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Civil Liberties and Public Policy

Politics in Action: Free Speech on Campus

The Board of Regents of the University of Wisconsin System requires students at the university's Madison campus to pay an activity fee that supports various campus services and extracurricular student activities. In the university's view, such fees enhance students' educational experiences by promoting extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity, and providing opportunities to develop social skills—all consistent with the university's broad educational mission. Registered student organizations (RSOs) expressing a wide range of views are eligible to receive a portion of the fees, which the student government administers subject to the university's approval.

There has been broad agreement that the process for approving RSO applications for funding is administered in a viewpoint-neutral fashion. RSOs may also obtain funding through a student referendum. Some students, however, sued the university, alleging that the activity fee violated their First Amendment rights because it forced them to support expressions of views they did not share. They argued that the university must grant them the choice not to fund RSOs that engage in political and ideological expression offensive to their personal beliefs.

The Supreme Court held in a unanimous decision in *Board of Regents of University of Wisconsin System v. Southworth* that if a university determines that its mission is well served if students have the means to engage in dynamic discussion on a broad range of issues, it may

4.1 Trace the process by which the Bill of Rights has been applied to the states, p. 107.

4.2 Distinguish the two types of religious rights protected by the First Amendment and determine the boundaries of those rights, p. 109.

4.3 Differentiate the rights of free expression protected by the First Amendment and determine the boundaries of those rights, p. 116.

4.4 Describe the rights to assemble and associate protected by the First Amendment and their limitations, p. 126.

4.5 Describe the right to bear arms protected by the Second Amendment and its limitations, p. 128.

4.6 Characterize defendants' rights and identify issues that arise in their implementation, p. 130.

4.7 Outline the evolution of a right to privacy and its application to the issue of abortion, p. 143.

4.8 Assess how civil liberties affect democratic government and how they both limit and expand the scope of government, p. 145.

These UCLA students are exercising their right to protest, an important civil liberty. Determining the boundaries of civil liberties often raises complex questions and may involve balancing competing values.

MyPoliSciLab Video Series

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The Big Picture Ensure that your civil liberties are being upheld. Author George C. Edwards III breaks down the civil liberties that the United States Constitution guarantees, and he discusses how different rights can sometimes conflict with one another.

The Basics What are civil liberties and where do they come from? In this video, you will learn about our First Amendment guarantees and about protections the Bill of Rights provides those accused of crimes. In the process, you'll discover how our liberties have changed over time to reflect our changing values and needs.

In Context Uncover the importance of civil liberties in a changing American society. University of Massachusetts at Boston political scientist Maurice T. Cunningham identifies the origins of our civil liberties and evaluates the clash between national security and civil liberties in a post-9/11 age.

Thinking Like a Political Scientist What are some of the challenges facing political scientists in regards to civil liberties? In this video, University of Massachusetts at Boston political scientist Maurice T. Cunningham raises some of the thought-provoking questions regarding civil liberties that have arisen during the last decade.

In the Real World The American legal system and the American people have both struggled over whether the death penalty should be imposed in this country. In this segment, we'll hear what citizens have to say about the death penalty.

So What? Want to stage a protest in your community? Find out what protections and rights you are entitled to as a demonstrator—as well as what limitations you must work within. Author George C. Edwards III lays out the American civil liberty laws and gives examples of how students have exercised their rights in the past.

impose a mandatory fee to sustain such dialogue. The Court recognized that inevitably the fees subsidize speech that some students find objectionable or offensive. Thus, the Court held that a university must protect students' First Amendment rights by requiring viewpoint neutrality in the allocation of funding support.

The University of Wisconsin case is the sort of complex controversy that shapes American civil liberties. Debates about the right to abortion, the right to bear arms, the separation of church and state, and similar issues are constantly in the news. Some of these issues arise from conflicting interests. The need to protect society against crime often conflicts with society's need to protect the rights of people accused of crime. Other conflicts derive from strong differences of opinion about what is ethical, moral, or right. To some Americans, abortion is murder, the taking of a human life. To others, a woman's choice whether to bear a child, free of governmental intrusion, is a fundamental right. Everyone, however, is affected by the extent of our civil liberties.

Deciding complex questions about civil liberties requires balancing competing values, such as maintaining an open system of expression while protecting individuals from the excesses such a system may produce. Civil liberties are essential to democracy. How could we have free elections without free speech, for example? But does it follow that critics of officials should be able to say whatever they want, no matter how untrue? And who should decide the extent of our liberty? Should it be a representative institution such as Congress or a judicial elite such as the Supreme Court?

The role of the government in resolving civil liberties controversies is also the subject of much debate. Conservatives usually advocate narrowing the scope of government, yet many conservatives strongly support government-imposed limits on abortion and government-sanctioned prayers in public schools. They also want government to be less hindered by concern for defendants' rights. Liberals, who typically support a broader scope of government, usually want to limit government's role in prohibiting abortion and encouraging religious activities and to place greater constraints on government's freedom of action in the criminal justice system.

civil liberties
The constitutional and other legal protections against government actions. Our civil liberties are formally set down in the Bill of Rights.

Bill of Rights
The first 10 amendments to the U.S. Constitution, which define such basic liberties as freedom of religion, speech, and press and guarantee defendants' rights.

Civil liberties are constitutional and other legal protections of individuals against government actions. Americans' civil liberties are set down in the **Bill of Rights**, the first 10 amendments to the Constitution. At first glance, many questions about civil liberties issues may seem straightforward. For example, the Bill of Rights' guarantee of a free press appears to mean that Americans can write what they choose. In the real world of American law, however, these issues are subtle and complex.

Disputes about civil liberties often end up in court. The Supreme Court of the United States is the final interpreter of the content and scope of our liberties; this ultimate power to interpret the Constitution accounts for the ferocious debate over presidential appointments to the Supreme Court.

Throughout this chapter you will find special features titled "You Are the Judge." Each feature describes an actual case heard by the Supreme Court and asks you to decide the case and then compare your decision with that of the Court.

To understand the specifics of American civil liberties, we must first understand the Bill of Rights.

Issues of civil liberties present many vexing problems for the courts to resolve.

- *For example, is a display of the Ten Commandments on a government site simply a recognition of their historic importance to the development of law or an impermissible use of government power to establish religion?*

The Bill of Rights

4.1 Trace the process by which the Bill of Rights has been applied to the states.

By 1787, all state constitutions had bills of rights, some of which survive, intact, to this day. Although the new U.S. Constitution had no bill of rights, the state ratifying conventions made its inclusion a condition of ratification. The First Congress passed the Bill of Rights in 1789 and sent it to the states for ratification. In 1791, these amendments became part of the Constitution.

The Bill of Rights—Then and Now

The Bill of Rights ensures Americans' basic liberties, such as freedom of speech and religion, and protection against arbitrary searches and being held for long periods without trial (see Table 4.1). When the Bill of Rights was ratified, British abuses of the colonists' civil liberties were still a fresh and bitter memory. Colonial officials had jailed newspaper editors, arrested citizens without cause, and detained people and forced them to confess at gunpoint or worse. Thus, the first 10 amendments enjoyed great popular support.

Political scientists have discovered that people are devotees of rights in theory but that their support often wavers when it comes time to put those rights into practice.[1] For example, Americans in general believe in freedom of speech, but many citizens would oppose letting the Ku Klux Klan speak in their neighborhood or allowing public schools to teach about atheism or homosexuality. In addition, Americans seem willing to trade civil liberties for security when they feel that the nation is threatened, as in the case of terrorism.[2] As you will see in this chapter, because few rights are absolute, we cannot avoid the difficult questions of balancing civil liberties and other individual and societal values.

TABLE 4.1 THE BILL OF RIGHTS

These amendments were passed by Congress on September 25, 1789, and ratified by the states on December 15, 1791.

Amendment I—Religion, Speech, Assembly, Petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II—Right to Bear Arms

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Amendment III—Quartering of Soldiers

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

Amendment V—Grand Juries, Double Jeopardy, Self-Incrimination, Due Process, Eminent Domain

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Criminal Court Procedures

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII—Trial by Jury in Common-Law Cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States.

Amendment VIII—Bails, Fines, and Punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX—Rights Retained by the People

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X—Rights Reserved to the States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Bill of Rights and the States

Take another look at the **First Amendment**. Note the first words: "Congress shall make no law. . . ." The Founders wrote the Bill of Rights to restrict the powers of the new national government. In 1791, Americans were comfortable with their state governments; after all, every state constitution had its own bill of rights. Thus, a literal reading of the First Amendment suggests that it does not prohibit a state government from passing a law prohibiting the free exercise of religion, free speech, or freedom of the press.

What happens, however, if a state passes a law violating one of the rights protected by the federal Bill of Rights and the state's constitution does not prohibit this abridgment of freedom? In 1833, the answer to that question was "nothing." The Bill of Rights, said the Court in ***Barron v. Baltimore***, restrained only the national government, not states and cities.

An opening toward a different answer was provided by the **Fourteenth Amendment**, one of the three "Civil War amendments," which was ratified in 1868. The Fourteenth Amendment declares,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nonetheless, in the Slaughterhouse Cases (1873), the Supreme Court gave a narrow interpretation of the Fourteenth Amendment's *privileges or immunities clause*, concluding it applied only to national citizenship and not state citizenship and thus did little to protect rights against state actions.

In 1925, in ***Gitlow v. New York***, however, the Court relied on the Fourteenth Amendment to rule that a state government must respect some First Amendment rights. Specifically, the Court said that freedoms of speech and press "were fundamental personal rights and liberties protected by the **due process clause** of the Fourteenth Amendment from impairment by the states." In effect, the Court interpreted the Fourteenth Amendment to say that states could not abridge the freedoms of expression protected by the First Amendment.

This decision began the development of the **incorporation doctrine**, the legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment. In *Gitlow*, the Supreme Court held only parts of the First Amendment to be binding on the states. Gradually, and especially during the 1960s, the Court applied most of the Bill of Rights to the states (see Table 4.2). Many of the decisions that nationalized provisions of the Bill of Rights were controversial. Nevertheless, today the Bill of Rights guarantees individual freedoms against infringement by state and local governments as well as by the national government. Only the Third and Seventh Amendments, the grand jury requirement of the Fifth Amendment, and the prohibition against excessive fines and bail in the Eighth Amendment have not been applied specifically to the states.

First Amendment
The constitutional amendment that establishes the four great liberties: freedom of the press, of speech, of religion, and of assembly.

Barron v. Baltimore
The 1833 Supreme Court decision holding that the Bill of Rights restrained only the national government, not the states and cities.

Fourteenth Amendment
The constitutional amendment adopted after the Civil War that declares "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Gitlow v. New York
The 1925 Supreme Court decision holding that freedoms of press and speech are "fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states" as well as by the federal government.

due process clause
Part of the Fourteenth Amendment guaranteeing that persons cannot be deprived of life, liberty, or property by the United States or state governments without due process of law.

incorporation doctrine
The legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment.

establishment clause
Part of the First Amendment stating that "Congress shall make no law respecting an establishment of religion."

Freedom of Religion

4.2 Distinguish the two types of religious rights protected by the First Amendment and determine the boundaries of those rights.

The First Amendment contains two elements regarding religion and government. These elements are commonly referred to as the establishment clause and the free exercise clause. The **establishment clause** states that "Congress shall make no law respecting an establishment of religion."

TABLE 4.2 THE INCORPORATION OF THE BILL OF RIGHTS

Date	Amendment	Right	Case
1925	First	Freedom of speech	*Gitlow v. New York*
1931	First	Freedom of the press	*Near v. Minnesota*
1937	First	Freedom of assembly	*De Jonge v. Oregon*
1940	First	Free exercise of religion	*Cantwell v. Connecticut*
1947	First	Establishment of religion	*Everson v. Board of Education*
1958	First	Freedom of association	*NAACP v. Alabama*
1963	First	Right to petition government	*NAACP v. Button*
2010	Second	Right to bear arms	*McDonald v. Chicago*
	Third	No quartering of soldiers	Not incorporated[a]
1949	Fourth	No unreasonable searches and seizures	*Wolf v. Colorado*
1961	Fourth	Exclusionary rule	*Mapp v. Ohio*
1897	Fifth	Guarantee of just compensation	*Chicago, Burlington, and Quincy RR v. Chicago*
1964	Fifth	Immunity from self-incrimination	*Mallory v. Hogan*
1969	Fifth	Immunity from double jeopardy	*Benton v. Maryland*
	Fifth	Right to grand jury indictment	Not incorporated
1932	Sixth	Right to counsel in capital cases	*Powell v. Alabama*
1948	Sixth	Right to public trial	*In re Oliver*
1963	Sixth	Right to counsel in felony cases	*Gideon v. Wainwright*
1965	Sixth	Right to confrontation of witnesses	*Pointer v. Texas*
1966	Sixth	Right to impartial jury	*Parker v. Gladden*
1967	Sixth	Right to speedy trial	*Klopfer v. North Carolina*
1967	Sixth	Right to compulsory process for obtaining witnesses	*Washington v. Texas*
1968	Sixth	Right to jury trial for serious crimes	*Duncan v. Louisiana*
1972	Sixth	Right to counsel for all crimes involving jail terms	*Argersinger v. Hamlin*
	Seventh	Right to jury trial in civil cases	Not incorporated
1962	Eighth	Freedom from cruel and unusual punishment	*Robinson v. California*
	Eighth	Freedom from excessive fines or bail	Not incorporated
1965	Ninth	Right of privacy	*Griswold v. Connecticut*

[a]The quartering of soldiers has not occurred under the Constitution.

free exercise clause
A First Amendment provision that prohibits government from interfering with the practice of religion.

The **free exercise clause** prohibits the abridgment of citizens' freedom to worship or not to worship as they please. Sometimes these freedoms conflict. The government's practice of providing chaplains on military bases is one example of this conflict; some accuse the government of establishing religion in order to ensure that members of the armed forces can freely practice their religion. Usually, however, the establishment clause and the free exercise clause cases raise different kinds of conflicts. Religious issues and controversies have assumed importance in political debate in recent years,[3] so it is not surprising that interpretations of the Constitution are intertwined with partisan politics.

The Establishment Clause

Some nations, such as Great Britain, have an established church that is officially supported by the government and recognized as a national institution. A few American colonies had official churches, but the religious persecutions that incited many colonists to move to America discouraged any desire that the First Congress might have had to

establish a national church in the United States. Thus, the First Amendment prohibits an established national religion.

It is much less clear, however, what else the First Congress intended to include in the establishment clause. Some people argued that it meant only that the government could not favor one religion over another. In contrast, Thomas Jefferson argued that the First Amendment created a "wall of separation" between church and state, forbidding not just favoritism but also any support for religion at all. These interpretations continue to provoke argument, especially when religion is mixed with education, as occurs with such issues as government aid to church-related schools and prayer in public schools.

EDUCATION Proponents of aid to church-related schools argue that it does not favor any specific religion. Some opponents reply that the Roman Catholic Church has by far the largest religious school system in the country and gets most of the aid. It was Lyndon B. Johnson, a Protestant, who in 1965 obtained the passage of the first substantial aid to parochial elementary and secondary schools. He argued that the aid went to students, not schools, and thus should go wherever the students were, including church-related schools.

In ***Lemon v. Kurtzman*** (1971), the Supreme Court declared that laws that provide aid to church-related schools must do the following:

1. Have a secular legislative purpose
2. Have a primary effect that neither advances nor inhibits religion
3. Not foster an excessive government "entanglement" with religion

Since that time, the Court has had to draw a fine line between aid that is permissible and aid that is not. For instance, the Court has allowed religiously affiliated colleges and universities to use public funds to construct buildings. Public funds may also be used to provide students in parochial schools with textbooks, computers and other instructional equipment, lunches, and transportation to and from school and to administer standardized testing services. However, schools may not use public funds to pay teacher salaries or to provide transportation for students on field trips. The theory underlying these decisions is that it is possible to determine that buildings, textbooks, lunches, school buses, and national tests are not used to support sectarian education. However, determining how teachers handle a subject in class or focus a field trip may require complex and constitutionally impermissible regulation of religion.

In an important loosening of its constraints on aid to parochial schools, the Supreme Court decided in 1997 in *Agostini v. Felton* that public school systems could send teachers into parochial schools to teach remedial and supplemental classes to needy children. In a landmark decision in 2002, the Court in ***Zelman v. Simmons-Harris*** upheld a program that provided some families in Cleveland, Ohio, with vouchers they could use to pay tuition at religious schools.

RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS In recent decades, the Supreme Court has also been opening public schools to religious activities. The Court decided that public universities that permit student groups to use their facilities must allow student religious groups on campus to use the facilities for religious worship.[4] In the 1984 Equal Access Act, Congress made it unlawful for any public high school receiving federal funds (almost all of them do) to keep student groups from using school facilities for religious worship if the school opens its facilities for other student meetings.[5] In 2001, the Supreme Court extended this principle to public elementary schools.[6] Similarly, in 1993, the Court required public schools that rent facilities to organizations to do the same for religious groups.[7]

Beyond the question of use of facilities there is the question of use of public funds for religious activities in public school contexts. In 1995, the Court held that

Lemon v. Kurtzman
The 1971 Supreme Court decision that established that aid to church-related schools must (1) have a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.

Zelman v. Simmons-Harris
The 2002 Supreme Court decision that upheld a state program providing families with vouchers that could be used to pay for tuition at religious schools.

Engel v. Vitale
The 1962 Supreme Court decision holding that state officials violated the First Amendment when they wrote a prayer to be recited by New York's schoolchildren.

School District of Abington Township, Pennsylvania v. Schempp
The 1963 Supreme Court decision holding that a Pennsylvania law requiring Bible reading in schools violated the establishment clause of the First Amendment.

the University of Virginia was constitutionally required to subsidize a student religious magazine on the same basis as other student publications.[8] However, in 2004, the Court held that the state of Washington could exclude students pursuing a devotional theology degree from its general scholarship program.[9]

The threshold of constitutional acceptability becomes higher when public funds are used more directly for education. Thus, school authorities may not permit religious instructors to come into public school buildings during the school day to provide religious education,[10] although they may release students from part of the compulsory school day to receive religious instruction elsewhere.[11] In 1980, the Court also prohibited the posting of the Ten Commandments on the walls of public classrooms.[12]

Two particularly contentious topics related to religion in public schools are school prayer and the teaching of "alternatives" to the theory of evolution.

SCHOOL PRAYER School prayer is perhaps the most controversial religious issue. In ***Engel v. Vitale*** (1962) and ***School District of Abington Township, Pennsylvania v. Schempp*** (1963), the Court aroused the wrath of many Americans by ruling that recitations of prayers (in the former case) or Bible passages (in the latter) as part of classroom exercises in public schools violated the establishment clause. In the 1963 decision, the justices observed that "the place of religion in our society is an exalted one . . . [but] in the relationship between man and religion, the State is firmly committed to a position of neutrality."

It is *not* unconstitutional, of course, to pray in public schools. Students may pray silently as much as they wish. What the Constitution forbids is the sponsorship or encouragement of prayer, directly or indirectly, by public school authorities. Thus, the Court has ruled that school-sponsored prayer at a public school graduation[13] and student-led prayer at football games were unconstitutional.[14] When several Alabama laws authorized schools to hold one-minute periods of silence for "meditation or voluntary prayer," the Court rejected this approach because the state made it clear that the purpose of the statute was to return prayer to the schools. The Court indicated that a less clumsy approach would pass its scrutiny.[15]

One of the most controversial issues regarding the First Amendment's prohibition of the establishment of religion is prayer in public schools. Although students may pray on their own, school authorities may not sponsor or encourage prayer. Some schools violate the law, however.

• *What was your experience with prayer in school?*

Many school districts have simply ignored the Supreme Court's ban on school prayer and continue to allow prayers in their classrooms. Some religious groups and many members of Congress, especially conservative Republicans, have pushed for a constitutional amendment permitting prayer in school. A majority of the public consistently supports school prayer.[16]

EVOLUTION Fundamentalist and evangelical Christian groups have pressed some state legislatures to mandate the teaching of "creation science"—their alternative to Darwin's theory of evolution—in public schools. Louisiana, for example, passed a law requiring schools that taught Darwinian theory to teach creation science, too. In 1987, the Supreme Court ruled that this law violated the establishment clause.[17] The Court had already held, in a 1968 case, that states cannot prohibit Darwin's theory of evolution from being taught in the public schools.[18] More recently, some groups have advocated, as an alternative to evolution, "intelligent design," the view that living things are too complicated to have resulted from natural selection and thus must be the result of an intelligent cause. Although they claim that their belief has no religious implications, lower courts have begun to rule that requiring teachers to present intelligent design as an alternative to evolution is a constitutionally unacceptable promotion of religion in the classroom.

PUBLIC DISPLAYS The Supreme Court's struggle to interpret the establishment clause is also evident in areas other than education. In 2005, the Supreme Court found that two Kentucky counties violated the establishment clause value of official religious neutrality when they posted large, readily visible copies of the Ten Commandments in their courthouses. The Court concluded that the counties' ostensible and predominant purpose was to advance religion.[19] However, the Court did not hold that a governmental body can never integrate a sacred text constitutionally into a governmental display on law or history. Thus, in 2005, the Court also upheld the inclusion of a monolith inscribed with the Ten Commandments among the 21 historical markers and 17 monuments surrounding the Texas State Capitol. The Court argued that simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause. Texas's placement of the Commandments monument on its capitol grounds was a far more passive use of those texts than their posting in elementary school classrooms and also served a legitimate historical purpose.[20]

Displays of religious symbols during the holidays have prompted considerable controversy. In 1984, the Court found that Pawtucket, Rhode Island, could set up a Christmas nativity scene on public property—along with Santa's house and sleigh, Christmas trees, and other symbols of the Christmas season.[21] Five years later, the Court extended the principle to a Hanukkah menorah placed next to a Christmas tree. The Court concluded that these displays had a secular purpose and provided little or no benefit to religion. At the same time, the Court invalidated the display of the nativity scene without secular symbols in a courthouse because, in this context, the county gave the impression of endorsing the display's religious message.[22]

Why It *Matters* to You

The Establishment Clause

What if the Constitution did not prohibit the establishment of religion? If a dominant religion received public funds and was in a position to control health care, public education, and other important aspects of public policy, these policies might be quite different from what they are today. In addition, the potential for conflict between followers of the established religion and adherents of other religions would be substantial.

The Court's basic position is that the Constitution does not require complete separation of church and state; it mandates accommodation of all religions and forbids hostility toward any. At the same time, the Constitution forbids government endorsement of religious beliefs. Drawing the line between neutrality toward religion and promotion of it is not easy; this dilemma ensures that cases involving the establishment of religion will continue to come before the Court.

The Free Exercise Clause

The First Amendment also guarantees the free exercise of religion. This guarantee seems simple enough. Whether people hold no religious beliefs, practice voodoo, or go to church, temple, or mosque, they should have the right to practice religion as they choose. In general, Americans are tolerant of those with religious views outside the mainstream, as you can see in "America in Perspective: Tolerance for the Free Speech Rights of Religious Extremists."

The matter is, of course, more complicated. Religions sometimes forbid actions that society thinks are necessary; conversely, religions may require actions that society finds unacceptable. For example, what if a religion justifies multiple marriages or the use of illegal drugs? Muhammad Ali, the boxing champion, refused induction into the armed services during the Vietnam War because, he said, military service would violate his Muslim faith. Amish parents often refuse to send their children to public schools. Jehovah's Witnesses and Christian Scientists may refuse to accept blood transfusions and certain other kinds of medical treatment for themselves or their children.

America in Perspective

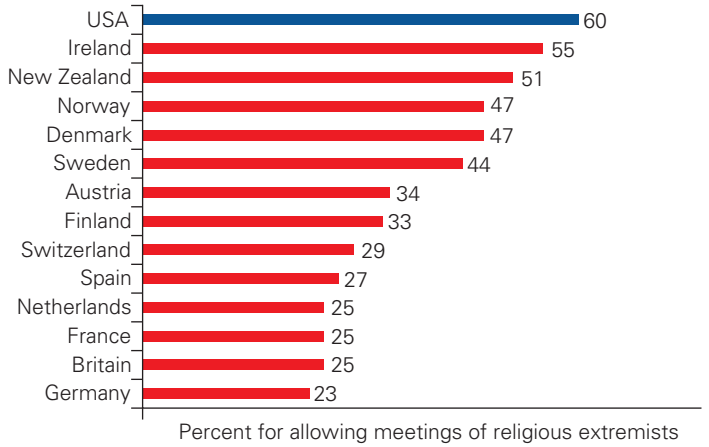
Tolerance for the Free Speech Rights of Religious Extremists

Despite 9/11, Americans are more tolerant of the free speech rights of religious extremists than are people in other democracies with developed economies.

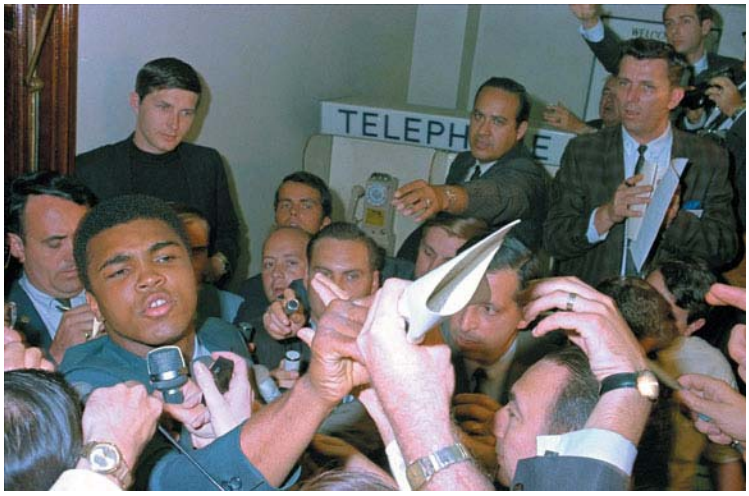
Question: There are some people whose views are considered extreme by the majority. Consider religious extremists, that is, people who believe that their religion is the only true faith and all other religions should be considered enemies. Do you think such people should be allowed to hold public meetings to express their views?

CRITICAL THINKING QUESTION

Why do you think Americans are so tolerant?



SOURCE: Authors' analysis of 2008 International Social Survey Program data.



Cassius Clay was the world heavyweight boxing champion before he converted to Islam, changed his name to Muhammad Ali, and was drafted during the war in Vietnam. Arguing that he opposed war on religious grounds, he refused to join the army. The federal government prosecuted him for draft dodging, and he was stripped of his title. In 1971, the Supreme Court overturned his conviction for draft evasion. He is pictured here at the Houston induction center in 1967.

Consistently maintaining that people have an inviolable right to *believe* what they want, the courts have been more cautious about the right to *practice* a belief. What if, the Supreme Court once asked, a person "believed that human sacrifices were a necessary part of religious worship?" Not all religious practices receive constitutional protection. Thus, over the years, the Court has upheld laws and regulations forbidding polygamy, prohibiting business activities on Sunday (restricting the commerce of Orthodox Jews, for whom Sunday is a workday), denying tax exemptions to religious schools that discriminate on the basis of race,[23] allowing the building of a road through ground sacred to some Native Americans, and even prohibiting a Jewish air force captain from wearing his yarmulke while on duty (Congress later intervened to permit military personnel to wear yarmulkes).

