corporations made their support known as well, voicing the phrase “Black Lives Matter” via advertising and social media. Many cities addressed resolutions to “defund the police”—an idea that gained currency via the protests and that largely focused on reducing spending on the more militarized aspects of policing, redirecting those funds to less confrontational methods of ensuring public safety, such as de-escalation training and the hiring of more mental health experts. Other outcomes were symbolic and wide-ranging. Cities and states took action on removing statues of Confederate leaders and renaming public spaces that had honored the Confederacy, and the Mississippi state legislature

(continues)

(continued)

finally acted to remove the Confederate battle standard from its state flag. The Washington, DC, professional football team changed its nickname (which had been a racial slur toward American Indians) and musicians changed the names of their bands to avoid glorifying the pre-Civil War South; The Dixie Chicks became simply The Chicks and Lady Antebellum became Lady A. Along with these symbolic acts came promises of sustained, long-term reform from nearly all levels of government.

Why was this event so significant? What made George Floyd's death an issue of national, not just personal, tragedy? One answer has to do with systemic racism and the reality of stark differences in the criminal justice system in the US. African American teenagers are twenty-one times more likely to be shot and killed by police officers than White teens. Moreover, African American and Latinx people make up 32 percent of the total US population, but 56 percent of those incarcerated in our nation's prisons and jails. If these trends continue, one in three African American males born today will be imprisoned over the course of his lifetime, but only one in seventeen White men will suffer that fate. On the other side of the equation, we have a law enforcement system that is largely White: 72 percent of local police officers are White people.

Another reason the events in Minneapolis, Minnesota, became a part of the national conversation is that perceptions of the facts described above

differ markedly. In the weeks following the killing of Floyd, people in the US of all races agreed nearly unanimously on some issues: law enforcement officers should be punished for abuses, fired for multiple abuses, and be required to have good relations with the community they serve. But support for other reforms has differed sharply by race: 72 percent of African Americans, but only 44 percent of White Americans, believe police officers should not be in charge of enforcing nonviolent crimes; 70 percent of African Americans, but only 41 percent of White Americans, believe police budgets should be reduced and the money shifted toward social programs.

Racial profiling, use of force, and the militarization of domestic law enforcement are also issues Americans often view differently depending on their own ascriptive identities. More than half (60 percent) of White Americans trust the ability of police to protect them from violent crime, but fewer than half of Americans who are not White feel the same way. Similar double-digit racial differences exist when people in the US are polled about their confidence in the police or the criminal justice system generally. And what causes the disparate outcomes described in the previous paragraph? Fifty percent of African Americans say the cause is mostly discrimination, but only 19 percent of White Americans agree.

What do wrongful deaths of African Americans at the hands of police officers mean for American

politics? Among other things, they remind us that the processes and policies of our system of government have very real consequences for us. The politicians we vote for in federal, state, and local elections shape our communities and our justice system. The choices we have made over centuries and that we continue to make today have created an imperfect system that we must continue to improve. When America was founded, we endeavored to (among other things) "form a more perfect Union, establish Justice, [and] insure domestic Tranquility." The killing of George Floyd reminds us of how hard we still need to work to attain those goals.

How did you experience the racial justice protests in 2020, or in the years that followed? How would you describe the relationship between people in your community and law enforcement? What changes would you like to see in that relationship?

Sources: The Gallup Organization, "Two in Three Americans Support Racial Justice Protests," July 28, 2020; "Most Americans Say Policing Needs 'Major Changes,'" July 22, 2020; "Nonwhites Less Likely to Feel Police Protect and Serve Them," November 17, 2014. ProPublica, "Deadly Force in Black and White," October 10, 2014, <https://www.propublica.org/article/deadly-force-in-black-and-white>. NAACP, "Criminal Justice Fact Sheet," <https://www.naacp.org/criminal-justice-fact-sheet/> (July 29, 2020). *The Washington Post*, "In urban areas, police are consistently much whiter than the people they serve," June 4, 2020, <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/?arc404=true> (July 29, 2020).