At the same time, Congress and the Supreme Court have granted protection to a range of religiously motivated practices. The Court allowed Amish parents to take their children out of school after the eighth grade, reasoning that the Amish community was well established and that its children would not burden the state.[24] More broadly, although a state can compel parents to send their children to an accredited school, parents have a right to choose religious schools rather than public schools for their children's education. A state may not require Jehovah's Witnesses or members of other religions to participate in public school flag-saluting ceremonies. Congress has also decided—and the courts have upheld—that people can become conscientious objectors to war on religious grounds. In 2012, the Court held that just as the establishment clause prevents the government from appointing ministers, the free exercise clause prevents it from interfering with the freedom of religious groups to select their own. Thus, religious groups are not subject to employment discrimination laws.[25]

What kind of laws that affect religious practices might be constitutional? In 1988, in upholding Oregon's prosecution of persons using the drug peyote as part of their religious rituals (*Employment Division v. Smith)*, the Court decided that state laws interfering with religious practices but not specifically aimed at religion were constitutional. As long as a law did not single out religious practices because they were engaged in for religious reasons, it could apply to conduct even if the conduct were religiously inspired.[26] However, the Religious Freedom Restoration Act, which Congress passed in 1993 and which applies only to the national government,[27] requires laws to meet a more restrictive standard: a law or regulation cannot interfere with religious

practices unless the government can show that it was narrowly tailored and in pursuit of a "compelling interest." The Court in a 2006 decision allowed a small religious sect to use a hallucinogenic tea in its rituals despite the federal government's attempts to bar its use.[28]

In 2000, Congress passed legislation that, in accordance with the "compelling interest" standard, made it more difficult for local governments to enforce zoning or other regulations against religious groups and required governments to allow those institutionalized in state facilities (such as prisons) to practice their faith. The Supreme Court upheld this law in 2005.[29] You can examine a free exercise case involving local laws in "You Are the Judge: The Case of Animal Sacrifices."

Freedom of Expression

4.3 Differentiate the rights of free expression protected by the First Amendment and determine the boundaries of those rights.

Explore on **MyPoliSciLab** **Simulation**: You Are a Police Officer

A democracy depends on the free expression of ideas. Thoughts that are muffled, speech that is forbidden, and meetings that cannot be held are the enemies of the democratic process. Totalitarian governments know this, which is why they go to enormous trouble to limit expression.

Americans pride themselves on their free and open society. Freedom of conscience is absolute; Americans can *believe* whatever they want. The First Amendment plainly forbids the national government from limiting freedom of *expression*—that is, the right to say or publish what one believes. Is freedom of expression, then, like freedom of conscience, *absolute*? Most experts answer "no." Supreme Court justice Oliver Wendell Holmes offered a classic example of impermissible speech in 1919: "The most stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theater and causing a panic."

You Are the Judge

The Case of Animal Sacrifices

The church of Lukumi Babalu Aye, in Hialeah, Florida, practiced Santeria, a Caribbean-based mix of African ritual, voodoo, and Catholicism. Central to Santeria is the ritual sacrifice of animals—at birth, marriage, and death rites as well as at ceremonies to cure the sick and initiate new members.

Offended by these rituals, the city of Hialeah passed ordinances prohibiting animal sacrifices in religious ceremonies. The church challenged the constitutionality of these laws, claiming they violated the free exercise clause of the First Amendment because the ordinances essentially barred the practice of Santeria. The city, the Santerians claimed, was discriminating against a religious minority. Besides, many other forms of killing animals were legal, including fishing, using animals in medical research, selling lobsters to be boiled alive, and feeding live rats to snakes.

YOU BE THE JUDGE:

Do the Santerians have a constitutional right to sacrifice animals in their religious rituals? Does the city's interest in protecting animals outweigh the Santerians' requirement for animal sacrifice?

DECISION:

In 1993, the Court overturned the Hialeah ordinances that prohibited the use of animal sacrifice in religious ritual. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* the justices concluded that governments that permit other forms of killing animals may not then ban sacrifices or ritual killings. In this instance, the Court found no compelling state interest that justified the abridgment of the freedom of religion.

Given that not all speech is permissible, the courts have had to address two questions in deciding where to draw the line separating permissible from impermissible speech. First, can the government censor speech that it thinks will violate the law? Second, what constitutes *speech* (or press) within the meaning of the First Amendment and thus deserves constitutional protection, and what does not? Holding a political rally to attack an opposing candidate's stand receives First Amendment protection. Obscenity and libel and incitements to violence and overthrow of the government do not. But just how do we know, for example, what is obscene? To complicate matters further, certain forms of nonverbal speech, such as picketing, are considered symbolic speech and receive First Amendment protection. Judges also have had to balance freedom of expression against competing values, such as public order, national security, and the right to a fair trial. Then there are questions regarding commercial speech. Does it receive the same protection as religious and political speech? Regulating the publicly owned airwaves raises yet another set of difficult questions.

One controversial freedom of expression issue involves so-called hate speech. Advocates of regulating hate speech forcefully argue that, for example, racial insults, like fighting words, are "undeserving of First Amendment protection because the perpetrator's intent is not to discover the truth or invite dialogue, but to injure the victim."[30] In contrast, critics of hate speech policy argue that "sacrificing free speech rights is too high a price to pay to advance the cause of equality."[31] In 1992, the Supreme Court ruled that legislatures and universities may not single out racial, religious, or sexual insults or threats for prosecution as "hate speech" or "bias crimes."[32]

Prior Restraint

In the United States, the First Amendment ensures that even if the government frowns on some material, a person's right to publish it is all but inviolable. That is, it ensures there will not be **prior restraint**, government actions that prevent material from being published—or, in a word, censorship. A landmark case involving prior restraint is ***Near v. Minnesota*** (1931). A blunt newspaper editor called local officials a string of names including "grafters" and "Jewish gangsters." The state closed down his business, preventing him from publishing, but the Supreme Court ordered the paper reopened.[33] Of course, the newspaper editor—or anyone else—could later be punished for violating a law or someone's rights *after* publication.

The extent of an individual's or group's freedom from prior restraint does depend in part, however, on who that individual or group is. Expressions of students in public school may be limited more than those of adults in other settings. In 1988, the Supreme Court ruled that a high school newspaper was not a public forum and could be regulated in "any reasonable manner" by school officials.[34] In 2007, the Court held that the special characteristics of the school environment and the governmental interest in stopping student drug abuse allow schools to restrict student expressions that they reasonably regard as promoting such abuse.[35]

The Supreme Court has also upheld restrictions on the right to publish in the name of national security. Wartime often brings censorship to protect classified information. These restrictions often have public support; few would find it unconstitutional if a newspaper, for example, were hauled into court for publishing troop movement plans during a war. Nor have the restrictions upheld been limited to wartime censorship. The national government has successfully sued former CIA agents for failing to meet their contractual obligations to submit books about their work to the agency for censorship, even though the books revealed no classified information.[36] In recent years, WikiLeaks has published hundreds of thousands of classified government documents covering a wide of range of foreign policy issues. The U.S. Department of Justice has opened a criminal probe of WikiLeaks founder Julian Assange.

prior restraint
Government actions preventing material from being published. Prior restraint is usually prohibited by the First Amendment, as confirmed in *Near v. Minnesota.*

Near v. Minnesota
The 1931 Supreme Court decision holding that the First Amendment protects newspapers from prior restraint.

Schenck v. United States
A 1919 Supreme Court decision upholding the conviction of a socialist who had urged resistance to the draft during World War I. Justice Holmes declared that government can limit speech if the speech provokes a "clear and present danger" of substantive evils.

Nevertheless, the courts are reluctant to issue injunctions prohibiting the publication of material even in the area of national security. The most famous case regarding prior restraint and national security involved the publication of stolen Pentagon papers. You can examine this case in "You Are the Judge: The Case of the Purloined Pentagon Papers."

Free Speech and Public Order

In wartime and peacetime, considerable conflict has arisen over the tradeoff between free speech and the need for public order. During World War I, Charles T. Schenck, the secretary of the American Socialist Party, distributed thousands of leaflets urging young men to resist the draft. Schenck was charged with impeding the war effort. The Supreme Court upheld his conviction in ***Schenck v. United States*** (1919). Justice Holmes declared that government could limit speech if it provokes a clear and present danger of substantive evils. Only when such danger exists can government restrain speech. It is difficult to say, of course, when speech becomes dangerous rather than simply inconvenient for the government.

The courts confronted the issue of free speech and public order during the 1950s. In the late 1940s and early 1950s, there was widespread fear that communists had infiltrated the government. American anticommunism was a powerful force, and the national government was determined to jail the leaders of the Communist Party. Senator Joseph McCarthy and others in Congress persecuted people whom they thought were subversive, based on the Smith Act of 1940, which forbade advocating the violent overthrow of the American government. In *Dennis v. United States* (1951), the Supreme Court upheld prison sentences for several Communist Party leaders for conspiring to advocate the violent overthrow of the government—even in the absence of evidence that they actually urged people to commit specific

You Are the Judge

The Case of the Purloined Pentagon Papers

During the Johnson administration, the Department of Defense amassed an elaborate secret history of American involvement in the Vietnam War that included hundreds of documents, many of them secret cables, memos, and war plans. Many documented American ineptitude and South Vietnamese duplicity. One former Pentagon official, Daniel Ellsberg, who had become disillusioned with the Vietnam War, managed to retain access to a copy of these Pentagon papers. Hoping that revelations of the Vietnam quagmire would help end American involvement, he decided to leak the Pentagon papers to the *New York Times*.

The Nixon administration pulled out all the stops in its effort to embarrass Ellsberg and prevent publication of the Pentagon papers. Nixon's chief domestic affairs adviser, John Ehrlichman, approved a burglary of Ellsberg's psychiatrist's office, hoping to find damaging information on Ellsberg. (The burglary was bungled, and it eventually led to Ehrlichman's conviction and imprisonment.) In the courts, Nixon administration lawyers sought an injunction against the *Times* that would have ordered it to cease publication of the secret documents. Government lawyers argued that national security was being breached and that Ellsberg had stolen the documents from the government. The *Times* argued that its freedom to publish would be violated if an injunction were granted. In 1971, the case of *New York Times v. United States* was decided by the Supreme Court.

YOU BE THE JUDGE:

Did the *Times* have a right to publish secret, stolen Department of Defense documents?

DECISION:

In a 6-to-3 decision, a majority of the justices agreed that the "no prior restraint" rule prohibited prosecution before the papers were published. The justices also made it clear that if the government brought prosecution for theft, the Court might be sympathetic. No such charges were filed.

The prevailing political climate often determines what limits the government will place on free speech. During the early 1950s, Senator Joseph McCarthy's persuasive—if unproven—accusations that many public officials were communists created an atmosphere in which the courts placed restrictions on freedom of expression—restrictions that would be unacceptable today.

Roth v. United States
A 1957 Supreme Court decision ruling that "obscenity is not within the area of constitutionally protected speech or press."

acts of violence. Although the activities of this tiny, unpopular group resembled yelling "Fire!" in an empty theater rather than a crowded one, the Court ruled that a communist takeover was so grave a danger that government could squelch their threat. Thus, it concluded that protecting national security outweighed First Amendment rights.

Soon the political climate changed, however, and the Court narrowed the interpretation of the Smith Act, making it more difficult to prosecute dissenters. In later years, the Court has found that it is permissible to advocate the violent overthrow of the government in the abstract but not actually to incite anyone to imminent lawless action (*Yates v. United States* [1957]; *Brandenburg v. Ohio* [1969]).

The 1960s brought waves of protest over political, economic, racial, and social issues and, especially, the Vietnam War. Many people in more recent times have engaged in public demonstrations, such as those opposing the war in Iraq or protesting against Wall Street. Courts have been quite supportive of the right to protest, pass out leaflets, or gather signatures on petitions—as long as it is done in public places. People may even distribute campaign literature anonymously.[37] First Amendment free speech guarantees do not apply when a person is on private property,[38] however, although a state may include politicking in shopping centers within its own free speech guarantee.[39] Moreover, cities cannot bar residents from posting signs on their own property.[40]

Obscenity

Obscenity is one of the more perplexing of free speech issues. In 1957, in ***Roth v. United States***, the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or press." Deciding what is obscene, however, has never been an easy matter. Obviously, public standards vary from time to time, place to place, and person to person. Much of today's MTV would have been banned only a few decades ago. What might be acceptable in Manhattan's Greenwich Village would shock residents of some other areas of the country. Works that some people call obscene might be good entertainment or even great art to others. At one time or another, the works of Aristophanes, Mark Twain, and even the "Tarzan" stories by Edgar Rice Burroughs

Miller v. California
A 1973 Supreme Court decision holding that community standards be used to determine whether material is obscene in terms of appealing to a "prurient interest" and being "patently offensive" and lacking in value.

were banned. The state of Georgia banned the acclaimed film *Carnal Knowledge* (a ban the Supreme Court struck down in 1974).[41]

The Court tried to clarify its doctrine by spelling out what could be classified as obscene and thus outside First Amendment protection in the 1973 case of ***Miller v. California***. Warren Burger, chief justice at the time, wrote that materials were obscene under the following circumstances:

1. The work, taken as a whole, appealed "to a prurient interest in sex."
2. The work showed "patently offensive" sexual conduct that was specifically defined by an obscenity law.
3. The work, taken as a whole, lacked "serious literary, artistic, political, or scientific value."

Decisions regarding whether material was obscene, said the Court, should be based on average people (in other words, juries) applying the contemporary standards of local—not national—communities.

The Court did provide "a few plain examples" of what sort of material might fall within this definition of obscenity. Among these examples were "patently offensive representations of ultimate sexual acts … actual or simulated," "patently offensive representations of masturbation or excretory functions," or "lewd exhibition of the genitals." Cities throughout the country duplicated the language of *Miller* in their obscenity ordinances. The qualifying adjectives *lewd* and *offensive* prevent communities from banning anatomy texts, for example, as obscene. The difficulty remains in determining what is *lewd* or *offensive*.

In addition to the difficulty in defining obscenity, another reason why obscenity convictions can be difficult to obtain is that no nationwide consensus exists that offensive material should be banned—at least not when it is restricted to adults. In many communities the laws are lenient regarding pornography, and prosecutors know that they may not get a jury to convict, even when the disputed material is obscene as defined by *Miller*. Thus, obscene material is widely available in adult bookstores, video stores, and movie theaters.

Many people are concerned about the impact of violent video games on children. Although government can regulate depictions of some sexual material, it cannot regulate depictions of violence.

Despite the Court's best efforts to define obscenity and determine when it can be banned, state and local governments continue to struggle with the application of these rulings. In one famous case, a small New Jersey town tried to get rid of a nude dancing parlor by using its zoning power to ban all live entertainment. The Court held that the measure was too broad, restricting too much expression, and was thus unlawful.[42] However, the Court has upheld laws specifically banning nude dancing when their effect on overall expression was minimal.[43] Jacksonville, Florida, tried to ban drive-in movies containing nudity. You can examine the Court's reaction in "You Are the Judge: The Case of the Drive-in Theater."

Regulations such as rating systems for movies and television aimed at keeping obscene material away from the young, who are considered more vulnerable to its harmful influences, have wide public support, and courts have consistently ruled that states may protect children from obscenity. Also strongly supported by the public and the courts are laws designed to protect the young against pornographic exploitation. It is a violation of federal law to receive sexually explicit photographs of children through the mail or over the Internet, and in 1990 the Supreme Court upheld Ohio's law forbidding the possession of child pornography.[44]

Advances in technology have created a new wrinkle in the obscenity issue. The Internet and the World Wide Web make it easier to distribute obscene material rapidly, and a number of online information services have taken advantage of this opportunity. In 1996, Congress passed the Communications Decency Act, banning obscene material and criminalizing the transmission of indecent speech or images to anyone under 18 years of age. This law made no exception for material that has serious literary, artistic, political, or scientific merit as outlined in *Miller v. California*, and in 1997, the Supreme Court overturned it as being overly broad and vague and thus a violation of

You Are the Judge

The Case of the Drive-in Theater

Almost everyone concedes that *sometimes* obscenity should be banned by public authorities. One instance might be when a person's right to show pornographic movies clashes with another's right to privacy. Showing dirty movies in an enclosed theater or in the privacy of your own living room is one thing. Showing them in public places where anyone, including schoolchildren, might inadvertently see them is something else. Or is it?

The city of Jacksonville, Florida, wanted to limit the showing of certain kinds of movies at drive-in theaters. Its city council reasoned that drive-ins were public places and that drivers passing by would be involuntarily exposed to movies they might prefer not to see. Some members of the council argued that drivers distracted by steamy scenes might even cause accidents. So the council passed a local ordinance forbidding movies showing nudity (defined in the ordinance as "bare buttocks … female bare breasts, or human bare pubic areas") at drive-in theaters.

Arrested for violating the ordinance, a Mr. Erznoznik challenged the constitutionality of the ordinance. He claimed that the law was overly broad and banned nudity, not obscenity. The lawyers for the city insisted that the law was acceptable under the First Amendment. The government, they claimed, had a responsibility to forbid a "public nuisance," especially one that might cause a traffic hazard.

YOU BE THE JUDGE:

Did Jacksonville's ban on nudity in movies at drive-ins go too far, or was it a constitutional limit on free speech?

DECISION:

In *Erznoznik v. Jacksonville* (1975), the Supreme Court held that Jacksonville's ordinance was unconstitutionally broad. The city council had gone too far; it could end up banning movies that might not be obscene. The ordinance would, said the Court, ban a film "containing a picture of a baby's buttocks, the nude body of a war victim or scenes from a culture where nudity is indigenous." Said Justice Powell for the Court, "Clearly, all nudity cannot be deemed obscene."

libel
The publication of false and malicious statements that damage someone's reputation.

New York Times v. Sullivan
A 1964 Supreme Court decision establishing that, to win damage suits for libel, public figures must prove that the defamatory statements were made with "actual malice" and reckless disregard for the truth.

free speech.[45] In 2002, the Court overturned a law banning virtual child pornography on similar grounds.[46] (Apparently the Supreme Court views the Internet similarly to print media, with similar protections against government regulation.) In 1999, however, the Court upheld prohibitions on obscene e-mail and faxes.

In 2011, the Court ruled that a California law banning the sale or rental of violent video games to minors violated the First Amendment because the games communicate ideas.[47] Depictions of violence, the Court added, have never been subject to government regulation and thus do not qualify for the same exceptional treatment afforded to obscene materials. The California law imposed a restriction on the content of protected speech and was invalid because the state could not show that it served a compelling government interest and was narrowly tailored to serve that interest.

Libel and Slander

Another type of expression not protected by the First Amendment is defamation, false statements that are malicious and damage a person's reputation. **Libel** refers to written defamation, *slander* to spoken defamation.

Of course, if politicians could collect damages for every untrue thing said about them, the right to criticize the government—which the Supreme Court termed "the central meaning of the First Amendment"—would be stifled. No one would dare be critical for fear of making a factual error. To encourage public debate, the Supreme Court has held in cases such as ***New York Times v. Sullivan*** (1964) that statements about public figures are libelous only if made with malice and reckless disregard for the truth. Public figures have to prove to a jury, in effect, that whoever wrote or said untrue statements about them knew that the statements were untrue and intended to harm them. This standard makes libel cases difficult for public figures to win because it is difficult to prove that a publication was intentionally malicious.[48]

Why It *Matters* to You

Libel Law

It is difficult for public figures to win libel cases. Public figures will likely lose even if they can show that the defendant made defamatory falsehoods about them. This may not be fair, but it is essential for people to feel free to criticize public officials. Fear of losing a lawsuit would have a chilling effect on democratic dialogue.

Private individuals have a lower standard to meet for winning libel lawsuits. They need show only that statements made about them were defamatory falsehoods and that the author was negligent. Nevertheless, it is unusual for someone to win a libel case, and most people do not wish to draw attention to critical statements about themselves.

If public debate is not free, there can be no democracy, yet in the process of free debate some reputations will be damaged (or at least bruised), sometimes unfairly. Libel cases must thus balance freedom of expression with respect for individual reputations. In one widely publicized case, General William Westmoreland, once the commander of American troops in South Vietnam, sued CBS over a documentary it broadcast called *The Uncounted Enemy*. It claimed that American military leaders in Vietnam, including Westmoreland, systematically lied to Washington about their success there to make it appear that the United States was winning the war. The evidence, including CBS's own internal memoranda, showed that the documentary made errors of fact. Westmoreland sued CBS for libel. Ultimately, the power of the press—in this case, a sloppy, arrogant press—prevailed. Fearing defeat at the trial, Westmoreland settled for a mild apology.[49]

An unusual case that explored the line between parody and libel came before the Supreme Court in 1988, when Reverend Jerry Falwell sued *Hustler* magazine. *Hustler* editor Larry Flynt had printed a parody of a Campari Liquor ad about various celebrities called "First Time" (in which celebrities related the first time they drank Campari, but with an intentional double meaning). When *Hustler* depicted the Reverend Jerry Falwell having had his "first time" in an outhouse with his mother, Falwell sued. He alleged that the ad subjected him to great emotional distress and mental anguish. The case tested the limits to which a publication could go to parody or lampoon a public figure. The Supreme Court ruled that they can go pretty far—all nine justices ruled in favor of the magazine.[50]

Texas v. Johnson
A 1989 case in which the Supreme Court struck down a law banning the burning of the American flag on the grounds that such action was symbolic speech protected by the First Amendment.

symbolic speech
Nonverbal communication, such as burning a flag or wearing an armband. The Supreme Court has accorded some symbolic speech protection under the First Amendment.

Symbolic Speech

Freedom of speech, more broadly interpreted, is a guarantee of freedom of expression. In 1965, school authorities in Des Moines, Iowa, suspended Mary Beth Tinker and her brother John when they wore black armbands to protest the Vietnam War. The Supreme Court held that the suspension violated the Tinkers' First Amendment rights. The right to freedom of speech, said the Court, went beyond the spoken word.[51]

As discussed in the chapter on the Constitution, when Gregory Johnson set a flag on fire at the 1984 Republican National Convention in Dallas to protest nuclear weapons, the Supreme Court decided that the state law prohibiting flag desecration violated the First Amendment (***Texas v. Johnson*** [1989]). Burning the flag, the Court said, constituted speech and not just dramatic action.[52] When Massachusetts courts ordered the organizers of the annual St. Patrick's Day parade to include the Irish-American Gay, Lesbian, and Bisexual Group of Boston, the Supreme Court declared that a parade is a form of protected speech, and thus that the organizers are free to include or exclude whomever they want.

Wearing an armband, burning a flag, and marching in a parade are examples of **symbolic speech**: actions that do not consist of speaking or writing but that express an opinion. Court decisions have classified these activities somewhere between pure speech and pure action. The doctrine of symbolic speech is not precise; for example, although burning a flag is protected speech, burning a draft card is not.[53] In 2003, the Court held that states may make it a crime to burn a cross with a purpose to intimidate, as long as the law clearly gives prosecutors the burden of proving that the act was intended as a threat and not as a form of symbolic expression.[54] Despite the imprecisions, these cases make it clear that First Amendment rights are not limited by a rigid definition of what constitutes speech.

Free Press and Fair Trials

The Bill of Rights is an inexhaustible source of potential conflicts among different types of freedoms. One is the conflict between the right of the press to print what it wants and the right to a fair trial. The quantity of press coverage given to the trial of Michael Jackson on charges of child sexual abuse was extraordinary, and little of it was sympathetic to Jackson. Defense attorneys argue that such publicity can inflame the community—and potential jurors—against defendants and compromise the fairness of a trial. It may very well.

Nevertheless, the Court has *never* upheld a restriction on the press in the interest of a fair trial. The Constitution's guarantee of freedom of the press entitles journalists to cover every trial. When a Nebraska judge issued a gag order forbidding the press to report any details of a particularly gory murder (or even to report the gag order itself), the outraged Nebraska Press Association took the case to the Supreme Court. The Court sided with the editors and revoked the gag order.[55] In 1980, the Court reversed a Virginia judge's order to close a murder trial to the public and the press. "The trial of a criminal case," said the Court, "must be open to the public."[56] A pretrial hearing,

Zurcher v. Stanford Daily
A 1978 Supreme Court decision holding that a search warrant could be applied to a newspaper without necessarily violating the First Amendment rights to freedom of the press.

commercial speech
Communication in the form of advertising, which can be restricted more than many other types of speech.

though, is a different matter. In a 1979 case, the Supreme Court permitted a closed hearing on the grounds that pretrial publicity might compromise the defendant's right to fairness. Ultimately, the only feasible measure that the judicial system can take against the influence of publicity in high-profile cases is to sequester the jury, thereby isolating it from the media and public opinion.

Occasionally a reporter withholds some critical evidence that either the prosecution or the defense wants in a criminal case, information that may be essential for a fair trial. Reporters argue that "protecting their sources" should exempt them from revealing notes from confidential informants. Some states have passed *shield laws* to protect reporters in these situations. In most states, however, reporters have no more rights than other citizens once a case has come to trial. The Supreme Court ruled in *Branzburg v. Hayes* (1972) that in the absence of shield laws, the right of a fair trial preempts the reporter's right to protect sources. After a violent confrontation with student protestors at Stanford University, the police got a search warrant and marched off to the *Stanford Daily* to obtain photographs of the scene they could use to make arrests. The paper argued that its files were protected by the First Amendment, but the decision in ***Zurcher v. Stanford Daily*** (1978) sided with the police.

Commercial Speech

As we have seen, not all forms of communication receive the full protection of the First Amendment. Laws restrict **commercial speech**, such as advertising, far more extensively than expressions of opinion on religious, political, or other matters. The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising. These regulations have responded to changes in social mores and priorities. At one time, for example, tampons could not be advertised on TV and cigarettes could; today, the situation is the reverse.

The FTC attempts to ensure that advertisers do not make false claims for their products, but "truth" in advertising does not prevent misleading promises. For example, when ads imply that the right mouthwash or deodorant will improve one's love life, that dubious message is perfectly legal.

Nevertheless, laws may regulate commercial speech on the airwaves in ways that would clearly be impossible in the political or religious realm—even to the point of forcing a manufacturer to say certain words. For example, the makers of Excedrin pain reliever were forced to add the words "on pain other than headache" in their commercials describing tests that supposedly supported the product's claims of superior effectiveness. (The test results were based on the pain that women experienced after giving birth.)

Although commercial speech is regulated more rigidly than other types of speech, the courts have been broadening its protection under the Constitution. For years, many states had laws that prohibited advertising for professional services—such as legal and engineering services—and for certain products ranging from eyeglasses and prescription drugs to condoms and abortions. Advocates of these laws claimed that they were designed to protect consumers against misleading claims, while critics charged that the laws prevented price competition. The courts have struck down many such restrictions as violations of freedom of speech, including restrictions on advertising casino gambling in states where such gambling is legal.[57] In general, the Supreme Court has allowed the regulation of commercial speech when the speech concerns unlawful activity or is misleading, but otherwise regulations must advance a substantial government interest and be no more extensive than necessary to serve that interest.[58]

Regulation of the Public Airwaves

The Federal Communications Commission (FCC) regulates the content, nature, and very existence of radio and television broadcasting. Although newspapers do not need licenses, radio and television stations do. A licensed station must comply with

regulations, including the requirement that it devote a certain percentage of broadcast time to public service, news, children's programming, political candidates, or views other than those its owners support. The rules are more relaxed for cable channels, which can specialize in a particular type of broadcasting because consumers pay for, and thus have more choice about, the service.

This sort of governmental interference would clearly violate the First Amendment if it were imposed on the print media. For example, Florida passed a law requiring newspapers in the state to provide space for political candidates to reply to newspaper criticisms. The Supreme Court, without hesitation, voided this law (***Miami Herald Publishing Company v. Tornillo*** [1974]). In contrast, in ***Red Lion Broadcasting Company v. Federal Communications Commission*** (1969), the Court upheld similar restrictions on radio and television stations, reasoning that such laws were justified because only a limited number of broadcast frequencies were available.

One FCC rule regulating the content of programs restricts the use of obscene words. Comedian George Carlin had a famous routine called "Filthy Words" that could never be said over the airwaves. A New York City radio station tested Carlin's assertion by airing his routine. The ensuing events proved Carlin right. In 1978, the Supreme Court upheld the commission's policy of barring these words from radio or television when children might hear them.[59] Similarly, the FCC twice fined New York radio personality Howard Stern $600,000 for indecency. Had Stern's commentaries been carried by cable or satellite instead of the airwaves, he could have expressed himself with impunity because cable is viewed as private communication between individuals. (In 2006, he made the move to satellite transmission.)