3.6g Voting Rights

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

As late as 1964, however, African Americans in particular were systemically denied the right to vote in most parts of the South. The response to this situation was the **Voting Rights Act of 1965**—the most important voting legislation ever enacted by Congress.

Voting Rights Act of 1965

Major legislation designed to overcome racial barriers to voting, primarily in the Southern States; it was extended again in 2006 for twenty-five years

Besides removing many barriers to voting, the act required that any change in a “standard, practice, or procedure with respect to voting” in certain parts of the United States (most of them being in the South) could take effect only after being cleared by the attorney general of the United States or by the United States District Court for the District of Columbia. The Supreme Court interpreted “standard, practice, or procedure” to include any change in a locale’s electoral system. This advance clearance requirement was satisfied only if the proposed change had neither the *purpose* nor the *effect* of “denying or abridging the right to vote on account of race or color.” This meant that African American voting power could in no way be weakened or diluted by any change in local election practices.

Congress made an important change in the law in 1982, banning existing electoral arrangements with a racially discriminatory effect anywhere in the United States. Conceivably, this addition to the law may produce a realignment of political power in sections of the country in which African Americans and Latinx amount to at least a sizable minority of the population, and in which local political practices dilute the political influence of these minorities. More recently, the Court ruled in 1993 that reapportionment schemes may violate the equal protection clause if they are drawn based solely on race—even when the intent is to increase racial minority representation.¹²⁶ Evidence that the Voting Rights Act continues to be controversial can be found in the 2006 congressional debates over renewing the act. Southern Republicans opposed extending the provisions requiring some states (mostly in the South) to obtain preclearance before altering their voting laws, and other legislators balked at extending requirements to provide ballots in multiple languages.¹²⁷ Ultimately, the act was extended for another twenty-five years, with some portions being made permanent. President George W. Bush signed the reauthorization act into law on July 27, 2006.

Provisions of this reauthorization faced legal challenges, though, and in 2009 the Supreme Court unanimously ruled that the law’s “preclearance” provisions can be challenged by individual communities (“political subdivisions”) seeking permanent exemption based on the argument that discrimination is no longer a concern in their locality.¹²⁸ Then, in 2013, a narrowly divided Court weakened the power of the Voting Rights Act still further. Finding the formula that identified those jurisdictions to be anachronistic and an overreach of federal power, it struck down the provision listing preclearance jurisdictions entirely. Stating that the nation had changed greatly since the act’s initial passage, the Court insisted that legislation must address current conditions.¹²⁹ As a result of this decision some jurisdictions, such as Texas, have adopted new voter ID laws and redistricting maps that may not have been approved by the federal government had preclearance still been in effect. The long-term effects on voter registration and turnout remain to be seen, but subsequent Court cases suggest it is now much more difficult to prove racial gerrymandering. In a 2024 case, the Court approved of redrawn congressional districts in South Carolina that had the effect of diluting African American votes. The majority concluded that the focus of the redistricting effort had been politically motivated rather than racially motivated and, therefore, permissible.¹³⁰



President Lyndon B. Johnson meets with Martin Luther King Jr. at the signing of the Voting Rights Act of 1965. The legislation provided African Americans the right to vote without discrimination and was the most important voting legislation ever enacted by Congress.

(Photo courtesy of Yoichi Okamoto, 1965, via Wikimedia.)

The Voting Rights Act has had a far-reaching impact. African Americans in the Southern states now vote at a rate approximating that of White people. In the 2024 election for the U.S. House of Representatives, voters nationally chose at least sixty African American and fifty-five Latinx members—a number that amounts to about 26 percent of the chamber. At the time of writing, there are currently five African Americans and six Latinx serving in the U.S. Senate. There are also eighteen Asian Americans serving in the House of Representatives and two in the Senate. Of course, it goes without saying that the 2008 presidential election was a landmark for African Americans in electoral politics. Illinois Senator Barack Obama, the son of a Black father and White mother, became the first African American identified presidential nominee of a major party when he was chosen as the Democratic nominee after a hard-fought primary season. He made history again in November 2008, when he was elected as the first African American president. One of the most significant acts of President Obama's first year in office was to appoint Sonia Sotomayor to the Supreme Court, making her the first Latina Supreme Court justice. In 2020, California Senator Kamala Harris became the first woman, first African American, and first Asian American to be elected vice president.

3.7 Sexual Equality

Nineteenth Amendment

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



(Getty Images)

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

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

3.7a The Legacy

Until recently, the legal status of women in the United States was one of substantial inequality. A wife had no legal existence apart from her husband. Without his consent, she could make no contracts that bound either of them. In response to such attitudes, the first convention on women's rights was held in 1848 in Seneca Falls, New York. Change in attitudes came slowly, however. Even the Fourteenth Amendment spoke of "male inhabitants." The **Nineteenth Amendment**, extending the franchise to women, was not ratified until 1920, after a long and turbulent suffrage movement. Not until 1971 did the Supreme Court first invalidate a law because it discriminated against women,¹³¹ and as late as 1973 there were nine hundred gender-based federal laws still on the books.

3.7b Gender to the Forefront

Attacks on racial discrimination during the 1950s helped to turn attention to laws that penalized women because they were women. Sex discrimination became a political issue few politicians could ignore after the publication of books such as Betty Friedan's *Feminine Mystique* in 1963 and Kate Millett's *Sexual Politics* in 1971, and after the formation of the National Organization for Women (NOW) in 1966. At about the same time, the female half of the postwar "baby boom" entered college, graduate schools, and the workforce. There were more women than ever before who were at an age and place in life and career when questions of gender discrimination were very important.

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

As a result of changes in both laws and attitudes, sex-based retirement plans, for example, may no longer require women to make higher contributions or to receive lower monthly benefits than men just because women as a group live longer than men as a group.¹³² States may no longer operate single-sex schools of nursing (and probably any other kind), even if coeducational public nursing schools also exist.¹³³ In the workplace, not only has sexual harassment been judged to be a violation of Title VII, but the Supreme Court also holds employers responsible under the law for not taking steps to prevent it.¹³⁴ Despite such remedies, sexual harassment and misconduct continue to be a problem in many settings, as contemporary movements such as #MeToo demonstrate.

Many people believe that real economic equality between the sexes will not be achieved without **comparable worth** (equal pay for jobs of equal value), a policy not required by federal law. Otherwise, they say, full-time female workers will continue to earn less on average than full-time male workers in many fields. According to the latest figures from the U.S. Bureau of Labor Statistics, women currently earn only about eighty-four cents for every \$1 that men earn.¹³⁵

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

<http://www.bvtlab.com/7Ud79>

3.8 Other Americans and Civil Rights

Discrimination against women and African Americans has occupied a prominent place on the public agenda in recent years, but discrimination has claimed other victims as well. American Indians, Asian Americans, Latinx, immigrants, and Americans with disabilities

comparable worth

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

have all demanded—with varying degrees of success—that public officials take steps to remedy years of neglect and unequal treatment. Sexual orientation and gender identity have also been the basis for discrimination by governments, businesses, and individuals, and were discussed as aspects of privacy earlier in this chapter.

3.8a American Indians

From an estimated sixteenth-century population of perhaps 2 million or more¹³⁶ (no one knows for certain), American Indians (also called Native Americans) numbered barely 500,000 in 1900 as war, disease, and systematic slaughter took their toll. Today, there are over 9 million, about 2.9 percent of the total US population. As a group, American Indians suffer disproportionately high rates of sickness, poverty, illiteracy, and unemployment. Not until 1924 did Congress recognize them as citizens.