The Supreme Court has held that government has a legitimate right to regulate sexually oriented programming on cable television but that any such regulation must be narrowly tailored to serve a compelling government interest in the least restrictive way. Congress had passed a law banning transmission for most of the day so that children would not be exposed to such programming. The Court concluded that targeted blocking, in which subscribers can ask their cable companies to block a signal to their homes, is less restrictive and a feasible and effective means of furthering government's compelling interests, so banning transmission could not be justified.[60]

Miami Herald Publishing Company v. Tornillo

A 1974 case in which the Supreme Court held that a state could not force a newspaper to print replies from candidates it had criticized, illustrating the limited power of government to restrict the print media.

Red Lion Broadcasting Company v. Federal Communications Commission

A 1969 case in which the Supreme Court upheld restrictions on radio and television broadcasting similar to those it had overturned in *Miami Herald Publishing Company v. Tornillo*. It reasoned that such regulations are justified because there are only a limited number of broadcasting frequencies available.

Although the Supreme Court ruled in *Roth v. United States* that obscenity is not protected by the First Amendment, determining just what is obscene has proven difficult. Popular radio personality Howard Stern pressed the limits of obscenity rules when he worked for radio stations using the public airwaves. Ultimately, he moved to satellite radio, where the rules are much less restrictive.

Campaigning

A relatively recent dimension of free speech relates to the effort of both the national and state governments to limit the role of money in political campaigns. The Federal Election Campaign Act of 1971 included limits on campaign contributions to candidates for the presidency and Congress, disclosure and reporting requirements, and public financing of presidential elections. In *Buckley v. Valeo* (1976) the Court upheld these provisions. However, it also ruled that spending money to influence elections is a form of constitutionally protected free speech. Thus, the Court voided parts of the law that limited total campaign expenditures, independent expenditures by individuals and groups, and expenditures by candidates from their personal or family funds.

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), often referred to as the McCain-Feingold Act. It banned unrestricted ("soft money") donations made directly to political parties (often by corporations, unions, or wealthy individuals) and the solicitation of those donations by elected officials. It also limited advertising that unions, corporations, and nonprofit organizations could engage in up to 60 days prior to an election, and restricted political parties' use of their funds for advertising on behalf of candidates (in the form of "issue ads" or "coordinated expenditures"). The Supreme Court upheld most of the law in 2003,[61] but in 2007 it held that issue ads that do not urge the support or defeat of a candidate may not be banned in the months preceding a primary or general election.[62] In *Citizens United v. Federal Election Commission* (2010), the Supreme Court made a broader decision, striking down provisions of McCain-Feingold in holding that the First Amendment prohibits government from restricting political broadcasts in candidate elections when those broadcasts are funded by corporations or unions.

Arizona created a public financing system for state candidates and provided them matching funds if a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of or opposition to that candidate, exceeded the publicly financed candidate's initial state allotment. The Court held that the law violated the First Amendment rights of candidates who raise private money because they may be reluctant to spend money to speak if they know that it will give rise to counter-speech paid for by the government.[63]

Freedom of Assembly

4.4 Describe the rights to assemble and associate protected by the First Amendment and their limitations.

The last of the great rights guaranteed by the First Amendment is the freedom to "peaceably assemble." Commentators often neglect this freedom in favor of the more trumpeted freedoms of speech, press, and religion, yet it is the basis for forming interest groups, political parties, and professional associations as well as for picketing and protesting. There are two facets of the freedom of assembly.

Right to Assemble

The first facet is the literal right to assemble—that is, to gather together in order to make a statement. This freedom can conflict with other societal values when it disrupts public order, traffic flow, peace and quiet, or bystanders' freedom to go about their business without interference. Within reasonable limits, called *time, place*, and *manner restrictions*, freedom of assembly includes the rights to parade, picket, and protest.

White supremacists and people opposing them square off. The Supreme Court has generally upheld the right of any group, no matter how controversial or offensive, to peaceably assemble, as long as the group's demonstrations remain on public property.

Whatever a group's cause, it has the right to demonstrate. For example, in 2011, the Supreme Court upheld the right of the congregation of a small church to picket military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.[64]

However, no group can simply hold a spontaneous demonstration anytime, anywhere, and any way it chooses. Usually, a group must apply to the local city government for a permit and post a bond of a few hundred dollars as a sort of security deposit. The governing body must grant a permit as long as the group pledges to hold its demonstration at a time and place that allows the police to prevent major disruptions. There are virtually no limitations on the content of a group's message. One important case arose when the American Nazi Party applied to march in the streets of Skokie, Illinois, a Chicago suburb with a sizable Jewish population, including many survivors of Hitler's death camps. You can examine the Court's decision in "You Are the Judge: The Case of the Nazis' March in Skokie."

Protest that verges on harassment tests the balance between freedom and order. Members of pro-life groups such as "Operation Rescue" have lined up outside abortion clinics to protest abortion and to shame clients into staying away or even harass them if they do visit the clinics. Rights are in conflict in such cases: a woman seeking to terminate her pregnancy has the right to obtain an abortion; the demonstrators have the right to protest the very existence of the clinic. The courts have acted to restrain these protestors, setting limits on how close they may come to the clinics and upholding damage claims of clients against the protestors. In one case, pro-life demonstrators in a Milwaukee, Wisconsin, suburb paraded outside the home of a physician who was reported to perform abortions. The town board forbade future picketing in residential neighborhoods. In 1988, the Supreme Court agreed that the right of residential privacy was a legitimate local concern and upheld the ordinance.[65] In 1994, Congress passed a law enacting broad new penalties against abortion protestors.

Right to Associate

The second facet of freedom of assembly is the right to associate with people who share a common interest, including an interest in political change. In a famous case at the height of the civil rights movement, Alabama tried to harass the state chapter of the

You Are the Judge

The Case of the Nazis' March in Skokie

Hitler's Nazis slaughtered 6 million Jews in death camps like Bergen-Belsen, Auschwitz, and Dachau. Many of the survivors migrated to the United States, and thousands settled in Skokie, Illinois, a suburb just north of Chicago with a heavily Jewish population.

The American Nazi Party in the Skokie area was a ragtag group of perhaps 25 to 30 members. Its headquarters was a storefront building on the West Side of Chicago, near an area with an expanding African American population. After Chicago denied them a permit to march in an African American neighborhood, the American Nazis announced their intention to march in Skokie. Skokie's city government required that they post a $300,000 bond to obtain a parade permit. The Nazis claimed that the high bond was set in order to prevent their march and that it infringed on their freedoms of speech and assembly. The American Civil Liberties Union (ACLU), despite its loathing of the Nazis, defended the Nazis' claim and their right to march. The ACLU lost half its Illinois membership because it took this position.

YOU BE THE JUDGE:

Do Nazis have the right to parade, preach anti-Jewish propaganda, and perhaps provoke violence in a community peopled with survivors of the Holocaust? What rights or obligations does a community have to maintain order?

DECISION:

A federal district court ruled that Skokie's ordinance did restrict freedom of assembly and association. No community could use its power to grant parade permits to stifle free expression. In *Collins v. Smith* (Collins was the Nazi leader, and Smith was the mayor of Skokie), the Supreme Court let this lower-court decision stand. In fact, the Nazis did not march in Skokie, settling instead for some poorly attended demonstrations in Chicago.

NAACP v. Alabama
The 1958 Supreme Court decision that the right to assemble meant Alabama could not require the state chapter of NAACP to reveal its membership list.

National Association for the Advancement of Colored People (NAACP) by requiring it to turn over its membership list. The Court found this demand an unconstitutional restriction on freedom of association (***NAACP v. Alabama*** [1958]).

In 2006, some law schools argued that congressional legislation that required them to grant military recruiters access to their students violated the schools' freedoms of speech and association (because they were forced to have recruiters on campus). Upholding the law, the Supreme Court concluded that it regulated conduct, not speech. In addition, nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the law restricts what they may say about the military's policies. Nor does the law force a law school to accept members it does not desire, and students and faculty are free to voice their disapproval of the military's message.[66]

Right to Bear Arms

4.5 Describe the right to bear arms protected by the Second Amendment and its limitations.

Few issues generate as much controversy as gun control. In an attempt to control gun violence, many communities have passed restrictions on owning and carrying handguns. National and state and local laws have also mandated background checks for gun buyers and limited the sale of certain types of weapons altogether. Yet other laws have required that guns be stored in a fashion to prevent their theft or children from accessing and firing them. Some groups, most notably the National Rifle Association, have invested millions of dollars to fight almost all gun control efforts, arguing that they violate the Second Amendment's guarantee of a right to bear arms. Many advocates of gun control argue that the Second

Point to Ponder

In its humorous way, this cartoon shows that constitutional rights are sometimes in conflict.

Is there any way to prioritize our basic rights?

"The way I see it, the Constitution cuts both ways. The First Amendment gives you the right to say what you want, but the Second Amendment gives me the right to shoot you for it."

Amendment applies only to the right of states to create militias. Surprisingly, the Supreme Court has rarely dealt with gun control.

In 2008, however, the Court directly faced the issue. A law in the District of Columbia restricted residents from owning handguns, excluding those registered prior to 1975 and those possessed by active and retired law enforcement officers. The law also required that all lawfully owned firearms, including rifles and shotguns, be unloaded and disassembled or bound by a trigger lock or similar device. The Supreme Court in *District of Columbia v. Heller* (2008) held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock is unconstitutional because it makes it impossible for citizens to use arms for the core lawful purpose of self-defense. In 2010 in *McDonald v. Chicago*, the Court extended the Second Amendment's limits on restricting an individual's right to bear arms to state and local gun control laws.

Nevertheless, like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, prohibitions on concealed weapons are permissible, as are limits on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, laws imposing conditions and qualifications on the commercial sale of arms, and laws restricting "dangerous and unusual weapons" that are not typically used for self-defense or recreation.

This mother and daughter attending the National Rifle Association's annual meeting are enjoying the right to bear arms. This right is not absolute, however.

Defendants' Rights

4.6 Characterize defendants' rights and identify issues that arise in their implementation.

The Bill of Rights contains only 45 words that guarantee the freedoms of religion, speech, press, and assembly. Most of the remaining words concern the rights of people accused of crimes. The Founders intended these rights to protect the accused in *political* arrests and trials; British abuse of colonial political leaders was still fresh in the memory of American citizens. Today the courts apply the protections in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments mostly in criminal justice cases.

It is useful to think of the criminal justice system as a funnel. Following a *crime* there is (sometimes) an *arrest*, which is (sometimes) followed by a *prosecution*, which is (sometimes) followed by a *trial*, which (usually) results in a *verdict* of innocence or guilt. The funnel gets smaller and smaller. For example, the ratio of crimes reported to arrests made is about five to one. At each stage of the criminal justice system, the Constitution protects the rights of the accused (see Figure 4.1).

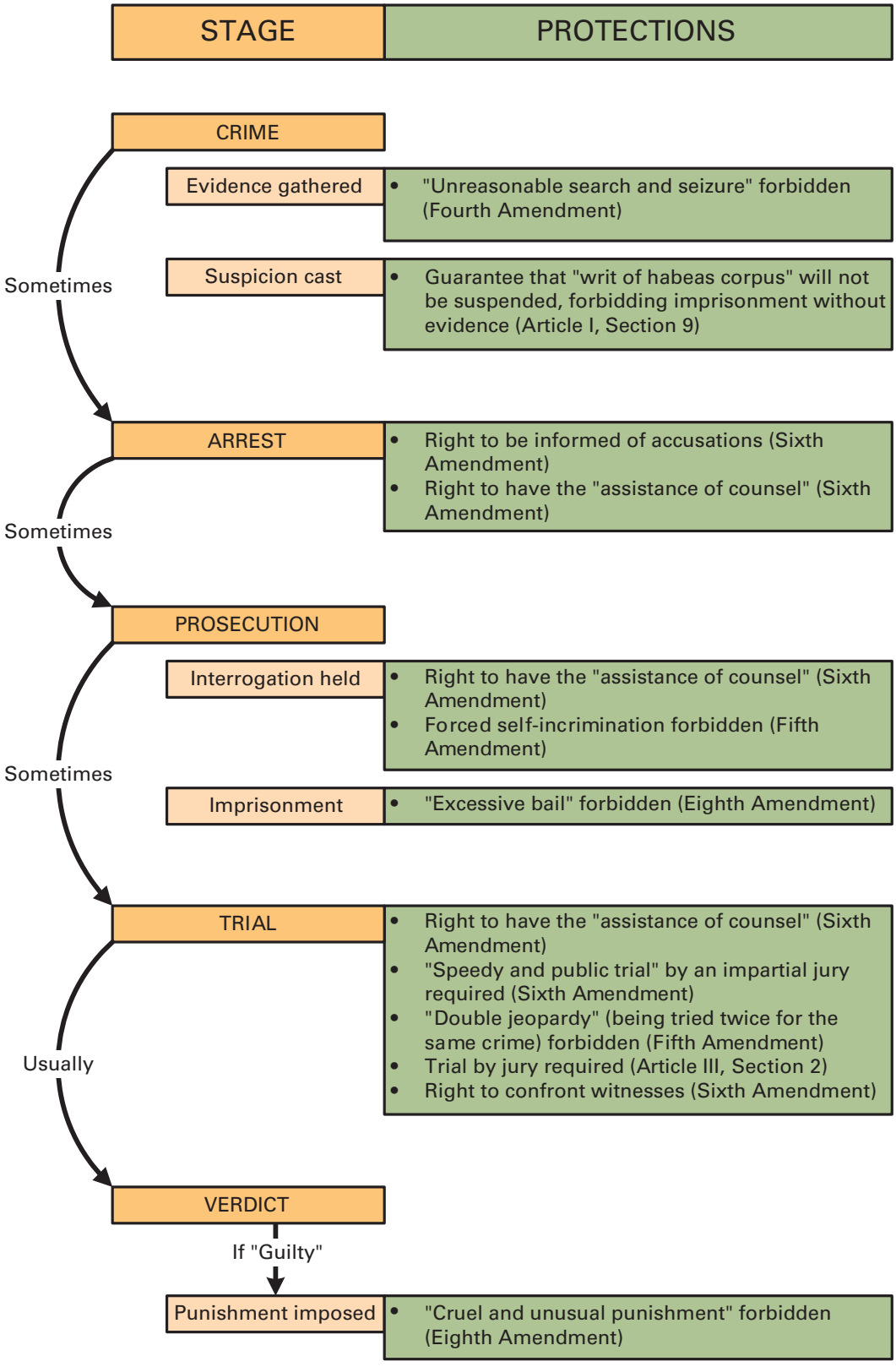
The language of the Bill of Rights comes from the late 1700s and is often vague. For example, just how speedy is a "speedy trial"? How "cruel and unusual" does a punishment have to be in order to violate the Eighth Amendment? The courts continually must rule on the constitutionality of actions by police, prosecutors, judges, and legislatures—actions that a citizen or group could claim violate certain rights. Defendants' rights, just like those rights protected by the First Amendment, are not clearly defined in the Bill of Rights.

One thing is clear, however. The Supreme Court's decisions have extended specific provisions of the Bill of Rights—one by one—to the states as part of the general process

of incorporation we discussed earlier. Virtually all the rights we discuss in the following sections affect the actions of both national and state authorities. Incorporation is especially important because most cases regarding defendants' rights come from the states.

FIGURE 4.1 THE CONSTITUTION AND THE STAGES OF THE CRIMINAL JUSTICE SYSTEM

Although our criminal justice system is complex, it can be broken down into stages. The Constitution protects the rights of the accused at every stage.



probable cause
The situation in which the police have reasonable grounds to believe that a person should be arrested.

unreasonable searches and seizures
Obtaining evidence in a haphazard or random manner, a practice prohibited by the Fourth Amendment. Probable cause and/or a search warrant are required for a legal and proper search for and seizure of incriminating evidence.

search warrant
A written authorization from a court specifying the area to be searched and what the police are searching for.

exclusionary rule
The rule that evidence cannot be introduced into a trial if it was not constitutionally obtained. The rule prohibits use of evidence obtained through unreasonable search and seizure.

Searches and Seizures

Police cannot arrest a citizen without reason. Before making an arrest, police need what the courts call **probable cause**, reasonable grounds to believe that someone is guilty of a crime.

In addition to needing evidence to make an arrest, police often need to get physical evidence—a car thief's fingerprints, a snatched purse—to use in court. To prevent abuse of police power, the Fourth Amendment forbids **unreasonable searches and seizures**. That is, certain conditions for searches must be met.

A search can occur if a court has issued a **search warrant**. Courts can issue a warrant only if there is probable cause to believe that a crime has occurred or is about to occur. These written warrants must specify the area to be searched and the material sought in the police search.

A search can take place without a warrant (as most do) if probable cause of a crime exists, if the search is necessary to protect an officer's safety, if the search is limited to material relevant to the suspected crime or within the suspect's immediate control, or if there is a need to prevent the imminent destruction of evidence.[67] The Supreme Court has also held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.[68]

In various rulings, the Supreme Court has upheld a wide range of warrantless searches. For example, the Court has upheld aerial searches to secure key evidence in cases involving marijuana growing and environmental violations, roadside checkpoints in which police randomly examine drivers for signs of intoxication,[69] the use of narcotics-detecting dogs at a routine stop for speeding,[70] and the search of a passenger and car following a routine check of the car's registration.[71] The Court also has approved warrantless "hot pursuit" of criminal suspects and has upheld warrantless car stops and "stop-and-frisk" encounters with passengers and pedestrians based on reasonable suspicion of criminal activity, rather than the higher standard of probable cause. It has approved mandatory drug testing of transportation workers and high school athletes with no individualized suspicion at all. Searches of K–12 students require only that there be a reasonable chance of finding evidence of wrongdoing, rather than probable cause.[72] In 2012, the Court held that officials may strip-search anyone arrested for any offense before admitting them to jails, even if the officials do not suspect the presence of contraband.[73]

However, some decisions offer more protection against searches. The Court has held that although officers may order a driver and passengers out of a car while issuing a traffic citation and may search for weapons to protect themselves from danger, they cannot search a car if there is no threat to the officer's safety.[74] In 2009, the Court decided that the police may search a vehicle incident to an arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search (to obtain a weapon or destroy evidence, for example) or that the vehicle contains evidence of the offense of arrest. They cannot search vehicles for evidence of other crimes.[75] Similarly, the Supreme Court prohibited highway checkpoints designed to detect ordinary criminal wrongdoing, such as possessing illegal drugs,[76] and it ruled that an anonymous tip that a person is carrying a gun is not sufficient justification for a police officer to stop and frisk that person.[77] In addition, the Court found that police use of a thermal imaging device to detect abnormal heat (needed for growing marijuana) in a home violated the Fourth Amendment.[78] In 2012, the Court held that the government's installation of a G.P.S. device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constituted a "search" and required a warrant.[79]

What happens if evidence used in court was obtained through unreasonable search and seizure? In a 1914 decision, the Supreme Court established the **exclusionary rule**, preventing prosecutors from introducing illegally seized evidence in court. Until 1961, however, the exclusionary rule applied only to the federal government. The Court broadened its application in the case of a Cleveland woman named Dollree Mapp. The local police had broken into Mapp's home looking for a suspected bombing fugitive, and while there, they searched it and found a cache of obscene materials. Mapp was convicted of possessing them. She appealed her case to the federal courts, claiming that

since the police had no probable cause to search for obscene materials, the evidence should not be used against her. In an important decision, ***Mapp v. Ohio***, the Supreme Court ruled that the evidence had been seized illegally and reversed Mapp's conviction. Since then, the exclusionary rule, treated as part of the Fourth Amendment, has been incorporated within the rights that restrict the states as well as the federal government.

Mapp v. Ohio
The 1961 Supreme Court decision ruling that the Fourth Amendment's protection against unreasonable searches and seizures must be extended to the states.

Why It *Matters* to You

The Exclusionary Rule

The exclusionary rule, in which courts disregard evidence obtained illegally, has been controversial. Although critics view the rule as a technicality that helps criminals to avoid justice, this rule protects defendants (who have not been proven guilty) from abuses of police power.

Critics of the exclusionary rule, including some Supreme Court justices, argue that its strict application may permit guilty persons to go free because of police carelessness or innocent errors. The guilty, they say, should not go free because of a "technicality." Supporters of the exclusionary rule respond that the Constitution is not a technicality and that—because everyone is presumed innocent until proven guilty—defendants' rights protect the *accused*, not the guilty. You can examine one contemporary search-and-seizure case in "You Are the Judge: The Case of Ms. Montoya."

You Are the Judge

The Case of Ms. Montoya

Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on Avianca Flight 080 from Bogotá, Colombia. Her first official encounter was with U.S. Customs inspector Talamantes, who noticed that she spoke no English. Interestingly, Montoya's passport indicated eight recent quick trips from Bogotá to Los Angeles. She had $5,000 in cash but no pocketbook or credit cards.

Talamantes and his fellow customs officers were suspicious. Stationed in Los Angeles, they were hardly unaware of the fact that Colombia was a major drug supplier. They questioned Montoya, who explained that her husband had a store in Bogotá and that she planned to spend the $5,000 at Kmart and JC Penney, stocking up on items for the store.

The inspector, somewhat wary, handed Montoya over to female customs inspectors for a search. These agents noticed what the Supreme Court later referred to delicately as a "firm fullness" in Montoya's abdomen. Suspicions, already high, increased. The agents applied for a court order to conduct pregnancy tests, X-rays, and other examinations, and eventually they found 88 balloons containing 80 percent pure cocaine in Montoya's alimentary canal.

Montoya's lawyer argued that this constituted unreasonable search and seizure and that her arrest and conviction should be set aside. There was, he said, no direct evidence that would have led the officials to suspect cocaine smuggling. The government argued that the arrest had followed from a set of odd facts leading to reasonable suspicion that something was amiss.

YOU BE THE JUDGE:

Was Montoya's arrest based on a search-and-seizure incident that violated the Fourth Amendment?

DECISION:

The Supreme Court held that U.S. Customs agents were well within their constitutional authority to search Montoya. Even though collection of evidence took the better part of two days, Justice Rehnquist, the opinion's author, remarked wryly that "the rudimentary knowledge of the human body which judges possess in common with the rest of mankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activities may be investigated through brief … stops."

Fifth Amendment
A constitutional amendment designed to protect the rights of persons accused of crimes, including protection against double jeopardy, self-incrimination, and punishment without due process of law.

self-incrimination
The situation occurring when an individual accused of a crime is compelled to be a witness against himself or herself in court. The Fifth Amendment forbids involuntary self-incrimination.

Beginning in the 1980s, the Court has made some exceptions to the exclusionary rule, including allowing the use of illegally obtained evidence when this evidence led police to a discovery that they eventually would have made without it.[80] The justices also decided to establish the good-faith exception to the rule; evidence can be used if the police who seized it mistakenly thought they were operating under a constitutionally valid warrant.[81] In 1995, the Court held that the exclusionary rule does not bar evidence obtained illegally as the result of clerical errors.[82] In 2006, it held that a police failure to abide by the rule requiring them to knock and announce themselves before entering a home was not a justification for suppressing the evidence they found upon entry with a warrant.[83] The Court even allowed evidence illegally obtained from a banker to be used to convict one of his customers.[84] In a 2009 decision, *Herring v. United States*, the Court held that the exclusionary rule does not apply when there is isolated police negligence rather than systematic error or reckless disregard of constitutional requirements.

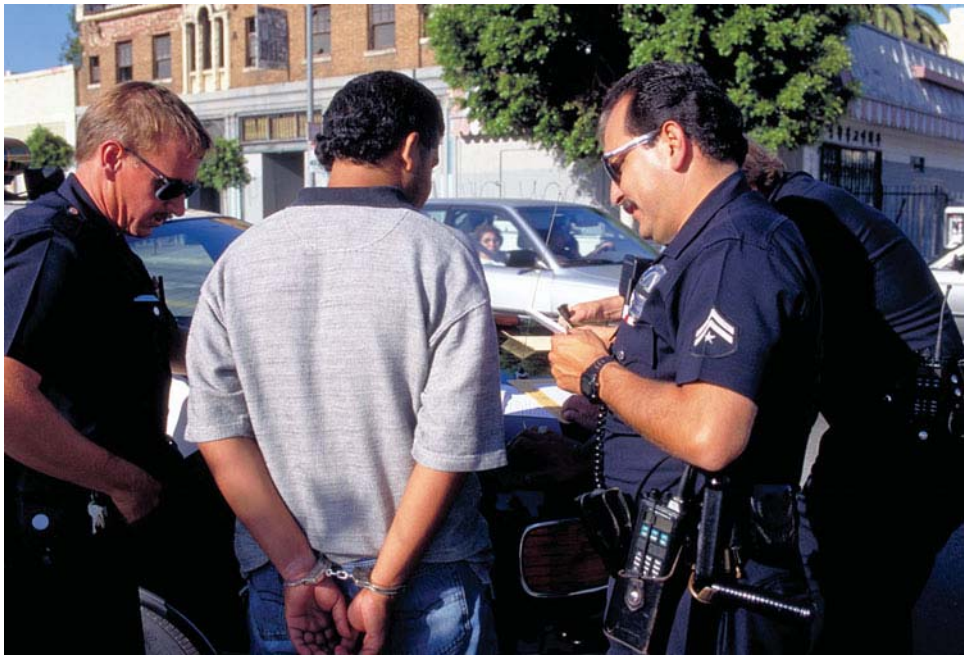
THE WAR ON TERRORISM The *USA Patriot Act*, passed just six weeks after the September 11, 2001, terrorist attacks, gave the government broad new powers for the wiretapping, surveillance, and investigation of terrorism suspects. Attorney General John Ashcroft also eased restrictions on domestic spying in counterterrorism operations, allowing agents to monitor political or religious groups without any connection to a criminal investigation. The Patriot Act gave the federal government the power to examine a terrorist suspect's records held by third parties, such as doctors, libraries, bookstores, universities, and Internet service providers. It also allowed searches of private property without probable cause and without notice to the owner until after the search has been executed, limiting a person's opportunities to challenge a search. Congress reauthorized the law in 2006 with few changes.

In December 2005, reports revealed that President George W. Bush had ordered the National Security Agency, without the court-approved warrants ordinarily required for domestic spying, to monitor the international telephone calls and e-mail messages of people inside the United States. In 2008, Congress overhauled the nation's surveillance law, the Foreign Intelligence Surveillance Act, allowing officials to use broad warrants to eavesdrop on large groups of foreign targets rather than requiring individual warrants, for wiretapping purely foreign communications like phone calls and e-mail messages that pass through American telecommunications switches. In targeting and wiretapping Americans, however, officials must obtain individual warrants from the special intelligence court, although in emergency circumstances, they can wiretap for at least seven days without a court order if they assert that "intelligence important to the national security of the United States may be lost."

Self-Incrimination

Suppose that evidence has been gathered and the police are ready to make an arrest. In the American system, the burden of proof rests on the police and the prosecutors. The **Fifth Amendment** forbids forced **self-incrimination**, stating that no person "shall be compelled to be a witness against himself." Whether in a congressional hearing, a courtroom, or a police station, suspects need not provide evidence that can later be used against them. However, the government may guarantee suspects *immunity*—exemption from prosecution in exchange for suspects' testimony regarding their own and others' misdeeds.

You have probably seen television shows in which an arrest is made and the arresting officers recite, often from memory, a set of rights to the arrestee. The recitation of these rights is authentic and originated from a famous court decision—perhaps the most important modern decision in criminal law—involving an Arizona man named Ernesto Miranda.[85]



One of the most important principles of constitutional law is that defendants in criminal cases have rights. Probable cause and/or a search warrant are required for a legal search for and seizure of incriminating evidence. Here police officers read the suspect his rights based on the Supreme Court's decision in *Miranda v. Arizona*.

Miranda v. Arizona
The 1966 Supreme Court decision that sets guidelines for police questioning of accused persons to protect them against self-incrimination and to protect their right to counsel.

Miranda was picked up as a prime suspect in the rape and kidnapping of an 18-year-old girl. Identified by the girl from a police lineup, he was questioned by police for two hours. During this time, they did not tell him of either his constitutional right against self-incrimination or his right to counsel. Miranda said enough to lead eventually to a conviction. The Supreme Court reversed his conviction on appeal, however. In ***Miranda v. Arizona*** (1966), the Court established guidelines for police questioning. Suspects must be told the following:

- They have a constitutional right to remain silent and may stop answering questions at any time.
- What they say can be used against them in a court of law.
- They have a right to have a lawyer present during questioning, and the court will provide them with a lawyer if they cannot afford their own.