Many American Indians have understandably resisted assimilation into the rest of the population, insisting instead on preserving their culture and heritage. Approximately one-quarter live on 325 semiautonomous reservations and, in Alaska, in 223 native villages

under the supervision of the Bureau of Indian Affairs in the Department of the Interior. The Indian Self-Determination and Education Assistance Act of 1975 granted American Indians greater control over their own affairs, and the Indian Bill of Rights of 1968 gave American Indians living on reservations protections similar to those found in the Constitution.

Recent policy reflects resurgent ethnic pride and new political awareness that began in the 1960s and 1970s and has been asserted by activist groups such as the National Indian Youth Council and the American Indian Movement. Such groups have not only protested inadequate national assistance and the plight of the reservation population but also have attempted, with some success, to recover through litigation ancient tribal fishing and land rights sometimes worth millions of dollars. In recent decades,

several American Indian tribes have been granted state authorization to operate gaming facilities on reservation land, providing an important source of revenue for their communities. With this success, though, has come a backlash. Though tribes have historically operated largely autonomously of state control, state compacts authorizing gaming have resulted in large profits that the non-Indian populations of these states have seen as potential tax revenue, leading some states to seek tax rates on casino profits well in excess of standard business tax rates.



(Adobe Stock)

Congress has recognized American Indians as citizens since 1924.

3.8b Latinx

Numbering over 62 million and making up about 19 percent of the population, Latinx are the nation's fastest-growing minority. In the most recent census, the number of Americans identifying themselves as Latino or Latina was larger than the number identifying as African American. A majority originally came from Mexico; most of the others came from Puerto Rico, South America, and parts of Central America. Historically, Mexican Americans resided mainly in the Southwest, Cuban Americans in Florida, and Puerto Ricans in the Northeast; today, Latinx live in significant numbers throughout much of the country.

For decades, Latinx have encountered the same discriminations in voting, education, housing, and employment that have confronted African Americans, compounded by a language barrier. Amendments to the Voting Rights Act of 1965 require ballots to be printed in Spanish as well as English in areas in which Spanish-speaking people number more than 5 percent of the population. Partly as a result of this act, Latinx voter registration jumped dramatically nationwide between 1972 and 2010, rising to over 51 percent of eligible Latinx voters; yet Latinx are still less likely than African Americans and White people to register to vote.¹³⁷ Despite lower registration rates, by 2024 there were over 36 million eligible Latinx voters—comprising about 14.7 percent of the electorate.¹³⁸ Moreover, Title VI of the Civil Rights Act of 1964 requires public schools to provide bilingual instruction to students deficient in English. Both education and political participation are important to any group seeking to maintain ethnic identity in a diverse culture. Policies to lower language barriers have sparked a backlash among those who see non-English-speaking (particularly Spanish-speaking) persons as a threat to an American cultural identity.

3.8c Immigrants

As the Statue of Liberty signifies, America is a land of immigrants—but some have been more welcome than others. Until 1921 entry into the United States was virtually unlimited; but in that year Congress established the first of a series of ceilings on immigration that discriminated against persons from Eastern Europe and Asia, a bias not eliminated until 1965. Today the law sets a ceiling of 675,000 immigrants per year, including those admitted because of job skills and family relationships. Exceptions to the ceiling for refugees and others mean that the total number of immigrants admitted annually exceeds 1 million.

Thousands more—no one knows the exact number—successfully enter or remain in the country without authorization, putting pressure on public services and, some say, taking jobs from citizens and others who legally reside in the United States. About 11 million immigrants reside in the United States without authorization today. In response to these issues, Congress passed the Immigration Reform and Control Act in 1986. Among other things, the law requires employers to verify the American citizenship or legal status of all job applicants and provides stiff penalties for employers who hire undocumented workers. The 1986 law has had an unintended consequence: discrimination against persons of Latinx or Asian descent. A study by the General Accounting Office (an investigatory agency of Congress, now called the Government Accountability Office) found that one in five of the 4.6 million employers surveyed admitted that the law encouraged them to discriminate against job applicants who were “foreign-appearing” or “foreign-sounding.”¹³⁹ Arizona sparked immigration controversy in 2010 when it passed a law requiring law enforcement officials to determine the immigration status of anyone they reasonably suspected of being an illegal alien. Supporters argued that this misdemeanor offense merely enforces existing federal law, while opponents contended it would lead to discriminatory racial profiling.¹⁴⁰ In 2012, the Supreme Court struck down most of the law on federalism grounds, but let stand



“Statue of Liberty from Ellis Island,” National Park Service, 1930, via Library of Congress.)