Ironically, when Ernesto Miranda himself was murdered, police read the suspect his "Miranda rights."

In the decades since the *Miranda* decision, the Supreme Court has made a number of exceptions to its requirements. In 1991, for example, the Court held that a coerced confession introduced in a trial does not automatically taint a conviction. If other evidence is enough for a conviction, then the coerced confession is a "harmless error" that does not necessitate a new trial.[86] The Court also declared that criminal suspects seeking to protect their right to remain silent must clearly state they are invoking it.[87]

Nevertheless, in 2000 in *Dickerson v. U.S.*, the Court made it clear that it supported the *Miranda* decision and that Congress was not empowered to change it. In 2010, the Court held that police may take a second run at questioning a suspect who has invoked his or her Miranda rights, but they must wait until 14 days after the suspect has been released from custody.[88] In 2011, the Court declared that officials must take greater care to explain rights to children when the police question them.[89]

Sixth Amendment
A constitutional amendment designed to protect individuals accused of crimes. It includes the right to counsel, the right to confront witnesses, and the right to a speedy and public trial.

Gideon v. Wainwright
The 1963 Supreme Court decision holding that anyone, however poor, accused of a felony where imprisonment may be imposed has a right to a lawyer.

The Fifth Amendment prohibits not only coerced confessions but also coerced crimes. The courts have overturned convictions based on *entrapment*, in which law enforcement officials encouraged persons to commit crimes (such as accepting bribes or purchasing illicit drugs) that they otherwise would not have committed. "You Are the Judge: The Case of the Enticed Farmer" addresses this issue.

The Right to Counsel

A crucial *Miranda* right is the right to counsel. The **Sixth Amendment** has always guaranteed the right to counsel in federal courts. In state courts a guaranteed right to counsel traces back only to 1932, when the Supreme Court, in *Powell v. Alabama,* ordered the states to provide an attorney for poor defendants in capital crime cases (cases in which the death penalty could be imposed). Most crimes are not capital crimes, however, and most crimes are tried in state courts. It was not until 1963, in ***Gideon v. Wainwright***,[90] that the Supreme Court extended the right to an attorney for everyone accused of a felony in a state court. Subsequently, the Court went a step further, holding that whenever imprisonment could be imposed, a lawyer must be provided for the accused (*Argersinger v. Hamlin* [1972]). In addition, the Supreme Court found that a trial court's erroneous deprivation of a criminal defendant's right to *choose* a counsel entitles him or her to reversal of his conviction.[91] In 2011, however, the Court held that in some circumstances states are not obligated to provide counsel in civil contempt cases carrying the potential for imprisonment.[92]

Trials

The Sixth Amendment (and the Constitution's protection against the suspension of the writ of *habeas corpus*) guarantees that persons who are arrested have a right to be brought before a judge. This guarantee applies at two stages of the judicial process. First, those detained have a right to be informed of the accusations against them. Second, they have a right to a *speedy and public trial, by an impartial jury*.

You Are the Judge

The Case of the Enticed Farmer

In 1984, Keith Jacobson, a 56-year-old farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. He expected nude photographs of adult males but instead found photographs of nude boys. He ordered no other magazines.

Three months later, Congress changed federal law to make the receipt of such materials illegal. Finding his name on the mailing list of the California bookstore, two government agencies repeatedly enticed Jacobson through five fictitious organizations and a bogus pen pal with solicitations for sexually explicit photographs of children. After 26 months of enticement, Jacobson finally ordered a magazine and was arrested for violating the Child Protection Act.

He was convicted of receiving child pornography through the mail, which he undoubtedly did. Jacobson claimed, however, that he had been entrapped into committing the crime.

YOU BE THE JUDGE:

Was Jacobson an innocent victim of police entrapment, or was he truly seeking child pornography?

DECISION:

The Court agreed with Jacobson. In *Jacobson v. United States* (1992), it ruled that the government had overstepped the line between setting a trap for the "unwary innocent" and the "unwary criminal" and failed to establish that Jacobson was independently predisposed to commit the crime for which he was arrested. Jacobson's conviction was overturned.

Despite the drama of highly publicized trials, trials are in fact relatively rare. In American courts, 90 percent of all criminal cases begin and end with a guilty plea. Most of these cases are settled through a process called **plea bargaining**. A plea bargain results from a bargain struck between a defendant's lawyer and a prosecutor to the effect that a defendant will plead guilty to a lesser crime (or fewer crimes) in exchange for a state not prosecuting that defendant for a more serious (or additional) crime.

plea bargaining
A bargain struck between the defendant's lawyer and the prosecutor to the effect that the defendant will plead guilty to a lesser crime (or fewer crimes) in exchange for the state's promise not to prosecute the defendant for a more serious (or additional) crime.

Critics of the plea-bargaining system believe that it permits many criminals to avoid the full punishment they deserve. After decades of new laws to toughen sentencing for criminals, however, prosecutors have gained greater leverage to extract guilty pleas from defendants, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.

The plea-bargaining process works to the advantage of both sides; it saves the state the time and money that would be spent on a trial, and it permits defendants who think they might be convicted of a serious charge to plead guilty to a lesser one. A study of sentencing patterns in three California counties discovered that a larger proportion of defendants who went to trial ended up going to prison compared with those who pleaded guilty and had no trial. In answer to their question "Does it pay to plead guilty?" the researchers gave a qualified yes.[93] Good or bad, plea bargaining is a practical necessity. Only a vast increase in resources would allow the court system to cope with a trial for every defendant. In 2012, the Supreme Court recognized the dominant role plea bargaining plays in criminal law when it held in two cases[94] that defendants have a right to an effective lawyer during pretrial negotiations.

The defendants in the 300,000 cases per year that actually go to trial are entitled to many rights, including the Sixth Amendment's provision for a speedy trial by an impartial jury. An impartial jury includes one that is not racially biased (in which potential jurors of the defendant's race have been excluded).[95] Lawyers for both sides spend hours questioning prospective jurors in a major case. Defendants, of course, prefer a jury that is biased toward them, and those who can afford it do not leave jury selection to chance. A sophisticated technology of jury selection has developed. Jury consultants—often psychologists or other social scientists—develop profiles of jurors likely to be sympathetic or hostile to a defendant.

The Constitution does not specify the size of a jury; in principle, it could be anywhere from 1 to 100 people. Tradition in England and America has set jury size at 12, although in petty cases 6 jurors are sometimes used. Traditionally, too, a jury had to be unanimous in order to convict. The Supreme Court has eroded both traditions, permitting states to use fewer than 12 jurors and to convict with a less-than-unanimous vote. Federal courts still employ juries of 12 persons and require unanimous votes for a criminal conviction.

In recent years, the Supreme Court has aggressively defended the jury's role in the criminal justice process—and limited the discretion of judges in sentencing. In several cases, the Court has held that other than a previous conviction, any fact of the case that might increase the penalty for a convicted defendant beyond what the law usually allows or what such defendants usually receive must be submitted to a jury and proved beyond a reasonable doubt.[96] These decisions ensure that the judge's authority to sentence derives wholly from the jury's verdict.

The Sixth Amendment also gives defendants the right to confront the witnesses against them. The Supreme Court has held that prosecutors cannot introduce testimony into a trial unless the accused can cross-examine the witness.[97] This is so even if the witness is providing facts such as lab reports.[98] Moreover, defendants have the right to question those who prepared the reports.[99]

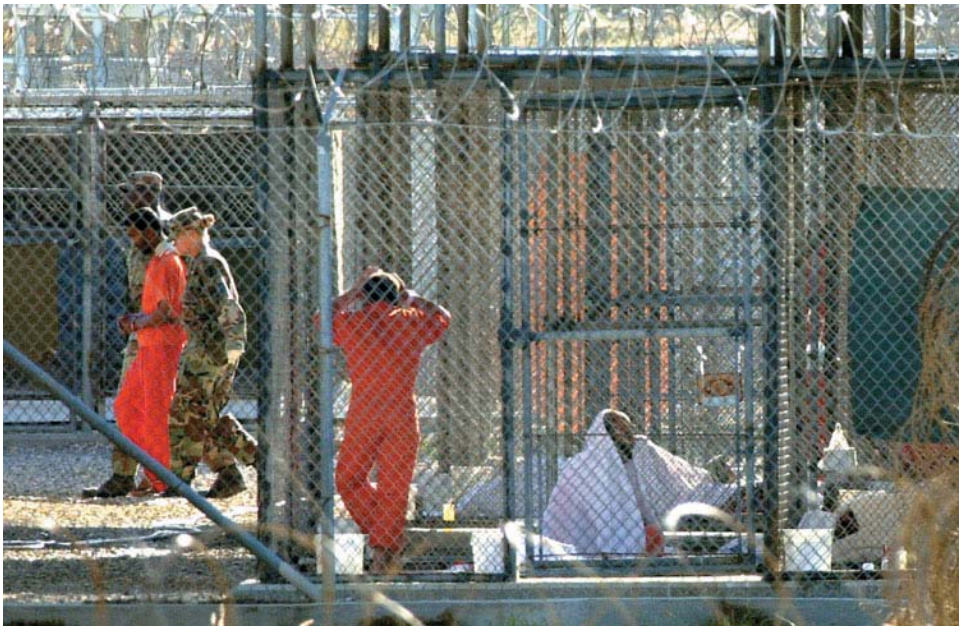
Defendants also have a right to know about evidence that may exonerate them. In 2010, the Court held that due process prohibits a state from withholding evidence that is favorable to a defendant's defense and key to determining a defendant's guilt or punishment.[100]

THE WAR ON TERRORISM Normally, these guarantees present few issues. However, in the aftermath of the September 11, 2001, terrorist attacks, the FBI detained more than 1,200 persons as possible dangers to national security. Of these persons, 762 were illegal aliens (mostly Arabs and Muslims), and many of them languished in jail for months until cleared by the FBI. For the first time in U.S. history, the federal government withheld the names of detainees, reducing their opportunities to exercise their rights for access to the courts and to counsel. The government argued that releasing the names and details of those arrested would give terrorists a window on the terror investigation. In 2004, the Supreme Court refused to consider whether the government properly withheld names and other details about these prisoners. However, in other cases, the Court found that detainees, both in the United States and at the naval base at Guantánamo Bay, Cuba, had the right to challenge their detention before a judge or other neutral decision maker (*Hamdi v. Rumsfeld* and *Rasul v. Bush* [2004]).

In a historic decision in 2006 (*Hamdan v. Rumsfeld*), the Supreme Court held that the procedures President Bush had approved for trying prisoners at Guantánamo Bay lacked congressional authorization and violated both the Uniform Code of Military Justice and the Geneva Conventions. The flaws the Court cited were the failure to guarantee defendants the right to attend their trial and the prosecution's ability under the rules to introduce hearsay evidence, unsworn testimony, and evidence obtained through coercion. Equally important, the Constitution did not empower the president to establish judicial procedures on his own.

Later that year, Congress passed the Military Commissions Act (MCA), which specifically authorized military commissions to try alien unlawful enemy combatants and denied access to the courts for aliens who were detained by the United States government as enemy combatants or who were waiting for the government to determine whether they were enemy combatants. This allowed the United States government to detain such aliens indefinitely without prosecuting them in any manner.

However, in 2008, the Supreme Court held in *Boumediene v. Bush* that foreign terrorism suspects held at Guantánamo Bay have constitutional rights to challenge their detention in U.S. courts. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times," the Court proclaimed as it declared unconstitutional the provision of the MCA that stripped the federal courts of jurisdiction



Prisoners held at the U.S. naval base at Guantánamo Bay, Cuba, present difficult issues of prisoners' rights.

to hear habeas corpus petitions from detainees seeking to challenge their designation as enemy combatants. The Court also found that the procedure established for reviewing enemy combatant status failed to offer the fundamental procedural protections of habeas corpus.

Cruel and Unusual Punishment

Punishments for citizens convicted of a crime range from probation to the death penalty. The **Eighth Amendment** forbids **cruel and unusual punishment**, although it does not define the phrase. Since 1962, when it was incorporated, this provision of the Bill of Rights has applied to the states.

What constitutes cruel and unusual punishment? In 2011, the Supreme Court upheld a lower court order that found that conditions in California's overcrowded prisons were so bad that they violated the ban on cruel and unusual punishment and thus the state had to release some of the prisoners.[101] The Court has also held that it is a violation of the cruel and unusual punishment clause to sentence a juvenile offender to life in prison without parole for a crime.[102] (For another case related to cruel and unusual punishment, see "You Are the Judge: The Case of the First Offender.") Almost the entire constitutional debate over cruel and unusual punishment, however, has centered on the death penalty. More than 3,300 people are currently on death row, nearly half of them in California, Texas, and Florida.

The Court first confronted the question of whether the death penalty is inherently cruel and unusual punishment in *Furman v. Georgia* (1972), when it overturned Georgia's death penalty law because the state imposed the penalty in a "freakish" and "random" manner. Following this decision, 35 states passed new death penalty laws to address the Court's concerns. Thus, some states, to prevent arbitrariness in punishment, mandated death penalties for some crimes. In *Woodson v. North Carolina* (1976), the Supreme Court ruled against such mandatory death penalties. The Court has upheld the death penalty itself, however, concluding in ***Gregg v. Georgia*** (1976), that capital punishment is "an expression of society's outrage at particularly offensive conduct. . . . It is an extreme sanction, suitable to the most extreme of crimes."

Eighth Amendment
The constitutional amendment that forbids cruel and unusual punishment.

cruel and unusual punishment
Court sentences prohibited by the Eighth Amendment.

Gregg v. Georgia
The 1976 Supreme Court decision that upheld the constitutionality of the death penalty, as "an extreme sanction, suitable to the most extreme of crimes."

You Are the Judge

The Case of the First Offender

Ronald Harmelin of Detroit was convicted of possessing 672 grams of cocaine (a gram is about one-thirtieth of an ounce). Michigan's mandatory sentencing law required the trial judge to sentence Harmelin, a first-time offender, to life imprisonment without possibility of parole. Harmelin argued that this was cruel and unusual punishment because it was "significantly disproportionate," meaning that, as we might say, the punishment did not fit the crime. Harmelin's lawyers argued that many other crimes more serious than cocaine possession would net similar sentences.

YOU BE THE JUDGE:

Was Harmelin's sentence cruel and unusual punishment?

DECISION:

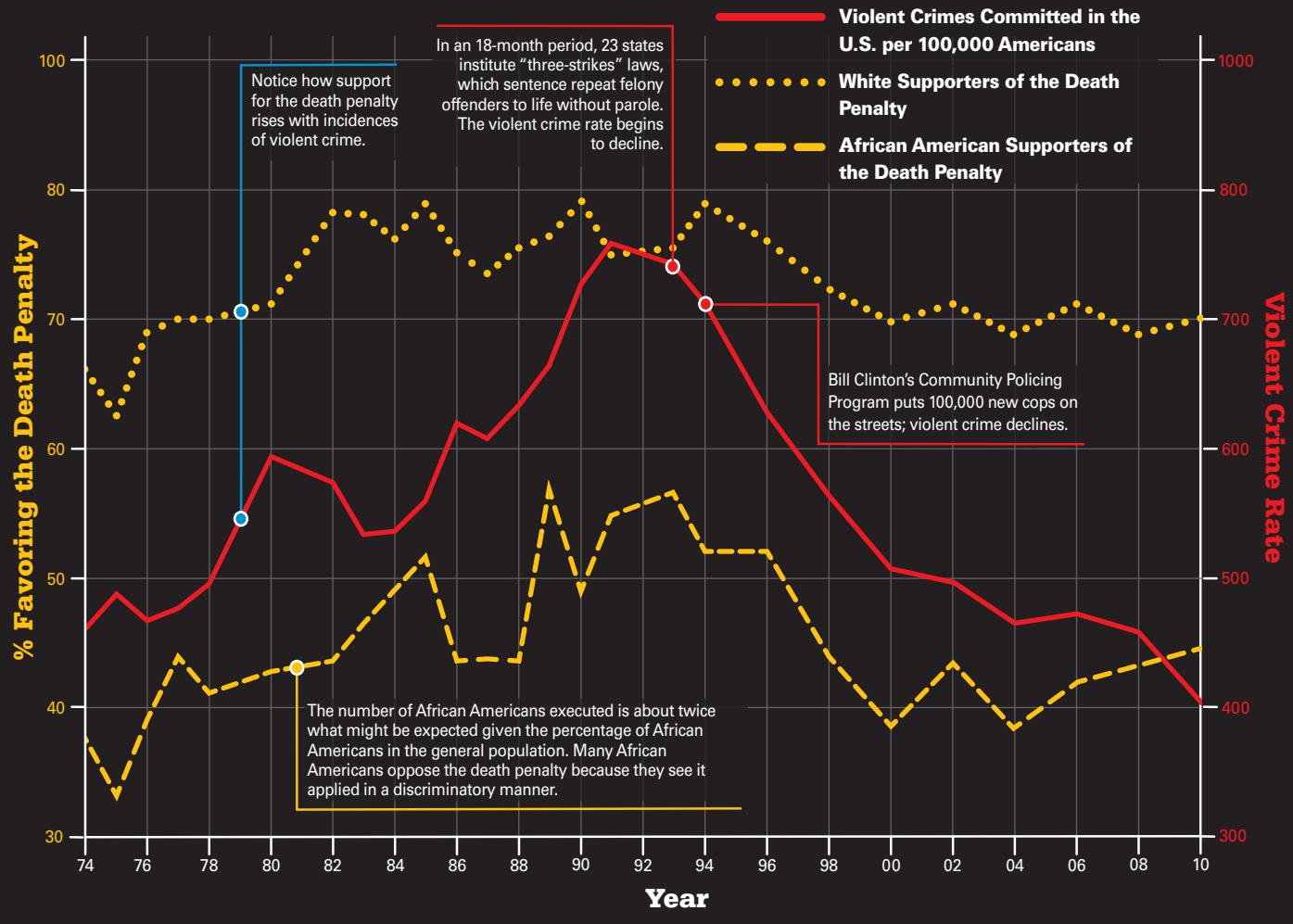
The Court upheld Harmelin's conviction in *Harmelin v. Michigan* (1991), spending many pages to explain that severe punishments were quite commonplace, especially when the Bill of Rights was written. Severity alone does not qualify a punishment as "cruel and unusual." The severity of punishment was up to the legislature of Michigan, which, the justices observed, knew better than they the conditions on the streets of Detroit. Later, Michigan reduced the penalty for possession of small amounts of cocaine and released Harmelin from jail.

Explore on MyPoliSciLab

Should the Government Apply the Death Penalty?

The United States is the only advanced democracy that practices capital punishment. Proponents argue that the death penalty is a deterrent to violent crimes, but since the early 1990s, public support for it has somewhat declined. A majority of Americans still support the death penalty, but the strength of this support differs by race.

Death Penalty Supporters by Race



SOURCE: Data from General Social Survey, 1972-2010; Bureau of Justice Statistics, U.S. Department of Justice.

Investigate Further

Concept How widespread is American support for using the death penalty? A majority of Americans endorse capital punishment, but support is far stronger among whites than African Americans. This difference is due in part to the fact that African Americans are more likely to be on death row than non-Hispanic whites.

Connection Is the death penalty related to violent crime rates? When violent crime goes up nationally, so does support for the death penalty because supporters believe it will decrease the violent crime rate. However, this idea is contested by death penalty opponents and those who see other explanations for less crime.

Cause What might account for the drop in the violent crime rate? There are at least two reasons not related to the death penalty for the decline of violent crime: increased federal spending to put more cops on the street, and states using stiffer sentencing for repeat felony offenders.

Shortly before retiring from the bench in 1994, Supreme Court Justice Harry Blackmun renounced the death penalty, declaring that its administration "fails to deliver the fair, consistent and reliable sentences of death required by the Constitution" (*Callins v. Collins* [1994]). Social scientists have shown that minority murderers whose victims were white are more likely to receive death sentences than are white murderers or those whose victims were not white. For example, about 80 percent of the murder victims in cases resulting in an execution were white, even though only 50 percent of murder victims generally are white. Nevertheless, in ***McCleskey v. Kemp*** (1987), the Supreme Court concluded that the death penalty did not violate the equal protection of the law guaranteed by the Fourteenth Amendment. The Court insisted that the unequal distribution of death penalty sentences was constitutionally acceptable because there was no evidence that juries intended to discriminate on the basis of race.

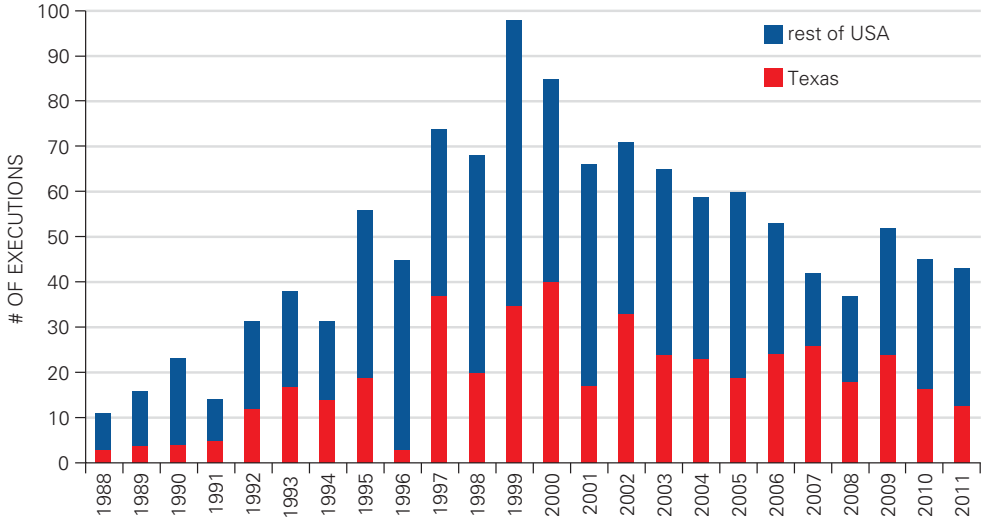
McCleskey v. Kemp
The 1987 Supreme Court decision that upheld the constitutionality of the death penalty against charges that it violated the Fourteenth Amendment because minority defendants were more likely to receive the death penalty than were white defendants.

Today, the death penalty remains a part of the American criminal justice system. About 1,100 persons have been executed since the Court's decision in *Gregg*. The Court has also made it more difficult for death row prisoners to file petitions that would force legal delays and appeals to stave off execution, it has made it easier for prosecutors to exclude jurors opposed to the death penalty (*Wainwright v. Witt*, 1985), and it has allowed "victim impact" statements detailing the character of murder victims and their families' suffering to be used against a defendant. Most Americans support the death penalty, although there is evidence that racism plays a role in the support of whites.[103] It is interesting to note that the European Union prohibits the death penalty in member countries.

In recent years, however, evidence that courts have sentenced innocent people to be executed has reinvigorated the debate over the death penalty. Attorneys have employed the new technology of DNA evidence in a number of states to obtain the release of dozens of death row prisoners. Governor George Ryan of Illinois declared a moratorium on executions in his state after researchers proved that 13 people on death row were innocent. Later, he commuted the death sentences of all prisoners in the state. In general, there has been a decline in executions, as you can see in Figure 4.2.

FIGURE 4.2 THE DECLINE OF EXECUTIONS

Supreme Court decisions, new DNA technology, and perhaps a growing public concern about the fairness of the death penalty have resulted in a dramatic drop in the number of death sentences—from 98 in 1999 to 43 in 2010. Texas leads the nation in executions, representing 30 percent of the national total in 2011. Texas prosecutors and juries are no more apt to seek and impose death sentences than those in other states that have the death penalty. However, once a death sentence is imposed there, prosecutors, the courts, the pardon board, and the governor are united in moving the process along.



SOURCES: Death Penalty Information Center; Texas Execution Information Center.

In addition, the Supreme Court has placed constraints on the application of the death penalty, holding that the Constitution barred the execution of the mentally ill (*Ford v. Wainwright*, 1986); mentally retarded persons (*Atkins v. Virginia*, 2002); those under the age of 18 when they committed their crimes (*Roper v. Simmons*, 2005); and those convicted of raping women (*Coker v. Georgia*, 1977) and children (*Kennedy v. Louisiana*, 2008) where the crime did not result, and was not intended to result, in the victim's death. In *Kennedy*, the Court went beyond the question in the case to rule out the death penalty for any individual crime—as opposed to offenses against the state, like treason or espionage—where the victim's life was not taken. In addition, the Court has required that a jury, not just a judge, find that an aggravating circumstance is associated with a murder when a state requires that for imposing death penalty (*Ring v. Arizona*, 2002). The Court also required lawyers for defendants in death penalty cases to make reasonable efforts to fight for their clients at a trial's sentencing phase (*Rompilla v. Beard* [2005]).

Debate over the death penalty continues. In 2008, the Supreme Court upheld the use of lethal injection, concluding that challengers to this method of execution must show not only that a state's method "creates a demonstrated risk of severe pain," but also that there were alternatives that were "feasible" and "readily implemented" that would "significantly" reduce that risk.[104] You can see what some students are doing about the injustices they perceive in the death penalty system in "Young People and Politics: College Students Help Prevent Wrongful Deaths."

Young People & Politics

College Students Help Prevent Wrongful Deaths

The Center on Wrongful Convictions at Northwestern University investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. The young staff, including faculty, cooperating outside attorneys, and Northwestern University law students, pioneered the investigation and litigation of wrongful convictions—including the cases of nine innocent men sentenced to death in Illinois.

Undergraduates as well as law students have been involved in establishing the innocence of men who had been condemned to die. One instance involved the case of a man with an IQ of 51. The Illinois Supreme Court stayed his execution, just 48 hours before it was due to be carried out, because of questions about his mental fitness. This stay provided a professor and students from a Northwestern University investigative journalism class with an opportunity to investigate the man's guilt.

They tracked down and re-interviewed witnesses. One eyewitness recanted his testimony, saying that investigators had pressured him into implicating the man. The students found a woman who pointed to her ex-husband as the killer. Then a private investigator interviewed the ex-husband, who made a videotaped statement claiming he killed in self-defense. The students literally helped to save the life of an innocent man.

On January 11, 2003, Governor George H. Ryan of Illinois chose Lincoln Hall at Northwestern University's School of Law to make a historic announcement. He commuted the death sentences of all 167 death row prisoners in Illinois (he also pardoned 4 others based on innocence the previous day). The governor felt it was fitting to make the announcement there, before "the students, teachers, lawyers, and investigators who first shed light on the sorrowful conditions of Illinois' death penalty system."

In addition to saving the lives of wrongfully convicted individuals in Illinois, the Northwestern investigations have also helped trigger a nationwide reexamination of the capital punishment system. To learn more about the Center on Wrongful Convictions, visit its Web site at http://www.law.northwestern.edu/wrongfulconvictions/.

CRITICAL THINKING QUESTIONS

1. Why do you think college students and others were better able to determine the truth about the innocence of condemned men than were the police and prosecutors at the original trial?
2. Are there other areas of public life in which students can make important contributions through their investigations?

The Right to Privacy

4.7 Outline the evolution of a right to privacy and its application to the issue of abortion.

The members of the First Congress who drafted the Bill of Rights and enshrined American civil liberties would never have imagined that Americans would go to court to argue about wiretapping, surrogate motherhood, abortion, or pornography. New technologies have raised ethical issues unimaginable in the eighteenth century and focused attention on the question of privacy rights.

Is There a Right to Privacy?

Nowhere does the Bill of Rights say that Americans have a **right to privacy**. Clearly, however, the First Congress had the concept of privacy in mind when it crafted the first 10 amendments. Freedom of religion implies the right to exercise private beliefs, the Third Amendment prohibited the government from forcing citizens to quarter soldiers in their homes during times of peace, protections against "unreasonable searches and seizures" make persons secure in their homes, and private property cannot be seized without "due process of law." In 1928, Justice Brandeis hailed privacy as "the right to be left alone—the most comprehensive of the rights and the most valued by civilized men."