The number of immigrants entering the United States was virtually unlimited until 1921.

the provision that requires state law enforcement officials to check the immigration status of people they arrest.¹⁴¹ Frustrated by a congressional stalemate on the issue, President Obama tackled immigration reform in 2014 via an executive action that would have deferred many deportations (see “Immigration Reform: Laws and Executive Orders” in Chapter 10). In 2016, however, the Court did not overturn an appellate decision that held that these actions exceeded the president’s constitutional authority.¹⁴² Immigration issues took center stage in the 2016 presidential campaign when Republican candidate Donald Trump claimed he would build a wall between the United States and Mexico that he would force Mexico to pay for. He also claimed he would ban all immigration by Muslims to the United States as an anti-terrorism measure. As president, Trump continued lobbying Congress to support building his wall, and he successfully imposed a ban on travel from several majority-Muslim nations, which the Supreme Court concluded was a lawful exercise of his power.¹⁴³ In May 2020, in response to the COVID-19 pandemic, President Trump signed an executive order temporarily suspending most immigration to the US. Though his rhetoric has been less vitriolic, President Biden has been forced to confront the challenges of an immigration system in need of reform. In June 2024, the Biden administration took steps to increase restrictions on immigrants seeking asylum in the US, while also developing a path to citizenship for many immigrants already living in the US without authorization.¹⁴⁴ Today, 68 percent of Americans view immigration as a good thing for the country, though a plurality believe the number of immigrants should be decreased.¹⁴⁵ Such sentiments, coupled with the continued influx of immigrants, guarantees that “immigration reform” will continue to be an important political topic for the foreseeable future.

3.8d Americans with Disabilities

One of the nation’s largest minority groups consists of the more than 61 million Americans with a physical or mental disability. The Civil Rights Act of 1964, the most comprehensive antidiscrimination legislation ever enacted by Congress, did not cover disabled Americans—long victims of bias in both the public and private sectors.

In 1990, Congress passed the Americans with Disabilities Act, which bans discrimination in employment (in businesses with more than fifteen employees) and in places of public accommodation (including not only restaurants and hotels but also establishments as varied as physicians’ offices, zoos, sports arenas, and dry cleaners). Called a “bill of rights for Americans with disabilities,” the law also stipulates that newly manufactured buses and railroad cars be accessible to persons in wheelchairs and that telephone companies provide service for those with hearing and speech impairments. The law’s definition of Americans with disabilities goes beyond those who rely on wheelchairs or who have difficulty seeing or hearing—it includes people with mental disorders and those with AIDS (acquired immune deficiency syndrome) and HIV (the virus that causes AIDS), but not those who use illegal drugs or who abuse legal drugs such as alcohol. Although in 2001 the Supreme Court ruled that the Americans with Disabilities Act required the PGA (Professional Golfers Association) to allow disabled persons to use golf carts during the PGA tour, the act suffered a major setback when the Court held that state employees could not sue states for failing to comply with the act.¹⁴⁶