The idea that the Constitution guarantees a right to privacy was first enunciated in a 1965 case involving a Connecticut law forbidding the use of contraceptives. It was a little-used law, but a doctor and a family planning specialist were arrested for disseminating birth control devices. The state reluctantly brought them to court, and they were convicted. The Supreme Court, in the case of *Griswold v. Connecticut*, wrestled with the privacy issue. Seven justices finally decided that the explicitly stated rights in the Constitution implied a right to privacy, including a right to family planning between husband and wife. Supporters of privacy rights argued that this ruling was reasonable enough, for what could be the purpose of the Fourth Amendment, for example, if not to protect privacy? Critics of the ruling—and there were many of them—claimed that the Supreme Court was inventing protections not specified by the Constitution.

There are other areas of privacy rights, including the sexual behavior of gays and lesbians, as discussed in the chapter on civil rights. The most important application of privacy rights, however, came in the area of abortion. The Supreme Court unleashed a constitutional firestorm in 1973 that has not yet abated.

Controversy over Abortion

In 1972, the Supreme Court heard one of the most controversial cases ever to come before the Court. Under the pseudonym of "Jane Roe," a Texas woman named Norma McCorvey sought an abortion. She argued that the state law allowing the procedure only to save the life of a mother was unconstitutional. Texas argued that states had the power to regulate moral behavior, including abortions. The Court ruled in ***Roe v. Wade*** (1973) that a right to privacy under the due process clause in the Fourteenth Amendment extends to a woman's decision to have an abortion, but that right must be balanced against the state's two legitimate interests for regulating abortions: protecting prenatal life and protecting the woman's health. Saying that these state interests become stronger over the course of a pregnancy, the Court resolved this balancing test by tying state regulation of abortion to the woman's current trimester of pregnancy. *Roe* forbade any state control of abortions during the first trimester; it permitted states to regulate abortion procedures, but only in a way that protected the mother's health, in the second trimester; and it allowed the states to ban abortion during the third trimester, except when the mother's life or health was in danger. This decision unleashed a storm of protest.

right to privacy
The right to a private personal life free from the intrusion of government.

Roe v. Wade
The 1973 Supreme Court decision holding that a state ban on abortions was unconstitutional. The decision forbade state control over abortions during the first trimester of pregnancy, permitted states to limit abortions to protect the mother's health in the second trimester, and permitted states to ban abortion during the third trimester.

Planned Parenthood v. Casey
A 1992 case in which the Supreme Court loosened its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on a "fundamental right" to one of "undue burden" that permits considerably more regulation.

Since *Roe v. Wade*, women have received more than 50 million legal abortions in the United States, more than a million in 2011. Abortion is a common experience: 22 percent of all pregnancies (excluding miscarriages) end in abortion. At current rates, about 3 in 10 American women will have had an abortion by the time they reach age 45. Moreover, a broad cross section of U.S. women has abortions. Fifty-seven percent of women having abortions are in their twenties; 61 percent have one or more children; 45 percent have never married; 42 percent have incomes below the federal poverty level; and 78 percent report a religious affiliation. No racial or ethnic group makes up a majority: 36 percent of women obtaining abortions are white non-Hispanic, 30 percent are black non-Hispanic, 25 percent are Hispanic, and 9 percent are of other racial backgrounds.[105]

Yet the furor has never subsided. Congress has passed numerous statutes forbidding the use of federal funds for abortions. Many states have passed similar restrictions. For example, Missouri forbade the use of state funds or state employees to perform abortions. The Court upheld this law in *Webster v. Reproductive Health Services* (1989).

In 1992, in ***Planned Parenthood v. Casey***, the Court changed its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on a "fundamental right" to one of "undue burden," which permits considerably more regulation. The Court upheld a 24-hour waiting period, a parental or judicial consent requirement for minors, and a requirement that doctors present women with information on the risks of the operation. The Court struck down a provision requiring a married woman to tell her husband of her intent to have an abortion, however, and the majority also affirmed their commitment to the basic right of a woman to obtain an abortion.

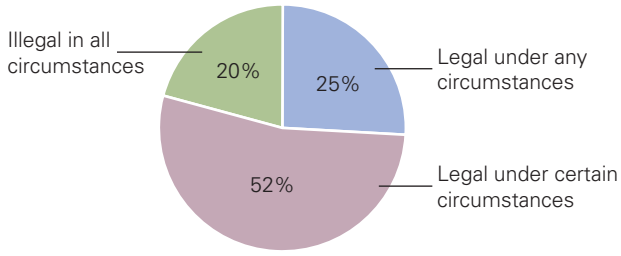
One area of controversy has been a procedure termed "partial birth" abortion. In 2000, the Court held in *Sternberg v. Carhart* that Nebraska's prohibition of partial birth abortions was unconstitutional because the law placed an undue burden on women seeking an abortion by limiting their options to less safe procedures, provided no exception for cases where the health of the mother was at risk, and did not clearly specify prohibited procedures. In 2003, Congress passed a law banning partial birth abortions, providing an exception to the ban in order to save the life of a mother but no

Abortion is perhaps the nation's most divisive issue, raising strong emotions on both sides of the debate. Here pro-life activists pray across the street from the Washington, D.C., offices of Planned Parenthood.

FIGURE 4.3 THE ABORTION DEBATE

In few areas of public opinion research do scholars find more divided opinion than abortion. Some people feel very strongly about the matter, enough so that they are "single-issue voters" unwilling to support any candidate who disagrees with them. The largest group takes a middle position, supporting the principle of abortion but also accepting restrictions.

Question: Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?



SOURCE: Gallup Poll, May 3–6, 2012.

exception to preserve a mother's health, as it found that the procedure was never necessary for a woman's health. In *Gonzales v. Carhart* (2007), the Supreme Court upheld that law, finding it was specific and did not subject women to significant health risks or impose an undue burden on a woman's right to an abortion. The Court also took pains to point out that the law would not affect most abortions, which are performed early in a pregnancy, and that safe alternatives to the prohibited procedure are available.

Americans are deeply divided on the issue of abortion (see Figure 4.3). Proponents of choice believe that access to abortion is essential if women are to be fully autonomous human beings. Opponents call themselves pro-life because they believe that the fetus is fully human and that an abortion therefore deprives a human of the right to life. These positions are irreconcilable, making abortion a politician's nightmare. Wherever a politician stands on this divisive issue, a large number of voters will be enraged.

With passions running so strongly on the issue, some advocates have taken extreme action. In the last two decades, abortion opponents have bombed a number of abortion clinics and murdered several physicians who performed abortions.

As mentioned earlier in the chapter, women's right to obtain an abortion has clashed with protesters' rights to free speech and assembly. In 1994, the Court consolidated the right to abortion established in *Roe* with the protection of a woman's right to enter an abortion clinic to exercise that right. Citing the government's interest in preserving order and maintaining women's access to pregnancy services, the Court upheld a state court's order of a 36-foot buffer zone around a clinic in Melbourne, Florida.[106] That same year, Congress passed the Freedom of Access to Clinic Entrances Act, which makes it a federal crime to intimidate abortion providers or women seeking abortions. In 2000, the Court upheld a 100-foot restriction on approaching someone at a health care facility to discourage abortions.[107] In another case, it decided that abortion clinics could invoke the federal racketeering law to sue violent antiabortion protest groups for damages.[108]

Understanding Civil Liberties

4.8 Assess how civil liberties affect democratic government and how they both limit and expand the scope of government.

American government is both democratic and constitutional. America is democratic because it is governed by officials who are elected by the people and, as such, are accountable for their actions. The American government is constitutional because it has a fundamental organic law, the Constitution, that limits the things that government may do. By restricting the

government, the Constitution limits what the people can empower the government to do. The democratic and constitutional components of government can produce conflicts, but they also reinforce one another.

Civil Liberties and Democracy

The rights ensured by the First Amendment—the freedoms of speech, press, and assembly—are essential to a democracy. If people are to govern themselves, they need access to all available information and opinions in order to make intelligent, responsible, and accountable decisions. If the right to participate in public life is to be open to all, then Americans—in all their diversity—must have the right to express their opinions.

Individual participation and the expression of ideas are crucial components of democracy, but so is majority rule, which can conflict with individual rights. The majority does not have the freedom to decide that there are some ideas it would rather not hear, although at times the majority tries to enforce its will on the minority. The conflict is even sharper in relation to the rights guaranteed by the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. These rights protect all Americans, but they also make it more difficult to punish criminals. It is easy—although misleading—for the majority to view these guarantees as benefits for criminals at the expense of society.

With some notable exceptions, the United States has done a good job in protecting the rights of diverse interests to express themselves. There is little danger that a political or economic elite will muffle dissent. Similarly, the history of the past five decades is one of increased protections for defendants' rights, and defendants are typically not among the elite. Ultimately, the courts have decided what constitutional guarantees mean in practice. Although federal judges, appointed for life, are not directly accountable to popular will,[109] "elitist" courts have often protected civil liberties from the excesses of majority rule.

Civil Liberties and the Scope of Government

Civil liberties in America are both the foundation for and a reflection of our emphasis on individualism. When there is a conflict between an individual or a group attempting to express themselves or worship as they please and an effort by a government to constrain them in some fashion, the individual or group usually wins. If protecting the freedom of an individual or group to express themselves results in inconvenience or even injustice for the public officials they criticize or the populace they wish to reach, so be it. Every nation must choose where to draw the line between freedom and order. In the United States, we generally choose liberty.

Today's government is huge and commands vast, powerful technologies. Americans' Social Security numbers, credit cards, driver's licenses, and school records are all on giant computers to which the government has immediate access. It is virtually impossible to hide from the police, the FBI, the Internal Revenue Service, or any governmental agency. Because Americans can no longer avoid the attention of government, strict limitations on governmental power are essential. The Bill of Rights provides these vital limitations.

Thus, in general, civil liberties limit the scope of government. Yet substantial government efforts are often required to protect the expansion of rights that we have witnessed thus far. Those seeking abortions may need help reaching a clinic, defendants may demand that lawyers be provided to them at public expense, advocates of unpopular causes may require police protection, and litigants in complex lawsuits over matters of birth or death may rely on judges to resolve their conflicts. It is ironic—but true—that an expansion of freedom may require a simultaneous expansion of government.

Review the Chapter

Listen to Chapter 4 on MyPoliSciLab

The Bill of Rights

4.1 Trace the process by which the Bill of Rights has been applied to the states, p. 107.

Under the incorporation doctrine, most of the freedoms outlined in the Bill of Rights limit the states as well as the national government. The due process clause of the Fourteenth Amendment provides the basis for this protection of rights.

Freedom of Religion

4.2 Distinguish the two types of religious rights protected by the First Amendment and determine the boundaries of those rights, p. 109.

The establishment clause of the First Amendment prohibits government sponsorship of religion, religious exercises, or religious doctrine, but government may support religious-related activities that have a secular purpose if this does not foster excessive entanglement with religion. The free exercise clause guarantees that people may hold any religious views they like, but government may at times limit practices related to those views.

Freedom of Expression

4.3 Differentiate the rights of free expression protected by the First Amendment and determine the boundaries of those rights, p. 116.

Americans enjoy wide protections for expression, both spoken and written, including symbolic and commercial speech. Free expression is protected even when it conflicts with other rights, such as the right to a fair trial. However, the First Amendment does not protect some expression, such as libel, fraud, obscenity, and incitement to violence, and government has more leeway to regulate expression on the public airwaves.

Freedom of Assembly

4.4 Describe the rights to assemble and associate protected by the First Amendment and their limitations, p. 126.

The First Amendment protects the right of Americans to assemble to make a statement, although time, place, and manner restrictions on parades, picketing, and protests are permissible. Citizens also have the right to associate with others who share a common interest.

Right to Bear Arms

4.5 Describe the right to bear arms protected by the Second Amendment and its limitations, p. 128.

Most people have a right to possess firearms and use them for traditionally lawful purposes. However, government may limit this right to certain classes of people, certain areas, and certain weapons, and may require qualifications for purchasing firearms.

Defendants' Rights

4.6 Characterize defendants' rights and identify issues that arise in their implementation, p. 130.

The Bill of Rights provides defendants with many rights, including protections against unreasonable searches and seizures, self-incrimination, entrapment, and cruel and unusual punishment (although the death penalty is not inherently constitutionally unacceptable). Defendants also have a right to be brought before a judicial officer when arrested, to have the services of counsel, to receive a speedy and fair trial (including by an impartial jury), and to confront witnesses who testify against them. They also must be told of their rights. Nevertheless, the implementation of each of these rights requires judges to make nuanced decisions about the meaning of relevant provisions of the Constitution.

The Right to Privacy

4.7 Outline the evolution of a right to privacy and its application to the issue of abortion, p. 143.

Beginning in the 1960s, the Supreme Court articulated a right to privacy, as implied by the Bill of Rights. This right has been applied in various domains and is the basis for a woman's right to an abortion under most, but not all, circumstances.

Understanding Civil Liberties

4.8 Assess how civil liberties affect democratic government and how they both limit and expand the scope of government, p. 145.

The rights of speech, press, and assembly are essential to democracy. So is majority rule. When any of the Bill of Rights, including defendants' rights, conflicts with majority rule, rights prevail.

There is a paradox about civil liberties and the scope of government. Civil liberties, by definition, limit the scope of government action, yet substantial government efforts may be necessary to protect the exercise of rights.

Learn the Terms

 **Study** and **Review** the **Flashcards**

civil liberties, p. 107
Bill of Rights, p. 107
First Amendment, p. 109
Fourteenth Amendment, p. 109
due process clause, p. 109
incorporation doctrine, p. 109
establishment clause, p. 109
free exercise clause, p. 110
prior restraint, p. 117
libel, p. 122
symbolic speech, p. 123
commercial speech, p. 124
probable cause, p. 132
unreasonable searches and seizures, p. 132
search warrant, p. 132
exclusionary rule, p. 132
Fifth Amendment, p. 134
self-incrimination, p. 134
Sixth Amendment, p. 136
plea bargaining, p. 137
Eighth Amendment, p. 139
cruel and unusual punishment, p. 139
right to privacy, p. 143

Key Cases

Barron v. Baltimore (1833)
Gitlow v. New York (1925)
Lemon v. Kurtzman (1971)
Zelman v. Simmons-Harris (2002)
Engel v. Vitale (1962)
School District of Abington Township, Pennsylvania v. Schempp (1963)
Near v. Minnesota (1931)
Schenck v. United States (1919)
Roth v. United States (1957)
Miller v. California (1973)
New York Times v. Sullivan (1964)
Texas v. Johnson (1989)
Zurcher v. Stanford Daily (1978)
Miami Herald Publishing Company v. Tornillo (1974)
Red Lion Broadcasting Company v. Federal Communications Commission (1969)
NAACP v. Alabama (1958)
Mapp v. Ohio (1961)
Miranda v. Arizona (1966)
Gideon v. Wainwright (1963)
Gregg v. Georgia (1976)
McCleskey v. Kemp (1987)
Roe v. Wade (1973)
Planned Parenthood v. Casey (1992)

Test Yourself

 **Study** and **Review** the **Practice Tests**

1. Prior to the Supreme Court ruling in *Gitlow v. New York*, how were state governments restricted by the Bill of Rights?

a. Only the First Amendment restricted state governments, with the Bill of Rights in its entirety applying just to the national government.
b. The Bill of Rights restricted state governments just as it did the national government.
c. The Bill of Rights did not restrict state governments but did restrict the national government.
d. The Bill of Rights restricted state governments on a case-by-case basis as it did the national government.
e. The Bill of Rights restricted state action only on a case-by-case basis while restricting the national government generally.

2. The legal concept under which the Supreme Court has nationalized the Bill of Rights is the

a. incorporation doctrine.
b. establishment doctrine.
c. inclusion doctrine.
d. privileges and immunities clause.
e. due process clause.

3. What was the Supreme Court's decision in the case of *Gitlow v. New York,* and what was its reasoning? Why was this decision significant?

4. Which of the following statements best explains the Supreme Court's interpretation of what the government may do to regulate religion?

a. It can prohibit religious beliefs and practices it considers inappropriate.
b. It can prohibit religious beliefs and practices so long as it does not specifically target a religion.
c. It can prohibit some religious practices but not religious beliefs.
d. It can prohibit neither religious beliefs nor religious practices.
e. It can prohibit religious practices and beliefs for only certain religions.

5. Imagine that you are an administrator at a public university and the Christian Fellowship has petitioned to use university facilities. According to Supreme Court decisions on the matter of religion and public schools, you

a. can deny the Christian Fellowship the use of the university facilities.

b. must allow the Christian Fellowship to use the facilities, just like the Political Science Club and other student organizations.

c. must allow the Christian Fellowship to use the facilities as long as its activities there do not include worship.

d. must put the question to a vote of your student body.

e. must require the Christian Fellowship group to file a religious exemption before you grant its request.

6. Concerning the establishment clause of the First Amendment, the Supreme Court has found that drawing the line between neutrality toward religion and promotion of it is difficult. Discuss a Supreme Court case that illustrates this. Why do you think drawing this line is so difficult?

7. Court decisions concerning symbolic speech

a. have clearly defined symbolic speech and what type of symbolic speech is protected.

b. have clearly defined symbolic speech but have ruled that it is never protected.

c. have extended protections to only some forms of symbolic speech.

d. have ruled that symbolic speech is always protected.

e. have not directly addressed the matter of symbolic speech.

8. What measures can a court take in order to guarantee the right to a fair trial in the face of media scrutiny?

a. The court can limit journalists' access to particularly sensitive trials.

b. The court can exercise prior restraint against the publication of information that might influence the jury.

c. The court can force journalists to hold back sensitive information until after the trial has ended.

d. The court can threaten journalists with fines and imprisonment for revealing sensitive information.

e. The Supreme Court has never upheld a restriction on the press in the interest of a fair trial.

9. The Constitution allows more regulation of the public airwaves than of the printed press.

True_____ False_____

10. Why does the Supreme Court allow more rigid regulation of commercial speech than other forms of speech?

11. The First Amendment to the U.S. Constitution reads, "Congress shall make no law … restricting the freedom of speech." Based on your understanding of Supreme Court cases discussed in this chapter, how well do you think the Supreme Court has protected the First Amendment protections of freedom of speech? Explain your answer.

12. Which statement is true?

a. Because the First Amendment mentions only assembly, there is no constitutional freedom of association.

b. There can be no restrictions on assembling to express opposition to government action.

c. There are virtually no limitations on the content of a protest group's message.

d. States can demand the names of members of a group interested in political change.

e. Governments do not have to protect protestors from violence by onlookers.

13. Suppose that you are in charge of deciding whether to provide permits to pro-choice and pro-life supporters who wish to assemble in your community and advocate their political positions. How might you balance this right to assemble with the government's necessity to ensure order, consistent with your understanding of this constitutional protection and Supreme Court decisions?

14. Which of the following are constitutional limits to the right to keep and bear arms?

a. limits on concealed weapons

b. limits on firearms possession by the mentally ill

c. limits on carrying firearms in schools

d. limits on the commercial sales of firearms

e. All of the above restrictions on the right to keep and bear arms are permissible.

15. In the case of *District of Columbia v. Heller* (2008), the Supreme Court struck down a law that outlawed the possession of handguns in our nation's capital. What was the Court's primary reasoning? Do you agree or disagree with the decision? In your opinion, how did the Court balance the right to bear arms with the need of the government to provide order in society? Explain your answer.

16. Each of the following protections is found in the Fifth and Sixth Amendments, except

a. the right to a speedy trial by an impartial jury.

b. the right to counsel.

c. the right to plea bargain.

d. the right to remain silent.

e. All of the above are rights protected in the Fifth and Sixth Amendments.

17. The Fourth Amendment to the Constitution requires police officers to have a warrant to search or arrest a criminal suspect.

True_____ False_____

18. What is the exclusionary rule and what are some exceptions to it, as identified by the U.S. Supreme Court?

19. What are the main arguments advanced by advocates and critics of the death penalty? Which set of arguments do you agree with more, and why? Has the Supreme Court ruled that the death penalty is "cruel and unusual punishment"? Why or why not?

20. Which of the following is NOT a constitutional restriction on abortion?

a. forbidding the use of state funds for abortions
b. requiring parental consent for a minor seeking an abortion
c. requiring married women to tell their husbands of their intent to have an abortion
d. banning "partial birth" abortions
e. requiring doctors to present women with the risks of having an abortion

21. Is there a right to privacy in the Bill of Rights and, if so, how has it evolved over time? Defend your answer, referring to Supreme Court cases.

22. Which statement is correct?

a. Majority rule can conflict with individual rights.
b. Supreme Court decisions have restricted individual rights over the past century.
c. The individual usually loses in conflicts over restrictions on free speech.
d. Civil liberties generally expand the scope of government.
e. The Constitution protects rights by restricting majority rule.

23. When thinking about citizens' rights, one can distinguish between the rights of an individual citizen and the rights of society as a whole. Based on what you have learned in this chapter, under what circumstances are the courts and the government more likely to give preference to individual rights over the rights of society? By the same token, under what circumstances are concerns for society as a whole likely to override individual rights?

24. The Bill of Rights was designed to protect individuals from the tyranny of government. But as civil liberties have expanded, promoting democracy, they have also expanded the scope of government. How might you resolve the apparent contradiction between the expansion of democracy and scope of government? How well do you think the Bill of Rights balances these two considerations?

Explore Further

WEB SITES

www.freedomforum.org
Background information and recent news on First Amendment issues.

www.eff.org
Web site concerned with protecting online civil liberties.

www.aclu.org
Home page of the American Civil Liberties Union, offering information and commentary on a wide range of civil liberties issues.

www.firstamendmentcenter.org/category/religion
Background on freedom of religion in the United States and discussion of major church–state cases.

www.firstamendmentcenter.org/category/speech
Background on freedom of speech in the United States and discussion of major free speech issues.

www.firstamendmentcenter.org/category/press
Background on freedom of the press in the United States and discussion of major free press issues.

www.cc.org
Christian Coalition home page, containing background information and discussion of current events.

www.deathpenaltyinfo.org
The Death Penalty Information Center, providing data on all aspects of the death penalty.

www.guttmacher.org
The Guttmacher Institute, a nonpartisan source of information on all aspects of abortion.

reproductiverights.org/en
Center for Reproductive Rights Web site.

www.nrlc.org
National Right to Life Web site.

FURTHER READING

Adler, Renata. ***Reckless Disregard.*** New York: Knopf, 1986. The story of two monumental conflicts between free press and individual reputations.

Baker, Liva. ***Miranda: The Crime, the Law, the Politics.*** New York: Atheneum, 1983. An excellent book-length treatment of one of the major criminal cases of our time.

Baumgartner, Frank R., Suzanne L. De Boef, and Amber E. Boydstun. ***The Decline of the Death Penalty and the Discovery of Innocence.*** New York: Cambridge University Press, 2008. Explains changes in public support for the death penalty and the number of executions.

Garrow, David J. ***Liberty and Sexuality.*** New York: Macmillan, 1994. The most thorough treatment of the development of the law on the right to privacy and abortion.

Heymann, Philip B. ***Terrorism, Freedom, and Security.*** Cambridge, MA: MIT Press, 2004. Thoughtfully balances concerns for freedom with those of safety from terrorism.

Irons, Peter. ***The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court.*** New York: Penguin Books, 1990. Accounts of 16 Americans over a period of 50 years who took their cases to the Supreme Court in defense of civil liberties.

Levy, Leonard W. ***The Emergence of a Free Press.*** New York: Oxford University Press, 1985. A major work on the Framers' intentions regarding freedom of expression.

Levy, Leonard W. ***The Establishment Clause: Religion and the First Amendment.*** New York: Macmillan, 1986. The author argues that it is unconstitutional for government to provide aid to any religion.

Lewis, Anthony. ***Make No Law: The Sullivan Case and the First Amendment.*** New York: Random House, 1991. A well-written story of the key case regarding American libel law and an excellent case study of a Supreme Court case.

Rose, Melody. ***Safe, Legal, and Unavailable: Abortion Politics in the United States.*** Washington, DC: CQ Press, 2007. Explores how many women do not have the ability to exercise their constitutional right to an abortion.

5 Civil Rights and Public Policy

Politics in Action: Launching the Civil Rights Movement

A 42-year-old seamstress named Rosa Parks was riding in the "colored" section of a Montgomery, Alabama, city bus on December 1, 1955. A white man got on the bus and found that all the seats in the front, which were reserved for whites, were taken. He moved on to the equally crowded colored section. J. F. Blake, the bus driver, then ordered all four passengers in the first row of the colored section to surrender their seats because the law prohibited whites and blacks from sitting next to or even across from one another.

Three of the African Americans hesitated and then complied with the driver's order. But Rosa Parks, a politically active member of the National Association for the Advancement of Colored People, said no. The driver threatened to have her arrested, but she refused to move. He then called the police, and a few minutes later two officers boarded the bus and arrested her.

At that moment the civil rights movement went into high gear. There had been substantial efforts—and some important successes—to use the courts to end racial segregation, but Rosa Parks's refusal to give up her seat led to extensive mobilization of African Americans. Protestors

5.1 Differentiate the Supreme Court's three standards of review for classifying people under the equal protection clause, p. 155.

5.2 Trace the evolution of protections of the rights of African Americans and explain the application of nondiscrimination principles to issues of race, p. 158.

5.3 Relate civil rights principles to progress made by other ethnic groups in the United States, p. 165.

5.4 Trace the evolution of women's rights and explain how civil rights principles apply to gender issues, p. 170.

5.5 Show how civil rights principles have been applied to seniors, people with disabilities, and gays and lesbians, p. 175.

5.6 Trace the evolution of affirmative action policy and assess the arguments for and against it, p. 180.

5.7 Establish how civil rights policy advances democracy and increases the scope of government, p. 183.

The struggle for equality has been a long one. The civil rights movement, led by African Americans such as those pictured here at a rally during the Montgomery bus boycott, played a critical role in obtaining more equal treatment for African Americans and, eventually, for other important groups in American society as well.

MyPoliSciLab Video Series

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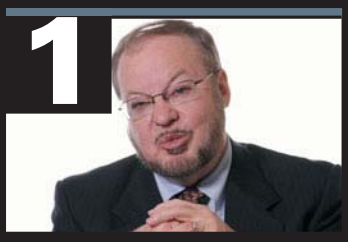
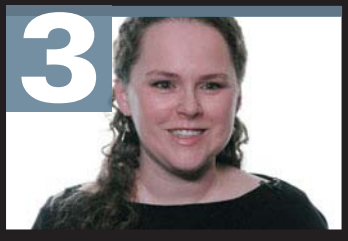


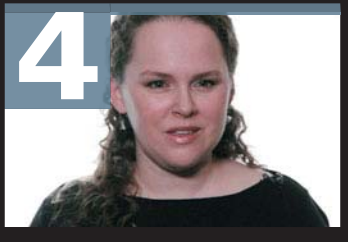
The Big Picture Discover how the civil rights movement triumphed. Author George C. Edwards III discusses the civil rights movement in the United States, and he demonstrates how many of the movement's victories happened once the courts found the systems set in place to be unconstitutional.

The Basics Discover whether we have always had civil rights and whether all American citizens have them. Watch as ordinary people answer questions about where our civil rights come from and how we won them. Consider what equal treatment and protection under the law means today.



In Context Discover how civil rights issues have permeated our society since the United States was founded. In the video, University of Oklahoma political scientist Alisa H. Fryar talks about how civil rights has expanded in scope since the civil rights movement of the twentieth century.

Thinking Like a Political Scientist Where are we headed in terms of civil rights research in the United States? University of Oklahoma political scientist Alisa H. Fryar discusses how current research on voting rights, municipal election methods, and education address civil rights issues.



In the Real World The Defense of Marriage Act declares that the federal government does not recognize same-sex marriage. Is that constitutional? Hear real people argue both sides as they discuss their beliefs about same-sex marriage, and find out how public opinion has changed dramatically over the years.

So What? Would you have been allowed to vote one-hundred years ago? In this video, author George C. Edwards III looks at the history of civil rights in the United States and gives insight into the civil rights movements that are happening today.

employed a wide range of methods, including nonviolent resistance. A new preacher in town, Martin Luther King, Jr., organized a boycott of the city buses. He was jailed, his house was bombed, and his wife and infant daughter were almost killed, but neither he nor the African American community wavered. Although they were harassed by the police and went without motor transportation by walking or even riding mules, they persisted in boycotting the buses.

It eventually took the U.S. Supreme Court to end the boycott. On November 13, 1956, the Court declared that Alabama's state and local laws requiring segregation on buses were illegal. On December 20, federal injunctions were served on the city and bus company officials, forcing them to follow the Supreme Court's ruling.

On December 21, 1956, Rosa Parks boarded a Montgomery city bus for the first time in over a year. She could sit wherever she liked and chose a seat near the front.

Americans have never fully come to terms with equality. Most Americans favor equality in the abstract—a politician who advocated inequality would not attract many votes—yet the concrete struggle for equal rights under the Constitution has been our nation's most bitter battle. It pits person against person, as in the case of Rosa Parks and the nameless white passenger, and group against group. Those people who enjoy privileged positions in American society have been reluctant to give them up.

Individual liberty is central to democracy. So is a broad notion of equality, such as that implied by the concept of "one person, one vote." Sometimes these values conflict, as when individuals or a majority of the people want to act in a discriminatory fashion. How should we resolve such conflicts between liberty and equality? Can we have a democracy if some citizens do not enjoy basic rights to political participation or suffer discrimination in employment? Can we or should we try to remedy past discrimination against minorities and women?

In addition, many people have called on government to protect the rights of minorities and women, increasing the scope and power of government in the process. Ironically, this increase in government power is often used to *check* government, as when the federal courts restrict the actions of state legislatures. It is equally ironic that society's collective efforts to use government to protect civil rights are designed not to limit individualism but to enhance it, freeing people from suffering and from prejudice. But how far should government go in these efforts? Is an increase in the scope of government to protect some people's rights an unacceptable threat to the rights of other citizens?

civil rights
Policies designed to protect people against arbitrary or discriminatory treatment by government officials or individuals.

The phrase "all men are created equal" is at the heart of American political culture, yet implementing this principle has proved to be one of our nation's most enduring struggles. Throughout our history, a host of constitutional questions have been raised by issues involving African Americans, other racial and ethnic minorities, women, the elderly, persons with disabilities, and gays and lesbians—issues ranging from slavery and segregation to unequal pay and discrimination in hiring. The rallying cry of these groups has been **civil rights**, which are policies designed to protect people against arbitrary or discriminatory treatment by government officials or individuals.

The Struggle for Equality

5.1 Differentiate the Supreme Court's three standards of review for classifying people under the equal protection clause.

The struggle for equality has been a persistent theme in our nation's history. Slaves sought freedom, free African Americans fought for the right to vote and to be treated as equals, women pursued equal participation in society, and the economically disadvantaged called for better treatment and economic opportunities. This fight for equality affects all Americans. Philosophically, the struggle involves defining the term *equality*. Constitutionally, it involves interpreting laws. Politically, it often involves power.

Fourteenth Amendment
The constitutional amendment adopted after the Civil War that states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

equal protection of the laws
Part of the Fourteenth Amendment emphasizing that the laws must provide equivalent "protection" to all people.

Conceptions of Equality

What does *equality* mean? Jefferson's statement in the Declaration of Independence that "all men are created equal" did not mean that he believed everybody was exactly alike or that there were no differences among human beings. The Declaration went on to speak, however, of "inalienable rights" to which all are equally entitled. American society does not emphasize *equal results* or *equal rewards*; few Americans argue that everyone should earn the same salary or have the same amount of property. Instead, a belief in *equal rights* has led to a belief in *equality of opportunity*; in other words, everyone should have the same chance to succeed.

The Constitution and Inequality

The delegates to the Constitutional Convention created a plan for government, not guarantees of individual rights. Not even the Bill of Rights mentions equality. It does, however, have implications for equality in that it does not limit the scope of its guarantees to specified groups within society. It does not say, for example, that only whites have freedom from compulsory self-incrimination or that only men are entitled to freedom of speech. The First Amendment guarantees of freedom of expression, in particular, are important because they allow those who are discriminated against to work toward achieving equality. As we will see, this kind of political activism has proven important for groups fighting for civil rights.

The first and only place in which the idea of equality appears in the Constitution is in the **Fourteenth Amendment**, one of the three amendments passed after the Civil War. (The Thirteenth abolishes slavery, and the Fifteenth extends the right to vote to African Americans.) Ratified in 1868, the Fourteenth Amendment forbids the states from denying to anyone "**equal protection of the laws**." This *equal protection clause* became the principal tool for waging struggles for equality. Laws, rules, and regulations inevitably classify people. For example, some people are eligible to vote while others are not; some people are eligible to attend a state university while others are denied admission. Such classifications cannot violate the equal protection of the law.

How do the courts determine whether a classification in a law or regulation is permissible or violates the equal protection of the law? For this purpose, the Supreme Court developed three levels of scrutiny, or analysis, called *standards of review* (see Table 5.1). The Court has ruled that to pass constitutional muster, most classifications must only be *reasonable*. In practice, this means that a classification must bear a rational relationship to some legitimate governmental purpose, for

TABLE 5.1 SUPREME COURT'S STANDARDS FOR CLASSIFICATIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Supreme Court has three standards of review for evaluating whether a classification in a law or regulation is constitutionally permissible. Most classifications must only bear a rational relationship to some legitimate governmental purpose. The burden of proof is on anyone challenging such classifications to show that they are not reasonable, but arbitrary. On the other extreme, the burden of proof is with the rule maker. Racial and ethnic classifications are inherently suspect, and courts presume they are invalid and uphold them only if they serve a compelling public interest and there is no other way to accomplish the purpose of the law. The courts make no presumptions about classifications based on gender. They must bear a substantial relationship to an important governmental purpose, a lower threshold than serving a compelling public interest.

Basis of Classification	Standard of Review	Applying the Test
Race and ethnicity	Inherently suspect *difficult to meet*	Is the classification necessary to accomplish a compelling governmental purpose and the least restrictive way to reach the goal?
Gender	Intermediate scrutiny *moderately difficult to meet*	Does the classification bear a substantial relationship to an important governmental goal?
Other (age, wealth, etc.)	Reasonableness *easy to meet*	Does the classification have a rational relationship to a legitimate governmental goal?

example, to educating students in colleges. The courts defer to rule makers, typically legislatures, and anyone who challenges these classifications has the burden of proving that they are not reasonable, but arbitrary. (A classification that is arbitrary—a law singling out, say, people with red hair or blue eyes for inferior treatment—would be invalid.) Thus, for example, the states can restrict the right to vote to people over the age of 18; age is a reasonable classification and hence a permissible basis for determining who may vote.

With some classifications, however, the burden of proof is with the rule maker. The Court has ruled that racial and ethnic classifications, such as those that would prohibit African Americans from attending school with whites or that would deny a racial or ethnic group access to public services such as a park or swimming pool, are *inherently suspect*. Courts presume that these classifications are invalid and uphold them only if they serve a "compelling public interest" and there is no other way to accomplish the purpose of the law. In the case of a racial or ethnic classification, the burden of proof is on the government that created it to prove that the classification meets these criteria. It is virtually impossible to show that a classification by race or ethnicity that serves to disadvantage a minority group serves a compelling public interest. What about classifications by race and ethnicity, such as for college admissions, that are designed to *remedy* previous discrimination? As we will see in our discussion of affirmative action, the Court is reluctant to approve even these laws.

Classifications based on gender receive *intermediate scrutiny*; the courts presume them to be neither constitutional nor unconstitutional. A law that classifies by gender, such as one that makes men but not women eligible for a military draft, must bear a substantial relationship to an important governmental purpose, a lower threshold than serving a "compelling public interest."

Conditions for women and minorities would be radically different if it were not for the "equal protection" clause.[1] The following sections show how equal protection litigation has worked to the advantage of minorities, women, and other groups seeking protection under the civil rights umbrella.

The African American struggle for equality paved the way for civil rights movements by women and other minorities. Here, civil rights leaders Roy Wilkins, James Farmer, Martin Luther King, Jr., and Whitney Young meet with President Lyndon B. Johnson.

Scott v. Sandford
The 1857 Supreme Court decision ruling that a slave who had escaped to a free state enjoyed no rights as a citizen and that Congress had no authority to ban slavery in the territories.

Thirteenth Amendment
The constitutional amendment ratified after the Civil War that forbade slavery and involuntary servitude.

African Americans' Civil Rights

5.2 Trace the evolution of protections of the rights of African Americans and explain the application of nondiscrimination principles to issues of race.

Throughout American history, African Americans have been the most visible minority group in the United States. Thus, African Americans have blazed the constitutional trail for securing equal rights for all Americans. They made very little progress, however, until well into the twentieth century.

The Era of Slavery

For the first 250 years of American settlement, most African Americans lived in slavery. Slaves were the property of their masters. They could be bought and sold, and they could neither vote nor own property. The Southern states, whose plantations required large numbers of unpaid workers, were the primary market for slave labor. Policies of the slave states and the federal government accommodated the property interests of slave owners, who were often wealthy and enjoyed substantial political influence.

In 1857, the Supreme Court bluntly announced in ***Scott v. Sandford*** that a black man, slave or free, was "chattel" and had no rights under a white man's government and that Congress had no power to ban slavery in the western territories. This decision invalidated the hard-won Missouri Compromise, which had allowed Missouri to become a slave state on the condition that northern territories would remain free of slavery. As a result, the *Scott* decision was an important milestone on the road to the Civil War.

The Union victory in the Civil War and the ratification of the **Thirteenth Amendment** ended slavery. The promises implicit in this amendment and the other two Civil War amendments introduced the era of reconstruction and segregation, in which these promises were first honored and then broken.

The Era of Reconstruction and Segregation

After the Civil War ended, Congress imposed strict conditions on the former Confederate states before it would seat their representatives and senators. No one who had served in secessionist state governments or in the Confederate army could hold state office, the legislatures had to ratify the new amendments, and the military would govern the states like "conquered provinces" until they complied with the tough federal plans for reconstruction. Many African American men held state and federal offices during the 10 years following the war. Some government agencies, such as the Freedmen's Bureau, provided assistance to former slaves who were making the difficult transition to independence.

To ensure his election in 1876, Rutherford Hayes promised to pull the troops out of the South and let the Southern states do as they pleased. Southerners lost little time reclaiming power and imposing a code of *Jim Crow laws*, or segregationist laws, on African Americans. ("Jim Crow" was the name of a stereotypical African American in a nineteenth-century minstrel song.) These laws relegated African Americans to separate public facilities, separate school systems, and even separate restrooms. Not only had most whites lost interest in helping former slaves, but much of what the Jim Crow laws mandated in the South was also common practice in the North. Indeed, the national government practiced segregation in the armed forces, employment, housing programs, and prisons.[2] In this era, racial segregation affected every part of life, from the cradle to the grave. African Americans were delivered by African American physicians or midwives and buried in African American cemeteries. Groups such as the Ku Klux Klan terrorized African Americans who violated the norms of segregation, lynching hundreds of people.

In the era of segregation, Jim Crow laws, such as those requiring separate drinking fountains for African Americans and whites, governed much of life in the South.

Plessy v. Ferguson
An 1896 Supreme Court decision that provided a constitutional justification for segregation by ruling that a Louisiana law requiring "equal but separate accommodations for the white and colored races" was constitutional.

The Supreme Court was of little help. Although it voided a law barring African Americans from serving on juries (*Strauder v. West Virginia* [1880]), in the *Civil Rights Cases* (1883), it held that the Fourteenth Amendment did not prohibit racial discrimination by private businesses and individuals.

The Court then provided a constitutional justification for segregation in the 1896 case of ***Plessy v. Ferguson***. The Louisiana legislature had required "equal but separate accommodations for the white and colored races" in railroad transportation. Although Homer Plessy was seven-eighths white, he had been arrested for refusing to leave a railway car reserved for whites. The Court upheld the law, saying that segregation in public facilities was not unconstitutional as long as the separate facilities were substantially equal. Moreover, the Court subsequently paid more attention to the "separate" than to the "equal" part of this ruling, allowing Southern states to maintain high schools and professional schools for whites even where there were no such schools for blacks. Significantly, until the 1960s, nearly all the African American physicians in the United States were graduates of two medical schools, Howard University in Washington, D.C., and Meharry Medical College in Tennessee.

Nevertheless, some progress on the long road to racial equality was made in the first half of the twentieth century. The Niagara Movement was an early civil rights organization, founded in 1905. In 1908, it folded into the National Association for the Advancement of Colored People (NAACP), which was formed partly in response to the continuing practice of lynching and a race riot that year in Springfield, Illinois. The Brotherhood of Sleeping Car Porters was founded in 1925, the first labor organization led by African Americans.

In the meantime, the Supreme Court voided some of the most egregious practices limiting the right to vote (discussed later in this chapter). In 1941, President Franklin D. Roosevelt issued an executive order forbidding racial discrimination in defense industries, and in 1948, President Harry S. Truman ordered the desegregation of the armed services. The leading edge of change, however, was in education.

Equal Education

Education is at the core of Americans' beliefs in equal opportunity. It is not surprising, then, that civil rights advocates focused many of their early efforts on desegregating schools. To avoid the worst of backlashes, they started with higher education.

Brown v. Board of Education
The 1954 Supreme Court decision holding that school segregation was inherently unconstitutional because it violated the Fourteenth Amendment's guarantee of equal protection. This case marked the end of legal segregation in the United States.

The University of Oklahoma admitted George McLaurin, an African American, as a graduate student but forced him to use separate facilities, including a special table in the cafeteria, a designated desk in the library, and a desk just outside the classroom doorway. In *McLaurin v. Oklahoma State Regents* (1950), the Court ruled that a public institution of higher learning could not provide different treatment to a student solely because of his or her race. In the same year, the Court found the "separate but equal" formula generally unacceptable for professional schools in *Sweatt v. Painter*.

At this point, civil rights leaders turned to elementary and secondary education. After searching carefully for the perfect case to challenge legal public school segregation, the Legal Defense Fund of the NAACP selected the case of Linda Brown. Brown was an African American student in Topeka, Kansas, required by Kansas law to attend a segregated school. In Topeka, African American schools were fairly equivalent to white schools with regard to the visible signs of educational quality—teacher qualifications, facilities, and so on. Thus, the NAACP chose the case in order to test the *Plessy v. Ferguson* doctrine of "separate but equal." It wanted to force the Court to rule directly on whether school segregation was inherently unequal and thereby violated the Fourteenth Amendment's requirement that states guarantee "equal protection of the laws."

President Eisenhower had just appointed Chief Justice Earl Warren. So important was the case that the Court heard two rounds of arguments, one before Warren joined the Court. The justices, after hearing the oral arguments, met in the Supreme Court's conference room. Believing that a unanimous decision would have the most impact, the justices negotiated a broad agreement and then determined that Warren himself should write the opinion.

In ***Brown v. Board of Education*** (1954), the Supreme Court set aside its precedent in *Plessy* and held that school segregation was inherently unconstitutional because it violated the Fourteenth Amendment's guarantee of equal protection. Legal segregation had come to an end.

A year after its decision in *Brown*, the Court ordered lower courts to proceed with "all deliberate speed" to desegregate public schools. Desegregation proceeded slowly in the South, however. A few counties threatened to close their public schools; white enrollment in private schools soared. In 1957, President Eisenhower had to send troops to desegregate Central High School in Little Rock, Arkansas. In 1969, 15 years after its first ruling that school segregation was unconstitutional and in the face of continued massive resistance, the Supreme Court withdrew its earlier grant of time to school authorities and declared, "Delays in desegregating school systems are no longer tolerable" (*Alexander v. Holmes County Board of Education*). Thus, after nearly a generation of modest progress, Southern schools were suddenly integrated (see Figure 5.1).

Why It *Matters* to You

Brown v. Board of Education

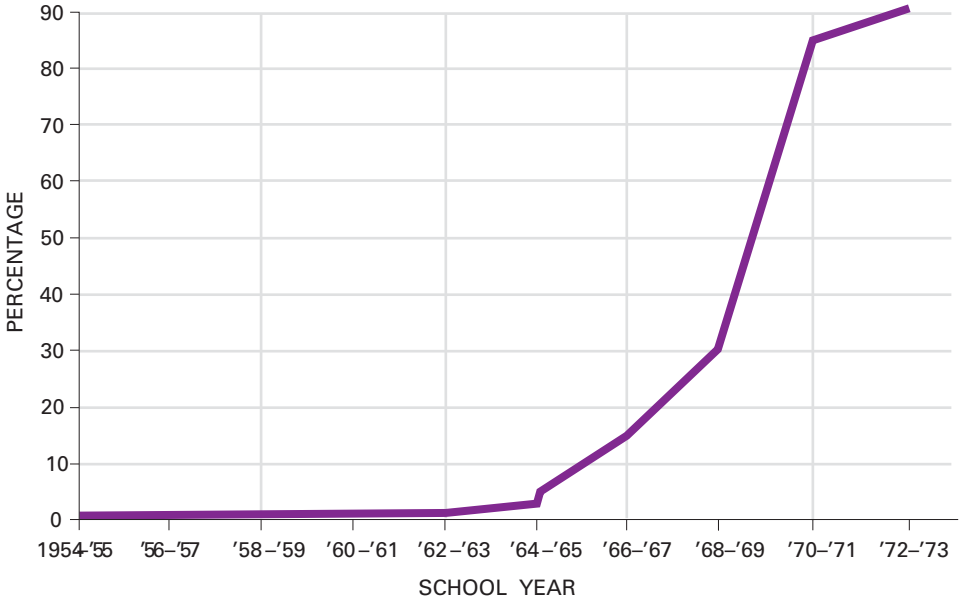
In *Brown v. Board of Education,* the Supreme Court overturned its decision in *Plessy v. Ferguson.* This decision was a major step in changing the face of America. Just imagine what the United States would be like today if we still had segregated public facilities and services like universities and restaurants.

In general, the Court found that if schools had been legally segregated, authorities had an obligation to overcome past discrimination. This could include assigning students to schools in a way that would promote racial balance. Some federal judges ordered the busing of students to achieve racially balanced schools, a practice upheld (but not required) by the Supreme Court in *Swann v. Charlotte-Mecklenberg County Schools* (1971).

FIGURE 5.1 PERCENTAGE OF BLACK STUDENTS ATTENDING SCHOOL WITH ANY WHITES IN SOUTHERN STATES

Despite the Supreme Court's decision in *Brown v. Board of Education* in 1954, school integration proceeded at a snail's pace in the South for a decade. Most Southern African American children entering the first grade in 1955 never attended school with white children. Things picked up considerably in the late 1960s, however, when the Supreme Court insisted that obstruction of implementation of its decision in *Brown* must come to an end.

The figure is based on elementary and secondary students in 11 Southern states—Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee, and Florida.



SOURCE: Lawrence Baum, *The Supreme Court*, 10th ed. (Washington, DC: CQ Press, 2010), 192.

Not all racial segregation is what is called *de jure* ("by law") segregation. *De facto* ("in reality") segregation results, for example, when children are assigned to schools near their homes and those homes are in neighborhoods that are racially segregated for social and economic reasons. Sometimes the distinction between *de jure* and *de facto* segregation has been blurred by past official practices. Because minority groups and federal lawyers demonstrated that Northern schools, too, had purposely drawn school district lines to promote segregation, school busing came to the North as well. Denver, Boston, and other cities instituted busing for racial balance, just as Southern cities did.

Majorities of both whites and blacks have opposed busing, which is one of the least popular remedies for discrimination. In recent years, it has become less prominent as a judicial instrument. Courts do not have the power to order busing between school districts; thus, school districts that are composed largely of minorities must rely on other means to integrate.

The Civil Rights Movement and Public Policy

The civil rights movement organized both African Americans and whites, and using tactics such as sit-ins, marches, and civil disobedience, sought to establish equal opportunities in the political and economic sectors and to end the policies and practices of segregation (see "Young People and Politics: Freedom Riders"). The movement's trail was long and sometimes bloody. Police turned their dogs on nonviolent marchers in Birmingham, Alabama. Racists murdered other activists in Meridian, Mississippi, and Selma, Alabama. Fortunately, the goals of the civil rights movement appealed to the national conscience. By the 1970s, overwhelming majorities of white Americans supported racial inegration.[3] Today, the principles established in *Brown* have near-universal support.

Young People & Politics

Freedom Riders

Most political activity is quite safe. There have been occasions, however, when young adults have risked bodily harm and even death to fight for their beliefs. Years after *Brown v. Board of Education* (1954), segregated transportation was still the law in some parts of the Deep South. To change this system, the Congress of Racial Equality (CORE) organized freedom rides in 1961. Young black and white volunteers in their teens and early twenties traveled on buses through the Deep South. In Anniston, Alabama, segregationists destroyed one bus, and men armed with clubs, bricks, iron pipes, and knives attacked riders on another. In Birmingham, the passengers were greeted by members of the Ku Klux Klan with further acts of violence. At Montgomery, the state capital, a white mob beat the riders with chains and ax handles.

The Ku Klux Klan hoped that this violent treatment would stop other young people from taking part in freedom rides. It did not. Over the next six months, more than a thousand people took part in freedom rides. A young white man from Madison, Wisconsin, James Zwerg, was badly injured by a mob and left in the road for over an hour. White-run ambulances refused to take him to the hospital. In an interview afterward, he reflected the grim determination of the freedom riders: "Segregation must be stopped. It must be broken down. Those of us on the Freedom Ride will continue. No matter what happens we are dedicated to this. We will take the beatings. We are willing to accept death."

As with the Montgomery bus boycott and the conflict at Little Rock, the freedom riders gave worldwide publicity to the racial discrimination suffered by African Americans, and in doing so they helped to bring about change. Attorney General Robert Kennedy petitioned the Interstate Commerce Commission (ICC) to draft regulations to end racial segregation in bus terminals. The ICC was reluctant, but in September 1961 it issued the necessary orders.

The freedom riders did not limit themselves to desegregating buses. During the summer of 1961, they also sat together in segregated restaurants, lunch counters, and hotels. Typically they were refused service, and they were often threatened and sometimes attacked. The sit-in tactic was especially effective when it focused on large companies that feared boycotts in the North and that began to desegregate their businesses.

In the end, the courage of young people committed to racial equality prevailed. They helped to change the face of America.

CRITICAL THINKING QUESTIONS

1. What are young adults doing to fight racism today?
2. Does civil disobedience have a role in contemporary America?

Civil Rights Act of 1964
The law making racial discrimination in hotels, motels, and restaurants illegal and forbidding many forms of job discrimination.

It was the courts as much as the national conscience that put civil rights goals on the nation's policy agenda. In other areas as well as in education, *Brown v. Board of Education* was the beginning of a string of Supreme Court decisions holding various forms of discrimination unconstitutional. *Brown* and these other cases gave the civil rights movement momentum that would grow in the years that followed.

As a result of national conscience, the courts, the civil rights movement, and the increased importance of African American voters, the 1950s and 1960s saw a marked increase in public policies seeking to foster racial equality. These innovations included policies to promote voting rights, access to public accommodations, open housing, and nondiscrimination in many other areas of social and economic life. The **Civil Rights Act of 1964** was the most important civil rights law in nearly a century. It did the following:

- Made racial discrimination illegal in hotels, motels, restaurants, and other places of public accommodation
- Forbade discrimination in employment on the basis of race, color, national origin, religion, or gender[4]
- Created the Equal Employment Opportunity Commission (EEOC) to monitor and enforce protections against job discrimination
- Provided for withholding federal grants from state and local governments and other institutions that practiced racial discrimination

- Strengthened voting rights legislation
- Authorized the U.S. Justice Department to initiate lawsuits to desegregate public schools and facilities

The Voting Rights Act of 1965 (discussed next) was the most extensive federal effort to crack century-old barriers to African Americans voting in the South. The Court decided in *Jones v. Mayer* (1968) that Congress could regulate the sale of private property to prevent racial discrimination, and Congress passed the *Open Housing Act of 1968* to forbid discrimination in the sale or rental of housing.

In short, in the years following *Brown,* congressional and judicial policies attacked virtually every type of segregation. By the 1980s, there were few, if any, forms of racial discrimination left to legislate against. Efforts for legislation were successful, in part, because by the mid-1960s federal laws effectively protected the right to vote, in fact as well as on paper. Members of minority groups thus had some power to hold their legislators accountable.

Voting Rights

The early Republic limited **suffrage**, the legal right to vote, to a handful of the population—mostly property-holding white males. The **Fifteenth Amendment**, adopted in 1870, guaranteed African Americans the right to vote—at least in principle. It said, "The right of citizens to vote shall not be abridged by the United States or by any state on account of race, color, or previous condition of servitude." The gap between these words and their implementation, however, remained wide for a full century. States seemed to outdo one another in developing ingenious methods of circumventing the Fifteenth Amendment.

Many states required potential voters to complete literacy tests before registering to vote. Typically the requirement was that they read, write, and understand the state constitution or the U.S. Constitution. In practice, however, registrars rarely administered the literacy tests to whites, while the standard of literacy they required of blacks was so high that few were ever able to pass the test. In addition, Oklahoma and other Southern states used a *grandfather clause* that exempted persons whose grandfathers were eligible to vote in 1860 from taking these tests. This exemption did not apply, of course, to the grandchildren of slaves but did allow illiterate whites to vote. The law was blatantly unfair; it was also unconstitutional, said the Supreme Court in the 1915 decision *Guinn v. United States*.

To exclude African Americans from registering to vote, most Southern states also relied on **poll taxes**, which were small taxes levied on the right to vote that often fell due at a time of year when poor sharecroppers had the least cash on hand. To render African American votes ineffective, most Southern states also used the **white primary**, a device that permitted political parties to exclude African Americans from voting in primary elections. Because the South was so heavily Democratic, white primaries had the effect of depriving African Americans of a voice in the most important contests and letting them vote only when it mattered least, in the general election. The Supreme Court declared white primaries unconstitutional in 1944 in *Smith v. Allwright*.

The civil rights movement put suffrage high on its political agenda; one by one, the barriers to African American voting fell during the 1960s. The **Twenty-fourth Amendment**, which was ratified in 1964, prohibited poll taxes in federal elections. Two years later, the Supreme Court voided poll taxes in state elections in *Harper v. Virginia State Board of Elections*.

To combat the use of discriminatory voter registration tests—requiring literacy or an understanding of the Constitution, for example—the **Voting Rights Act of 1965** prohibited any government from using voting procedures that denied a person the vote on the basis of race or color and abolished the use of literacy requirements for anyone who had completed the sixth grade. The federal government sent election registrars to areas with long histories of discrimination, and these same areas had to submit all proposed changes

suffrage
The legal right to vote, extended to African Americans by the Fifteenth Amendment, to women by the Nineteenth Amendment, and to 18- to 20-year-olds by the Twenty-sixth Amendment.