Liberties and Rights in the Constitutional Framework

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

Chapter Review

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

Key Terms

affirmative action	86	equality of condition	82
bill of attainder	72	equality of opportunity	82
<i>Brown v. Board of Education of Topeka</i>	84	equality of result	82
capital case	74	establishment clause	68
Civil Rights Act of 1964	85	exclusionary rule	74
clear and present danger test.	65	ex post facto laws	72
comparable worth	91	felony	74
cruel and unusual punishment	75	First Amendment	64
de facto segregation.	86	Fourteenth Amendment	63
de jure segregation	86	Fourth Amendment.	73
Eighth Amendment.	75	free exercise clause	68
equal protection clause	82	incitement test	65

legal guilt	72	prior restraint	66
<i>Lemon</i> test	69	probable cause.	73
libel.	67	<i>Roe v. Wade</i>	77
<i>Miranda</i> rights	74	separate-but-equal doctrine.	83
misdemeanor.	74	Sixth Amendment	74
NAACP.	84	symbolic speech	67
Nineteenth Amendment	90	Thirteenth Amendment.	82
Ninth Amendment	77	trigger law.	78
obscenity.	66	Voting Rights Act of 1965	88
plea bargain	74	warrant	73
presumption of innocence.	72		

Readings for Further Study

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

The rapidly changing field of criminal procedure and criminal justice can be followed in *Criminal Justice: A Brief Introduction*, 14th ed., by Frank J. Schmallerger (New York: Pearson, 2024).

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

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

Lisa Garcia Bedolla and Christian Hosam examine Latinx politics in *Latino Politics*, 3rd ed. (Boston: Polity, 2021), and John A. Garcia and Gabriel R. Sanchez provide another useful account in *Latino Politics in America*, 4th ed. (Lanham, MD: Rowman & Littlefield, 2021). Matt Barreto and Gary M. Segura provide another important look at this issue in *Latino America: How America's Most Dynamic Population Is Poised to Transform the Politics of the Nation* (New York: PublicAffairs, 2014).

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Pop Quiz

1. The purpose of protecting _____ is to place certain practices beyond government's reach.
2. Of the possible restrictions on speech today, the Supreme Court is least likely to approve a _____.
3. The _____ clause keeps government from becoming the tool of one religious group against others.
4. A deal with a prosecutor to obtain a lesser charge or lighter sentence in exchange for a guilty plea is called a _____.
5. Affirmative action programs are often aimed at achieving equality of _____.
6. For the most part, the Supreme Court considers obscenity as unprotected speech. T F
7. The establishment clause forbids the creation of an official state religion. T F
8. A police officer must always present a warrant before any search is made. T F
9. The Supreme Court has required the states to formulate uniform policies toward capital punishment. T F
10. Civil rights refers exclusively to one's specific constitutional rights. T F
11. Which of the following statements does not reflect an important objective of free expression?
 - a) It is necessary to the political process set up by the Constitution.
 - b) It contributes to social and political stability.
 - c) It allows the dominant wisdom of the day to be challenged.
 - d) It aids self-development.
12. An example of symbolic speech is _____.
 - a) a sit-in
 - b) libel
 - c) obscenity
 - d) defamation of character
13. The Supreme Court has approved all except which of the following?
 - a) paying a state legislature's chaplain out of public funds
 - b) letting the Amish take their children out of school after the eighth grade
 - c) the formation of a religious club at a public high school
 - d) exempting from state law members of the American Indian Church who ingest peyote as part of a religious ritual
14. The exclusionary rule does which of the following?
 - a) allows retroactive application of criminal laws in certain cases
 - b) bypasses the procedural safeguards of the legal process when meting out punishment
 - c) denies government the use of evidence gained as a result of the violation of the suspect's rights
 - d) allows the police to search a suspect without a warrant
15. According to the Supreme Court, segregation between school districts is unconstitutional when which of the following occurs?
 - a) Each district is composed of over 85 percent of one race.
 - b) It is accompanied by large economic inequalities between the districts.
 - c) There is evidence that school boards have caused the segregation between districts.
 - d) Educational opportunities are substantially different between the districts.

Answers: 1. civil liberties 2. prior restraint 3. establishment 4. plea bargain 5. result 6. T 7. T 8. F 9. F 10. F 11. B 12. A 13. D 14. C 15. C