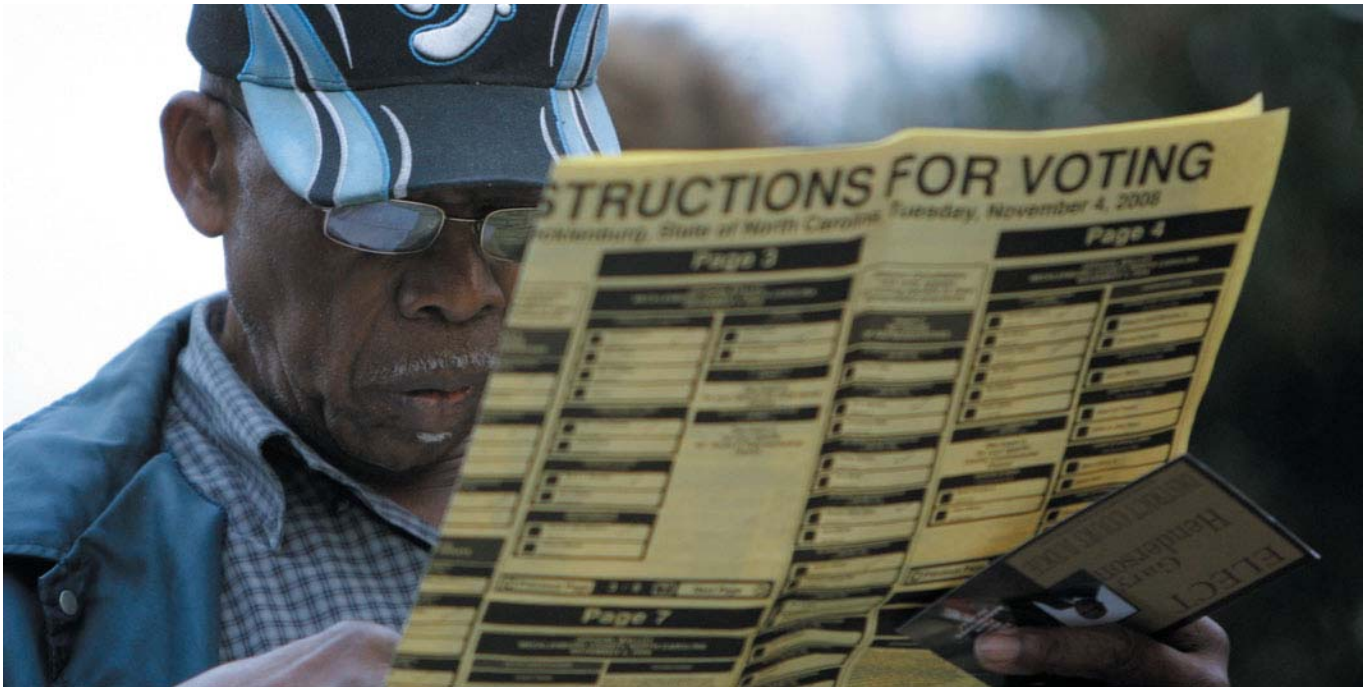
Fifteenth Amendment
The constitutional amendment adopted in 1870 to extend suffrage to African Americans.

poll taxes
Small taxes levied on the right to vote. This method was used by most Southern states to exclude African Americans from voting. Poll taxes were declared void by the Twenty-fourth Amendment in 1964.

white primary
Primary elections from which African Americans were excluded, an exclusion that, in the heavily Democratic South, deprived African Americans of a voice in the real contests. The Supreme Court declared white primaries unconstitutional in 1944.

Twenty-fourth Amendment
The constitutional amendment passed in 1964 that declared poll taxes void in federal elections.

Voting Rights Act of 1965
A law designed to help end formal and informal barriers to African American suffrage. Under the law, hundreds of thousands of African Americans were registered, and the number of African American elected officials increased dramatically.



The Voting Rights Act of 1965 produced a major increase in the number of African Americans registered to vote in Southern states. Voting also translated into increased political clout for African Americans.

in their voting laws or practices to a federal official for approval. As a result of these provisions, hundreds of thousands of African Americans registered to vote in Southern states.

The effects of these efforts were swift and certain, as the civil rights movement turned from protest to politics.[5] When the Voting Rights Act passed in 1965, only 70 African Americans held public office in the 11 Southern states. By the early 1980s, more than 2,500 African Americans held elected offices in those states, and the number has continued to grow. There are currently more than 9,400 African American elected officials in the United States.[6]

The Voting Rights Act of 1965 not only secured the right to vote for African Americans but also attempted to ensure that their votes would not be diluted through racial gerrymandering (drawing district boundaries to advantage a specific group). For example, in many cities, the residences of minorities were clustered in one part of the community. If members of the city council were elected from districts within the city, minority candidates would have a better chance to win some seats. In response, some cities chose to elect all council members in at-large seats (in which council members were elected from the entire city), thereby reducing the chances of a geographically concentrated minority electing a minority council member. When Congress amended the Voting Rights Act in 1982, it further insisted that minorities be able to "elect representatives of their choice" when their numbers and configuration permitted. Thus, governments at all levels had to draw district boundaries to avoid discriminatory *results* and not just discriminatory *intent*. In 1986, the Supreme Court upheld this principle in *Thornburg v. Gingles*.

Why It *Matters* to You

The Voting Rights Act

In passing the Voting Rights Act of 1965, Congress enacted an extraordinarily strong law to protect the rights of minorities to vote. There is little question that officials pay more attention to minorities when they can vote. And many more members of minority groups are now elected to high public office.

Officials in the Justice Department, which was responsible for enforcing the Voting Rights Act, and state legislatures that drew new district lines interpreted the amendment of the Voting Rights Act and the *Thornburg* decision as a mandate to create minority-majority districts, districts in which a minority group accounted for a majority of the voters. However, in 1993, the Supreme Court decried the creation of districts based solely on racial composition, as well as the district drawers' abandonment of traditional redistricting standards such as compactness and contiguity.[7] In 1994 the Court ruled that a state legislative redistricting plan that does not create the greatest possible number of minority-majority districts is not in violation of the Voting Rights Act,[8] and in 1995, the Court rejected the efforts of the Justice Department to achieve the maximum possible number of minority districts. It held that the use of race as a "predominant factor" in drawing district lines should be presumed to be unconstitutional.[9] The next year, the Supreme Court voided several convoluted congressional districts on the grounds that race had been the primary reason for abandoning compact district lines and that the state legislatures had crossed the line into unconstitutional racial gerrymandering.[10]

In yet another turn, in 1999, the Court declared in *Hunt v. Cromartie* that conscious consideration of race is not automatically unconstitutional if the state's primary motivation was potentially political (African Americans tend to be Democrats, for example) rather than racial. We can expect continued litigation concerning this question, especially since the Court has decided that state legislatures may redraw district boundaries at any time and not only after a census.[11]

The Rights of Other Minority Groups

5.3 Relate civil rights principles to progress made by other ethnic groups in the United States.

America is heading toward a *minority majority*, a situation in which Americans who are members of minority groups will outnumber Americans of European descent; a number of states already have minority majorities (see Figure 5.2). African Americans are not the only minority group that has suffered legally imposed discrimination. Even before the civil rights struggle, Native Americans, Hispanics, and Asians learned how powerless they could become in a society dominated by whites. The civil rights laws for which African Americans fought have benefited members of these groups as well. In addition, social movements tend to beget new social movements; thus, the African American civil rights movement of the 1960s spurred other minorities to mobilize to protect their rights.

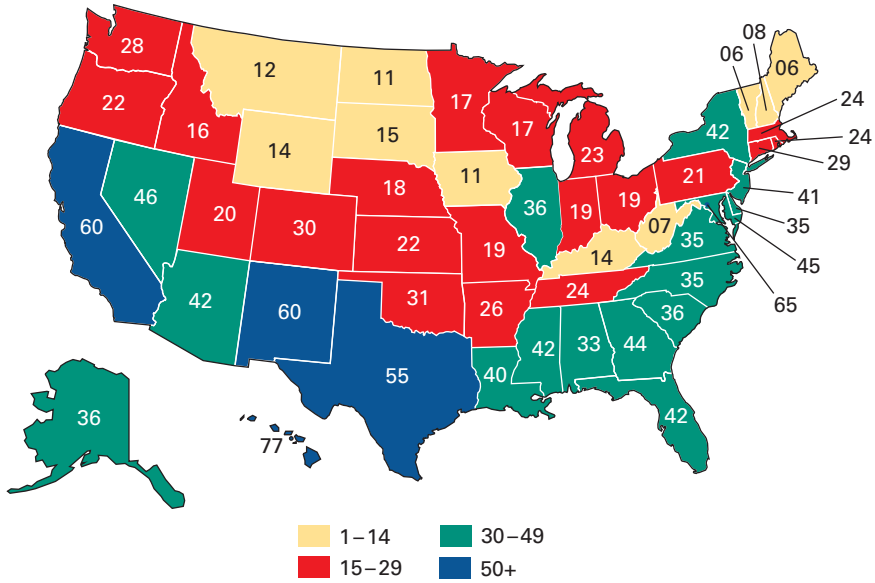
Native Americans

The earliest inhabitants of the continent, the American Indians, are, of course, the oldest minority group. About 5.2 million people identify themselves as at least part Native American or Native Alaskan, including 11 percent of New Mexicans and Oklahomans, and 19 percent of Alaskans.[12]

The history of poverty, discrimination, and exploitation experienced by American Indians is a long one. For generations, U.S. policy promoted westward expansion at the expense of Native Americans' lands. The government isolated Native Americans on reservations, depriving them of their lands and their rights. Then, with the Dawes Act of 1887, the federal government turned to a strategy of forced assimilation, sending children to boarding schools off the reservations, often against the will of their families, and banning tribal rituals and languages.

FIGURE 5.2 MINORITY POPULATION BY STATE

The country's minority population has now reached over 113 million, including about 51 million Hispanic Americans and 42 million African Americans. Minorities make up approximately 34 percent of all Americans. Forty-four percent of all the children under 18 are from minority families. This map shows minorities as a percentage of each state's population. Hawaii has the largest minority population at 77 percent, followed by the District of Columbia (65 percent), New Mexico (60 percent), California (60 percent), and Texas (55 percent). In eight other states—Arizona, Florida, Georgia, Maryland, Mississippi, Nevada, New Jersey, and New York—minorities make up at least 40 percent of the population.



SOURCE: U.S. Census Bureau.

Finally, in 1924, Congress made American Indians citizens of the United States and gave them the right to vote, a status that African Americans had achieved a half century before. Not until 1946 did Congress establish the Indian Claims Act to settle Indians' claims against the government related to land that had been taken from them.[13]

Today, Native Americans still have high rates of poverty and ill health, and almost half live on or near a reservation. Native Americans know, perhaps better than any other group, the significance of the gap between public policy regarding discrimination and the realization of that policy.

But progress is being made. The civil rights movement of the 1960s created a more favorable climate for Native Americans to secure guaranteed access to the polls, to housing, and to jobs and to reassert their treaty rights. The Indian Bill of Rights was adopted as Title II of the Civil Rights Act of 1968, applying most of the provisions of the Constitution's Bill of Rights to tribal governments. In *Santa Clara Pueblo v. Martinez* (1978), the Supreme Court strengthened the tribal power of individual tribe members and furthered self-government by Indian tribes.

Progress came in part through the activism of Indians such as Dennis Means of the American Indian Movement (AIM), Vine Deloria, and Dee Brown, who drew attention to the plight of American Indian tribes. In 1969, for example, some Native Americans seized Alcatraz Island in San Francisco Bay to protest the loss of Indian lands. In 1973, armed members of AIM seized 11 hostages at Wounded Knee, South Dakota—the site of an 1890 massacre of 200 Sioux (Lakota) by U.S. cavalry—and remained there for 71 days until the federal government agreed to examine Indian treaty rights.

Equally important, Indians began to use the courts to protect their rights. The Native American Rights Fund (NARF), founded in 1970, has won important victories concerning hunting, fishing, and land rights. Native Americans are also retaining access to their sacred places and have had some success in stopping the building of roads and buildings on ancient burial grounds or other sacred spots. Several tribes have won court cases protecting them from taxation of tribal profits.

Despite some progress, many Native Americans, such as these grandparents and their grandchildren, continue to suffer poverty and ill health.

As in other areas of civil rights, the preservation of Native American culture and the exercise of Native American rights sometimes conflict with the interests of the majority. For example, some tribes have gained special rights to fish and even to hunt whales. Anglers concerned with the depletion of fishing stock and environmentalists worried about loss of the whale population have voiced protests. Similarly, Native American rights to run businesses denied to others by state law and to avoid taxation on tribal lands have made running gambling casinos a lucrative option for Indians. This has irritated both those who oppose gambling and those who are offended by the tax-free competition.

Hispanic Americans

Hispanic Americans (or Latinos, as some prefer to be called)—chiefly from Mexico, Puerto Rico, and Cuba but also from El Salvador, Honduras, and other countries in Central and South America—have displaced African Americans as the largest minority group. Today they number more than 51 million and account for about 16 percent of the U.S. population. Hispanics make up 42 percent of the population of New Mexico and more than a third of the population of both California and Texas.[14]

In Texas and throughout much of the southwestern United States in the first half of the twentieth century, people of Mexican origin were subjected to discrimination and worse. They were forced to use segregated public restrooms and attend segregated schools. Hundreds were killed in lynchings. Approximately 500,000 Latinos served in the U.S. armed forces in World War II, but many of these veterans faced discrimination upon their return. Dr. Hector P. Garcia founded the American GI Forum, the country's first Latino veterans' advocacy group, in 1948 after he saw the Naval Station at Corpus Christi refusing to treat sick Latino veterans. Garcia's organization received national attention when the remains of Felix Longoria, a Mexican American soldier killed while on a mission in the Pacific, were returned to his relatives in Three Rivers, Texas, for final burial. The only funeral parlor in Longoria's hometown would not allow his family to hold services for him because of his Mexican heritage. Soon the incident became the subject of outrage across the country. With the help of the Forum and the sponsorship of then Senator Lyndon B. Johnson, Longoria was buried in Arlington National Cemetery.

Hernandez v. Texas
A 1954 Supreme Court decision that extended protection against discrimination to Hispanics.

In Jackson County, Texas, where Mexican Americans made up 14 percent of the population by the early 1950s, not a single person with a Spanish surname had been allowed to serve on a jury in 25 years. Some 70 Texas counties had similar records of exclusion. When an all-Anglo jury convicted Pete Hernandez, a migrant cotton picker, of murder in Jackson County, a team of Hispanic civil rights lawyers from the American GI Forum and the League of United Latin American Citizens (LULAC) filed suit, arguing that the jury that convicted him of murder could not be impartial because of the exclusion of Hispanics from the jury. This case eventually reached the Supreme Court, the first time that Hispanic lawyers had argued before the Court. The Supreme Court unanimously ruled in Hernandez's favor in ***Hernandez v. Texas*** (1954), holding that in excluding Hispanics from jury duty, Texas had unreasonably singled out a class of people for different treatment. The defendant had been deprived of the equal protection guaranteed by the Fourteenth Amendment, a guarantee "not directed solely against discrimination between whites and Negroes." This landmark decision, which protected Hispanics and the right to fair trials, helped widen the definition of discrimination beyond race.

Hispanic leaders drew from the tactics of the African American civil rights movement, using sit-ins, boycotts, marches, and related activities to draw attention to their cause. Inspired by the NAACP's Legal Defense Fund, they also created the Mexican American Legal Defense and Education Fund (MALDEF) in 1968 to help argue their cause in court. In the 1970s, MALDEF established the Chicana Rights Project to challenge sex-discrimination against Mexican American women. In addition, Hispanic groups began mobilizing in other ways to protect their interests. An early prominent example was the United Farm Workers, led by César Chávez, who in the 1960s publicized the plight of migrant workers, a large proportion of whom are Hispanic.

The rights of illegal immigrants have been a matter of controversy for decades. In 1975, Texas revised its education laws to withhold state funds for educating children who had not been legally admitted to the United States and authorized local school districts to deny enrollment to such students. In *Plyler v. Doe* (1982), the Supreme Court struck down the law as a violation of the Fourteenth Amendment because illegal immigrant children are people and therefore had protection from discrimination unless a substantial state interest could be shown to justify it. The Court found no substantial state interest that would be served by denying an education to students, who had no control over being brought to the United States, and observed that denying them an education would likely contribute to "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."

A major concern of Latinos has been discrimination in employment hiring and promotion. Using the leverage of discrimination suits, MALDEF has won a number of consent decrees with employers to increase the opportunities for employment for Latinos.

Like Native Americans, Hispanic Americans benefit from the nondiscrimination policies originally passed to protect African Americans. There are now more than 5,200 elected Hispanic officials in the United States,[15] and Hispanic Americans play a prominent role in the politics of such major cities as Houston, Miami, Los Angeles, and San Diego. In 1973, Hispanics won a victory when the Supreme Court found that multimember electoral districts (in which more than one person represents a single district) in Texas discriminated against minority groups because they decreased the probability of a minority being elected.[16] Nevertheless, poverty, discrimination, and language barriers continue to depress Hispanic voter registration and turnout.

Their growing numbers have made Hispanic Americans the largest minority group in the United States. Their political power is reflected in the two dozen members of the U.S. House of Representatives, such as Loretta and Linda Sanchez of California, the first set of sisters to serve simultaneously in Congress.

Asian Americans

Asian Americans are the fastest-growing minority group: the more than 17 million persons who are at least part Asian make up nearly 6 percent of the U.S. population.[17] For more than one hundred years prior to the civil rights acts of the 1960s, Asian Americans suffered discrimination in education, jobs, and housing as well as restrictions on immigration and naturalization. Discrimination was especially egregious during

World War II when the U.S. government, beset by fears of a Japanese invasion of the Pacific Coast, rounded up more than 100,000 Americans of Japanese descent and herded them into encampments. These internment camps were, critics claimed, America's concentration camps. The Supreme Court, however, in ***Korematsu v. United States*** (1944), upheld the internment as constitutional. Congress has since authorized benefits for the former internees. As with other groups, the policy changes we associate with the civil rights movement have led to changes in status and in political strength for Asian Americans. Today, Americans of Chinese, Japanese, Korean, Vietnamese, and other Asian ethnicities have assumed prominent positions in U.S. society.

Korematsu v. United States
A 1944 Supreme Court decision that upheld as constitutional the internment of more than 100,000 Americans of Japanese descent in encampments during World War II.

Arab Americans and Muslims

There are about 3.5 million persons of Arab ancestry in the United States, and about 6 million Muslims.[18] Since the terrorist attacks of September 11, 2001, Arab, Muslim, Sikh, South Asian Americans, and those perceived to be members of these groups have been the victims of increased numbers of bias-related assaults, threats, vandalism, and arson. The incidents have consisted of telephone, Internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, arson, and bombings directed at homes, businesses, and places of worship. Members of these groups have also experienced discrimination in employment, housing, education, and access to public accommodations and facilities.

One of the low points in the protection of civil rights in the United States occurred during World War II when more than 100,000 Americans of Japanese descent were moved to internment camps.

Nineteenth Amendment
The constitutional amendment adopted in 1920 that guarantees women the right to vote.

In the wake of the September 11, 2001, terrorist attacks, the FBI detained more than 1,200 persons as possible threats to national security. About two-thirds of these persons were illegal aliens—mostly Arabs and Muslims—and many of them languished in jail for months until cleared by the FBI. This process seemed to violate the Sixth Amendment right of detainees to be informed of accusations against them, as well as the constitutional protection against the suspension of the writ of habeas corpus. As we have seen, in 2004 the Supreme Court declared that detainees in the United States had the right to challenge their detention before a judge or other neutral decision maker.

The Rights of Women

5.4 Trace the evolution of women's rights and explain how civil rights principles apply to gender issues.

The first women's rights activists were products of the abolitionist movement, in which they had often encountered sexist attitudes. Noting that the status of women shared much in common with that of slaves, some leaders resolved to fight for women's rights. Two of these women, Lucretia Mott and Elizabeth Cady Stanton, organized a meeting at Seneca Falls in upstate New York. They had much to discuss. Not only were women denied the vote, but they were also subjected to patriarchal (male-dominated) family law and denied educational and career opportunities. The legal doctrine known as *coverture* deprived married women of any identity separate from that of their husbands; wives could not sign contracts or dispose of property. Divorce law was heavily biased in favor of husbands. Even abused women found it almost impossible to end their marriages, and men had the legal advantage in securing custody of the children.

The Battle for the Vote

On July 19, 1848, 100 men and women signed the Seneca Falls Declaration of Sentiments and Resolutions. Patterned after the Declaration of Independence, it proclaimed, "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her." Thus began the movement that would culminate, 72 years later, in the ratification of the **Nineteenth Amendment**, giving women the vote. Charlotte Woodward, 19 years old in 1848, was the only signer of the Seneca Falls Declaration who lived to vote for the president in 1920.

Although advocates of women's suffrage had hoped that the Fifteenth Amendment would extend the vote to women as well as to the newly freed slaves, this hope was disappointed, and as it turned out, the battle for women's suffrage was fought mostly in the late nineteenth and early twentieth centuries. Leaders like Stanton and Susan B. Anthony were prominent in the cause, which emphasized the vote but also addressed women's other grievances. The suffragists had considerable success in the states, especially in the West. Several states allowed women to vote before the constitutional amendment passed. The feminists lobbied, marched, protested, and even engaged in civil disobedience.[19]

The "Doldrums": 1920–1960

Winning the right to vote did not automatically win equal status for women. In fact, the feminist movement seemed to lose rather than gain momentum after winning the vote, perhaps because the vote was about the only goal on which all feminists agreed. There was considerable division within the movement on other priorities.

Many suffragists accepted the traditional model of the family. Fathers were breadwinners, mothers bread bakers. Although most suffragists thought that women should have the opportunity to pursue any occupation they chose, many also believed

that women's primary obligations revolved around the roles of wife and mother. Many suffragists had defended the vote as basically an extension of the maternal role into public life, arguing that a new era of public morality would emerge when women could vote. These *social feminists* were in tune with prevailing attitudes.

Public policy toward women continued to be dominated by protectionism rather than by the principle of equality. Laws protected working women from the burdens of overtime work, long hours on the job, and heavy lifting. The fact that these laws also protected male workers from female competition received little attention. State laws tended to reflect—and reinforce—traditional family roles. These laws concentrated on limiting women's work opportunities outside the home so they could concentrate on their duties within it. The laws in most states required husbands to support their families (even after a divorce) and to pay child support, though divorced fathers did not always pay. When a marriage ended, mothers almost always got custody of the children, although husbands had the legal advantage in custody battles. Public policy was designed to preserve traditional motherhood and hence, supporters claimed, to protect the family and the country's moral fabric.[20]

Only a minority of feminists challenged these assumptions. Alice Paul, the author of the original **Equal Rights Amendment** (ERA), was one activist who claimed that the real result of protectionist law was to perpetuate gender inequality. Simply worded, the ERA reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Most people saw the ERA as a threat to the family when it was introduced in Congress in 1923. It gained little support. In fact, women were less likely to support the amendment than men were.

Equal Rights Amendment
A constitutional amendment originally introduced in Congress in 1923 and passed by Congress in 1972, stating that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Despite public support, the amendment fell short of the three-fourths of state legislatures required for passage.

Reed v. Reed
The landmark case in 1971 in which the Supreme Court for the first time upheld a claim of gender discrimination.

Craig v. Boren
The 1976 ruling in which the Supreme Court established the "intermediate scrutiny" standard for determining gender discrimination.

The Second Feminist Wave

The civil rights movement of the 1950s and 1960s attracted many female activists, some of whom also joined student and antiwar movements. These women often met with the same prejudices as had women abolitionists. Betty Friedan's book *The Feminine Mystique*, published in 1963, encouraged women to question traditional assumptions and to assert their own rights. Groups such as the National Organization for Women (NOW) and the National Women's Political Caucus were organized in the 1960s and 1970s.

Before the advent of the contemporary feminist movement, the Supreme Court upheld virtually every instance of gender-based discrimination. The state and federal governments could discriminate against women—and, indeed, men—as they chose. In the 1970s, the Court began to take a closer look at gender discrimination. In ***Reed v. Reed*** (1971), the Court ruled that any "arbitrary" gender-based classification violated the equal protection clause of the Fourteenth Amendment. This was the first time the Court declared any law unconstitutional on the basis of gender discrimination.

Five years later, the Court heard a case regarding an Oklahoma law that prohibited the sale of 3.2 percent beer to males under the age of 21 but allowed females over the age of 18 to purchase it. In ***Craig v. Boren*** (1976), the Court voided the statute and established an "intermediate scrutiny" standard (see Table 5.1): the Court would not presume gender discrimination to be either valid or invalid. The courts were to show less deference to gender classifications than to more routine classifications but more deference than to racial classifications. Nevertheless, the Court has repeatedly said that there must be an "exceedingly persuasive justification" for any government to classify people by gender.

The Supreme Court has struck down many laws and rules for discriminating on the basis of gender. For example, the Court voided laws giving husbands exclusive control over family property.[21] The Court also voided employers' rules that denied women equal monthly retirement benefits because they live longer than men.[22]

Despite *Craig v. Boren*, men have been less successful than women in challenging gender classifications. The Court upheld a statutory rape law applying only to men[23] and the male-only draft, which we will discuss shortly. The Court also allowed a Florida law giving property tax exemptions only to widows, not to widowers.[24]

Contemporary feminists have suffered defeats as well as victories. The ERA was revived when Congress passed it in 1972 and extended the deadline for ratification

until 1982. Nevertheless, the ERA was three states short of ratification when time ran out. Paradoxically, whereas the 1920 suffrage victory had weakened feminism, losing the ERA battle stimulated the movement.

Women in the Workplace

One reason why feminist activism persists has nothing to do with ideology or other social movements. The family pattern that traditionalists sought to preserve—father at work, mother at home—is becoming a thing of the past. There are 72 million women in the civilian labor force (compared to 82 million males), representing 59 percent of adult women. Fifty-two percent of these women are married and living with their spouse. There are also 35 million female-headed households (more than 8 million of which include children), and about 67 percent of American mothers who have children below school age are in the labor force.[25] As conditions have changed, public opinion and public policy demands have changed, too.

Congress has made some important progress, especially in the area of employment. The Civil Rights Act of 1964 banned gender discrimination in employment. The protection of this law has been expanded several times. For example, in 1972, Congress gave the EEOC the power to sue employers suspected of illegal discrimination. The Pregnancy Discrimination Act of 1978 made it illegal for employers to exclude pregnancy and childbirth from their sick leave and health benefits plans. The Civil Rights and Women's Equity in Employment Act of 1991 shifted the burden of proof in justifying hiring and promotion practices to employers, who must show that a gender requirement is necessary for the particular job.

The Supreme Court also weighed in against gender discrimination in employment and business activity. In 1977, it voided laws and rules barring women from jobs through arbitrary height and weight requirements (*Dothard v. Rawlinson*). Any such prerequisites must be directly related to the duties required in a particular position. Women have also been protected from being required to take mandatory pregnancy leaves from their jobs[26] and from being denied a job because of an employer's concern for harming a developing fetus.[27] Many commercial contacts are made in private business and service clubs, which often have excluded women from membership. The Court has upheld state and city laws that prohibit such discrimination.[28]

Education is closely related to employment. Title IX of the Education Act of 1972 forbids gender discrimination in federally subsidized education programs (which include almost all colleges and universities), including athletics. But what about

In recent years, women have entered many traditionally male-dominated occupations. Here astronauts Peggy Wilson and Pam Melroy meet in the International Space Station.

single-gender schooling? In 1996, the Supreme Court declared that Virginia's categorical exclusion of women from education opportunities at the state-funded Virginia Military Institute (VMI) violated women's rights to equal protection of the law.[29] A few days later, The Citadel, the nation's only other state-supported all-male college, announced that it would also admit women.

Women have made substantial progress in their quest for equality, but debate continues as Congress considers new laws. Three of the most controversial issues that legislators will continue to face are wage discrimination, sexual harassment, and the role of women in the military.

Why It *Matters* to You

Changes in the Workplace

Laws and Supreme Court decisions striking down barriers to employment for women are not just words. They have had important consequences for employment opportunities for many millions of women and have helped women make substantial gains in entering careers formerly occupied almost entirely by men.

Wage Discrimination and Comparable Worth

Traditionally female jobs often pay much less than traditionally male jobs that demand comparable skill; for example, a secretary may earn far less than an accounts clerk with comparable qualifications. Median weekly earnings for women working full time are only 80 percent of those for men working full time.[30] In other words, although the wage gap has narrowed, women still earn only $0.80 for every $1.00 men make.

The first significant legislation that Barack Obama signed as president was a 2009 bill outlawing "discrimination in compensation," which is broadly defined to include wages and employee benefits. The law also makes it easier for workers to win lawsuits claiming pay discrimination based on gender, race, religion, national origin, age, or disability.

Sexual Harassment

Whether in schools,[31] in the military, on the assembly line, or in the office, women for years have voiced concern about sexual harassment, which, of course, does not affect only women. The U.S. Equal Employment Opportunity Commission defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature … when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."[32]

In 1986, the Supreme Court articulated this broad principle: sexual harassment that is so pervasive as to create a hostile or abusive work environment is a form of gender discrimination, which is forbidden by the 1964 Civil Rights Act.[33] In 1993, in *Harris v. Forklift Systems*, the Court reinforced its decision. No single factor, the Court said, is required to win a sexual harassment case under Title VII of the 1964 Civil Rights Act. The law is violated when the workplace environment "would reasonably be perceived, and is perceived, as hostile or abusive." Thus, workers are not required to prove that the workplace environment is so hostile as to cause them "severe psychological injury" or that they are unable to perform their jobs. The protection of federal law comes into play before the harassing conduct leads to psychological difficulty.[34] The Court has also made it clear that employers are responsible for preventing and eliminating harassment at work,[35] and they cannot retaliate against someone filing a complaint about sexual harassment.[36] Addressing harassment in public schools, the Court ruled that school districts can be held liable for sexual harassment in cases of student-on-student harassment.[37]

Sexual harassment may be especially prevalent in male-dominated occupations such as the military. A 1991 convention of the Tailhook Association, an organization

of naval aviators, made the news after reports surfaced of drunken sailors jamming a hotel hallway and sexually assaulting female guests, including naval officers, as they stepped off the elevator. After the much-criticized initial failure of the navy to identify the officers responsible for the assault, heads rolled, including those of several admirals and the secretary of the navy. In 1996 and 1997, a number of army officers and noncommissioned officers were discharged—and some went to prison—for sexual harassment of female soldiers in training situations. Behavior that was once viewed as simply male high jinks is now recognized as intolerable. The Pentagon removed top officials at the Air Force Academy in 2003 following charges that many female cadets had been sexually assaulted by male cadets. With more women serving in the military, the issue of protecting female military personnel from sexual harassment becomes ever more pressing.

Women in the Military

Military service is another controversial aspect of gender equality. Women have served in every branch of the armed services since World War II. Originally, they served in separate units such as the WACS (Women's Army Corps), the WAVES (Women Accepted for Volunteer Emergency Service in the navy), and the Nurse Corps. Until the 1970s, the military had a 2 percent quota for women (which was never filled). Now women are part of the regular service. They make up about 14 percent of the active duty armed forces[38] and compete directly with men for promotions. Congress opened all the service academies to women in 1975. Women have done well, sometimes graduating at the top of their class.

Two important differences between the treatment of men and that of women persist in military service. First, only men must register for the draft when they turn 18 (see "You Are the Judge: Is Male-Only Draft Registration Gender Discrimination?"). Second, statutes and regulations prohibit women from serving in combat. A breach exists between policy and practice, however, as generals have "attached" female troops to combat groups

Women, such as this soldier patrolling the streets in Afghanistan, are playing increasingly important roles in the military. However, they still face hurdles regarding some combat assignments.

You Are the Judge

Is Male-Only Draft Registration Gender Discrimination?

Since 1973 the United States has had a volunteer force, and in 1975, registration for the draft was suspended. However, in 1979, after the Soviet Union invaded Afghanistan, President Jimmy Carter asked Congress to require both men and women to register for the draft. Registration was designed to facilitate any eventual conscription. Congress reinstated registration in 1980, but, as before, for men only. In response, several young men filed a suit. They contended that the registration requirement was gender-based discrimination that violated the due process clause of the Fifth Amendment.

YOU BE THE JUDGE:

Does requiring only males to register for the draft unconstitutionally discriminate against them?

DECISION:

The Supreme Court displayed its typical deference to the elected branches in the area of national security when it ruled in 1981 in *Rostker v. Goldberg* that male-only registration did not violate the Fifth Amendment. The Court found that male-only registration bore a substantial relationship to Congress's goal of ensuring combat readiness and that Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women. Congress, the Court said, was allowed to focus on the question of military need rather than "equity."

fighting in the wars in Iraq and Afghanistan. Women fly jets, pilot helicopters at the front, operate antimissile systems, patrol streets with machine guns, dispose of explosives, and provide unit and convoy security. Some have been taken as prisoners of war, and more than 100 have been killed in combat in Iraq and Afghanistan. Women are now permitted to serve as combat pilots in the navy and air force and to serve on navy warships, including submarines. However, they are still not permitted to serve in ground combat units in the army or marines.

Women's participation in recent conflicts has reopened the debate over whether women should serve in combat. Some experts insist that because women, on average, have less upper-body strength than men, they are less suited to combat. Others argue that men will not be able to fight effectively beside wounded or dying women. Critics of these views point out that some women surpass some men in upper-body strength and that we do not know how well men and women will fight together. This debate is not only a controversy about ability; it also touches on the question of whether engaging in combat is a burden or a privilege. Clearly some women—and some who would deny them combat duty—take the latter view.

Other Groups Active Under the Civil Rights Umbrella

5.5 Show how civil rights principles have been applied to seniors, people with disabilities, and gays and lesbians.

Policies enacted to protect one or two groups can be applied to other groups as well. Three recent entrants into the civil rights arena are aging Americans, people with disabilities, and gays and lesbians. All these groups claim equal rights, as racial and ethnic minorities and women do, but they each face and pose different challenges.

Civil Rights and the Graying of America

America is aging rapidly. More than 40 million people are 65 or older, accounting for 13 percent of the total population. Nearly 5.5 million people are 85 or older.[39] People in their eighties are the fastest-growing age group in the country.

When the Social Security program began in the 1930s, 65 was chosen as the retirement age for the purpose of benefits. The choice was apparently arbitrary, but 65 soon became the usual age for mandatory retirement. Although many workers might prefer to retire while they are still healthy and active enough to enjoy leisure, not everyone wants or can afford to do so. Social Security is not—and was never meant to be—an adequate income, and not all workers have good pension plans or retirement savings plans. Nevertheless, employers routinely refused to hire people over a certain age. Nor was age discrimination limited to older workers. Graduate and professional schools often rejected applicants in their thirties on the grounds that their professions would get fewer years—and thus less return—out of them. This policy had a severe impact on housewives and veterans who wanted to return to school.

As early as 1967, in the Age Discrimination in Employment Act, Congress banned some kinds of age discrimination. In 1975, a civil rights law was passed denying federal funds to any institution that discriminated against people over the age of 40 because of their age. Today, for most workers there can be no compulsory retirement. In 1976, the Supreme Court, however, declared that it would not place age in the inherently suspect classification category, when it upheld a state law requiring police officers to retire at the age of 50. Thus, age classifications still fall under the reasonableness standard of review,[40] and employers need only show that age is related to the ability to do a job to require workers to retire.

Job bias is often hidden, and proving it depends on inference and circumstantial evidence. The Supreme Court made it easier to win cases of job bias in 2000 when it held in *Reeves v. Sanderson* that a plaintiff's evidence of an employer's bias, combined with sufficient evidence to find that the employer's asserted justification is false, may permit juries and judges to conclude that an employer unlawfully discriminated. Five years later, the Court found that employers can be held liable for discrimination even if they never intended any harm. Older employees need only show an employer's policies disproportionately harmed them—and that there was no reasonable basis for the employer's policy.[41] Thus, employees can win lawsuits without direct evidence of an employer's illegal intent. In 2008, the Supreme Court ruled that it is up to the employer to show that action against a worker stems from reasonable factors other than age (*Meacham v. Knolls Atomic Power Laboratory*). The impact of these decisions is likely to extend beyond questions of age discrimination to the litigation of race and gender discrimination cases brought under Title VII of the Civil Rights Act of 1964 as well as cases brought under the Americans with Disabilities Act.

Civil Rights and People with Disabilities

Americans with disabilities have suffered from both direct and indirect discrimination. Governments and employers have often denied them rehabilitation services, education, and jobs. And even when there has been no overt discrimination, many people with disabilities have been excluded from the workforce and isolated. Throughout most of American history, public and private buildings have been hostile to the blind, deaf, and mobility impaired. Stairs, buses, telephones, and other necessities of modern life have been designed in ways that keep the disabled out of offices, stores, and restaurants. As one slogan said, "Once, blacks had to ride at the back of the bus. We can't even get on the bus."

The first rehabilitation laws were passed in the late 1920s, mostly to help veterans of World War I. Accessibility laws had to wait another 50 years. The Rehabilitation Act of 1973 added people with disabilities to the list of Americans protected from discrimination. Because the law defines an inaccessible environment as a form of discrimination, wheelchair ramps, grab bars on toilets, and Braille signs have become common features of American life. The Education of All Handicapped Children Act of 1975 entitled all children to a free public education appropriate to their needs.

In recent decades, public policy has focused on integrating the disabled, such as this college student being fitted with an all-terrain wheelchair, to participate more fully in society.

The **Americans with Disabilities Act of 1990** (ADA) strengthened these protections, requiring employers and administrators of public facilities to make "reasonable accommodations" and prohibiting employment discrimination against people with disabilities. The Supreme Court has ruled that the law also affirmed the right of individuals with disabilities if at all possible to live in their communities rather than be institutionalized.[42]

Americans with Disabilities Act of 1990
A law passed in 1990 that requires employers and public facilities to make "reasonable accommodations" for people with disabilities and prohibits discrimination against these individuals in employment.

Determining who is "disabled" has generated some controversy. Are people with AIDS entitled to protections? In 1998, the Supreme Court answered "yes." It ruled that the ADA offered protection against discrimination to people with AIDS.[43] In 2008, Congress expanded the definition of disability, making it easier for workers to prove discrimination. Accordingly, in deciding whether a person is disabled, courts are not to consider the effects of "mitigating measures" like prescription drugs, hearing aids, and artificial limbs. Moreover, "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Otherwise, the more successful a person is at coping with a disability, the more likely it is that a court would find that he or she is no longer disabled and therefore no longer covered under the ADA.

Nobody wants to oppose policies beneficial to people with disabilities. Nevertheless, laws designed to protect the rights of these individuals have met with opposition and, once passed, with sluggish enforcement. The source of this resistance is concern about the cost of programs. Such concern is often shortsighted, however. Changes allowing people with disabilities to become wage earners, spenders, and taxpayers are a gain rather than a drain on the economy.

Gay and Lesbian Rights

Even by conservative estimates, several million Americans are homosexual, representing every social stratum and ethnic group. Yet gays and lesbians have often faced discrimination in hiring, education, access to public accommodations, and housing, and they may face the toughest battle for equality.

Homophobia—fear and hatred of homosexuals—has many causes. Some of these causes are very deep-rooted, relating, for example, to the fact that certain religious

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Are All Forms of Discrimination the Same?

In the 1967 *Loving v. Virginia* decision, the Supreme Court ruled unconstitutional all laws that restricted marriage based solely on race. Today, a similar debate revolves around marriage for same-sex couples. Public opposition to interracial marriage declined dramatically after the federal government gave its ruling — as shown in the 1972 and 1988 data. Has opinion about same-sex marriage changed in a similar way?

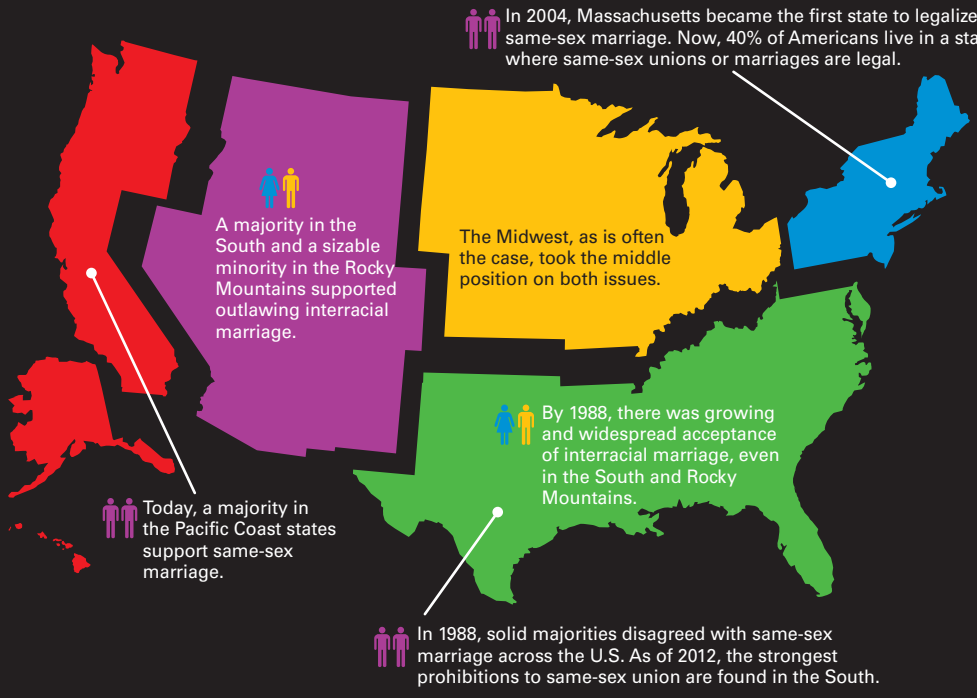
"Should Interracial Marriage Be Legal?"

1972

REGION	YES	NO
Northeast	71%	26%
Midwest	61%	35%
South	43%	53%
Rocky Mountains	54%	41%
Pacifc Coast	74%	24%

1988

REGION	YES	NO
Northeast	85%	11%
Midwest	76%	21%
South	62%	35%
Rocky Mountains	89%	11%
Pacifc Coast	87%	12%



"Should Same-Sex Marriage Be Legal?"

1988

REGION	YES	NO
Northeast	12%	63%
Midwest	12%	66%
South	8%	78%
Rocky Mountains	12%	63%
Pacifc Coast	16%	62%

2010

REGION	YES	NO
Northeast	54%	30%
Midwest	50%	41%
South	38%	46%
Rocky Mountains	45%	44%
Pacifc Coast	52%	33%

SOURCE: General Social Survey data from 1972, 1988, and 2010.

Investigate Further

Concept How do we measure discrimination of interracial and same-sex marriage? Pollsters ask if a person agrees or disagrees with policy proposals, such as laws that recognize same-sex or interracial marriage. By watching the responses over time, we are able to determine change across the country.

Connection How does geography help predict public opinion on interracial marriage and same-sex marriage? The American South and Rocky Mountains are historically more conservative regions, and more resistant to changing definitions of marriage. But, even in these regions, opinion on marriage became more liberal over time.

Cause Does opinion about marriage influence policy or vice versa? After the Supreme Court settled the matter of interracial marriage in 1967, majority opinions followed suit across the country. Support for same-sex marriage has also changed over time, but policies vary by state. Legalization is more common where public opinion is most favorable, and bans are most common where support lags.

groups condemn homosexuality. Homophobia has even led to killings, including the brutal 1998 killing of Matthew Shepard, a 21-year-old political science freshman at the University of Wyoming. Shepard was found tied to a fence, having been hit in the head with a pistol 18 times and repeatedly kicked in the groin.

The growth of the gay rights movement was stimulated by a notorious incident in a New York City bar in 1969. Police raided the Stonewall bar, frequented by gay men. Such raids were then common. This time, customers at the bar resisted the police. Unwarranted violence, arrests, and injury to persons and property resulted. In the aftermath of Stonewall, gays and lesbians organized in an effort to protect their civil rights, in the process developing political skills and forming effective interest groups. Significantly, most colleges and universities now have gay rights organizations on campus.

The record on gay rights is mixed. In an early defeat, the Supreme Court, in 1986, ruled in *Bowers v. Hardwick* that states could ban homosexual relations. More recently, in 2000 the Court held that the Boy Scouts could exclude a gay man from being an adult member because homosexuality violates the organization's principles.[44]

Attitudes are changing, however. Few Americans oppose equal employment opportunities for homosexuals, and majorities support the legality of homosexual relations and the acceptability of homosexuality as a lifestyle. More than half the public views homosexual relations as moral.[45]

An example of attitudes in transition is in the area of military service. The 1993 "don't ask, don't tell" policy for the armed forces, while reaffirming the Defense Department's strict prohibition against homosexual conduct, nonetheless did not automatically exclude gays from the military as long as they did not disclose their sexual orientation or engage in homosexual relations. In 2011, with the support of Congress and the president, the Pentagon ended the policy and allowed gays to serve openly in the military.

Gay activists have won other important victories. Several states, including California, and more than 100 communities have passed laws protecting homosexuals against some forms of discrimination.[46] In 1996, in *Romer v. Evans*, the Supreme Court voided a state constitutional amendment approved by the voters of Colorado that denied homosexuals protection against discrimination, finding the Colorado amendment violated the U.S. Constitution's guarantee of equal protection of the law. In 2003, in *Lawrence v. Texas*, the Supreme Court overturned *Bowers v. Hardwick* when it voided a Texas antisodomy law on the grounds that such laws were unconstitutional intrusions of the right to privacy.

Today the most prominent issue concerning gay rights may be same-sex marriage. Most states have laws banning such marriages and the recognition of same-sex marriages that occur in other states. In 1996 Congress passed the Defense of Marriage Act, which permits states to disregard same-sex marriages even if they are legal elsewhere in the United States. However, New York, Vermont, Massachusetts, Connecticut, New Hampshire, Iowa, Maryland, Washington, Maine, and Washington, D.C., have legalized same-sex marriages. Several other states, including California, New Jersey, Hawaii, and Oregon, recognize same-sex "civil unions" or provide domestic partnership benefits to same-sex couples. A majority of the public now support legalizing same-sex marriage.[47] When given the opportunity, gay and lesbian couples have rushed to the altar, provoking a strong backlash from social conservatives. President George W. Bush called for a constitutional amendment to ban same-sex marriage, but Congress has yet to pass such an amendment. With the prospects for gay marriage remaining uncertain, gays also continue to push for benefits associated with marriage, including health insurance, taxes, Social Security payments, hospital visitation rights, and much else that most people take for granted.

affirmative action
A policy designed to give special attention to or compensatory treatment for members of some previously disadvantaged group.

Affirmative Action

5.6 Trace the evolution of affirmative action policy and assess the arguments for and against it.

Some people argue that groups that have suffered invidious discrimination require special efforts to provide them with access to education and jobs. In 1965, President Lyndon Johnson signed Executive Order 11246, prohibiting federal contractors and federally assisted construction contractors and subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. The order also required contractors to take "affirmative action" to ensure against employment discrimination, including the implementation of plans to increase the participation of minorities and women in the workplace.

Affirmative action involves efforts to bring about increased employment, promotion, or admission for members of groups who have suffered from discrimination. The goal is to move beyond *equal opportunity* (in which everyone has the same chance of obtaining good jobs, for example) toward *equal results* (in which different groups have the same percentage of success in obtaining those jobs). This goal might be accomplished through special rules in the public and private sectors that recruit or otherwise give preferential treatment to previously disadvantaged groups. Numerical quotas that ensure that a certain portion of government contracts, law school admissions, or police department promotions go to minorities and women are the strongest and most controversial form of affirmative action. The constitutional status of affirmative action is not clear.

At one point, the federal government mandated that all state and local governments, as well as each institution receiving aid from or contracting with the federal government, adopt an affirmative action program. The University of California at Davis (UC–Davis) introduced one such program. Eager to produce more minority physicians in California, the medical school set aside 16 of 100 places in the

Point to Ponder

While supporters see affirmative action as a policy designed to provide greater opportunities for minorities to excel, opponents see it as a violation of the merit principle.

Is it possible to design a policy that meets both our concern for equality and the principle of merit as the basis of advancement?

entering class for "disadvantaged groups." One white applicant who did not make the freshman class was Allan Bakke. After receiving his rejection letter from Davis for two straight years, Bakke learned that the mean scores on the Medical College Admissions Test of students admitted under the university's program were the 46th percentile on verbal tests and the 35th on science tests. Bakke's scores on the same tests were at the 96th and 97th percentiles, respectively. He sued UC–Davis, claiming that it had denied him equal protection of the laws by discriminating against him because of his race.

The result was an important Supreme Court decision in Bakke's favor, ***Regents of the University of California v. Bakke*** (1978).[48] The Court ordered Bakke admitted, holding that the UC–Davis Special Admissions Program did discriminate against him because of his race. Yet the Court refused to order UC–Davis never to use race as a criterion for admission. A university could, said the Court, adopt an "admissions program in which race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process." It could *not*, as the UC–Davis Special Admissions Program did, set aside a quota of spots for particular groups.

Over the next 18 years, the Court upheld voluntary union- and management-sponsored quotas in a training program,[49] as well as preferential treatment of minorities in promotions,[50] and it ordered quotas for minority union memberships.[51] It also approved a federal rule setting aside 10 percent of all federal construction contracts for minority-owned firms[52] and a requirement for preferential treatment for minorities to increase their ownership of broadcast licenses.[53] It did, however, find a Richmond, Virginia, plan that reserved 30 percent of city subcontracts for minority firms to be unconstitutional.[54]

Things changed in 1995, however. In ***Adarand Constructors v. Pena***, the Court overturned the decision regarding broadcast licenses and cast grave doubt on its holding regarding contracts set aside for minority-owned firms. It held that federal programs that classify people by race, even for an ostensibly benign purpose such as expanding opportunities for members of minorities, should be presumed to be unconstitutional. Such programs must be subject to the most searching judicial inquiry and can survive only if they are "narrowly tailored" to accomplish a "compelling governmental interest." In other words, the Court applied criteria for evaluating affirmative action programs similar to those it applies to other racial classifications, the suspect standard we discussed earlier in the chapter. Although *Adarand* did not void federal affirmative action programs in general, it certainly limited their potential impact.

In addition, in 1984, the Court ruled that affirmative action does not exempt recently hired minorities from traditional work rules specifying the "last hired, first fired" order of layoffs.[55] And in 1986, it found unconstitutional an effort to give preference to African American public school teachers in layoffs because this policy punished innocent white teachers and the African American teachers had not been the actual victims of past discrimination.[56] We examine a more recent case of a public employer using affirmative action promotions to counter underrepresentation of minorities in the workplace in "You Are the Judge: The Case of the New Haven Firefighters."

Opposition to affirmative action comes also from the general public. Such opposition is especially strong when affirmative action is seen as *reverse discrimination*—in which, as in the case of Allan Bakke, individuals are discriminated against when people who are less qualified are hired or admitted to programs because of their minority status. In 1996, California voters passed Proposition 209, which banned state affirmative action programs based on race, ethnicity, or gender in public hiring, contracting, and educational admissions (Washington State passed a similar ban in 1998). There is little question that support for Proposition 209 represented a widespread skepticism about affirmative action programs.

In 2003, the Supreme Court made two important decisions on affirmative action in college admissions. In the first, the Court agreed that there was a compelling interest in promoting racial diversity on campus. The Court upheld the University of Michigan law school's use of race as one of many factors in admission in *Grutter v. Bollinger* (2003).

Regents of the University of California v. Bakke
A 1978 Supreme Court decision holding that a state university could weigh race or ethnic background as one element in admissions but could not set aside places for members of particular racial groups.

Adarand Constructors v. Pena
A 1995 Supreme Court decision holding that federal programs that classify people by race, even for an ostensibly benign purpose such as expanding opportunities for minorities, should be presumed to be unconstitutional.

You Are the Judge

The Case of the New Haven Firefighters

New Haven, Connecticut, used objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, the city threw out the results based on the statistical racial disparity. White and Hispanic firefighters who passed the exams but were denied a chance at promotions by the city's refusal to certify the test results sued the city alleging that discarding the test results discriminated against them based on their race in violation of Title VII of the Civil Rights Act of 1964. The city responded that if they had certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters.

YOU BE THE JUDGE:

Did New Haven discriminate against white and Hispanic firefighters?

DECISION:

In *Ricci v. DeStefano* (2009), the Court held that if an employer uses a hiring or promotion test, it generally has to accept the test results unless the employer has strong evidence that the test was flawed and improperly favored a particular group. New Haven could not reject the test results simply because the higher scoring candidates were white.

The Court found that the law school's use of race as a plus in the admissions process was narrowly tailored and that the school made individualistic, holistic reviews of applicants in a nonmechanical fashion. In response to *Grutter*, in 2006, Michigan voters passed a ballot initiative banning affirmative action in college admissions and government hiring.

However, in its second decision, *Gratz v. Bollinger* (2003), the Court struck down the University of Michigan's system of undergraduate admissions in which every applicant from an underrepresented racial or ethnic minority group was automatically awarded 20 points of the 100 needed to guarantee admission. The Court said that the system was tantamount to using a quota, which it outlawed in *Bakke*, because it made the factor of race decisive for virtually every minimally qualified underrepresented minority applicant. The 20 points awarded to minorities were more than the school awarded for some measures of academic excellence, writing ability, or leadership skills.

In 2007, the Supreme Court addressed the use of racial classification to promote racial balance in public schools in Seattle, Washington, and Jefferson County, Kentucky. Some parents had filed lawsuits contending that using race as a tiebreaker to decide which students would be admitted to popular schools violated the Fourteenth Amendment's equal protection guarantee. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), the Court agreed that the school districts' use of race in their voluntary integration plans, even for the purpose of preventing resegregation, violated the equal protection guarantee and therefore was unconstitutional. Using the inherently suspect standard related to racial classifications, the Court found that the school districts lacked the compelling interest of remedying the effects of past intentional discrimination and concluded that racial balancing by itself was not a compelling state interest. The Court did indicate that school authorities might use a "race conscious" means to achieve diversity but that the school districts must be sensitive to other aspects of diversity besides race and narrowly tailor their programs to achieve diversity.

Whatever the Court may rule in the future with regard to affirmative action, the issue is clearly a complex and difficult one. Opponents of affirmative action argue that merit is the only fair basis for distributing benefits and that any race or gender discrimination is wrong, even when its purpose is to rectify past injustices rather than to reinforce them. Proponents of affirmative action argue in response that what constitutes merit is highly subjective and can embody prejudices of which the decision maker may be quite unaware. For example, experts suggest, a man might "look more like" a road dispatcher than a woman and thus get a higher rating from interviewers. Many affirmative action advocates also believe that increasing the number of women and minorities in desirable jobs is such an important social goal that it should be considered when looking at individuals' qualifications. They claim that what white males lose from affirmative action programs are privileges to which they were never entitled in the first place; after all, nobody has the right to be a doctor or a road dispatcher. Moreover, research suggests that affirmative action offers significant benefits for women and minorities with relatively small costs for white males.[57]

Understanding Civil Rights and Public Policy

5.7 Establish how civil rights policy advances democracy and increases the scope of government.

The original Constitution is silent on the issue of equality. The only direct reference in the Constitution to equality is in the Fourteenth Amendment, which forbids the states to deny "equal protection of the laws." Those five words have been the basis for major civil rights statutes and scores of judicial rulings protecting the rights of minorities and women. These laws and decisions, granting people new rights, have empowered groups to seek and gain still more victories. The implications of their success for democracy and the scope of government are substantial.

Explore on **MyPoliSciLab Simulation**: You Are a Mayor

Civil Rights and Democracy

Equality is a basic principle of democracy. Every citizen has one vote because democratic government presumes that each person's needs, interests, and preferences are neither any more nor any less important than the needs, interests, and preferences of every other person. Individual liberty is an equally important democratic principle, one that can conflict with equality.

Equality tends to favor majority rule. Because under simple majority rule everyone's wishes rank equally, the policy outcome that most people prefer seems to be the fairest choice in cases of conflict. What happens, however, if the majority wants to deprive the minority of certain rights? In situations like these, equality threatens individual liberty. Thus, the principle of equality can invite the denial of minority rights, whereas the principle of liberty condemns such action.[58] In general, Americans today strongly believe in protecting minority rights against majority restrictions, as you can see in "America in Perspective: Respect for Minority Rights."

Majority rule is not the only threat to liberty. Politically and socially powerful minorities have suppressed majorities as well as other minorities. Women have long outnumbered men in America, about 53 percent to 47 percent. In the era of segregation, African Americans outnumbered whites in many Southern states. Inequality persisted, however, because customs that reinforced it were entrenched within the society and because inequality often served the interests of the dominant groups. When slavery and segregation existed in an agrarian economy, whites could get cheap agricultural

America in Perspective

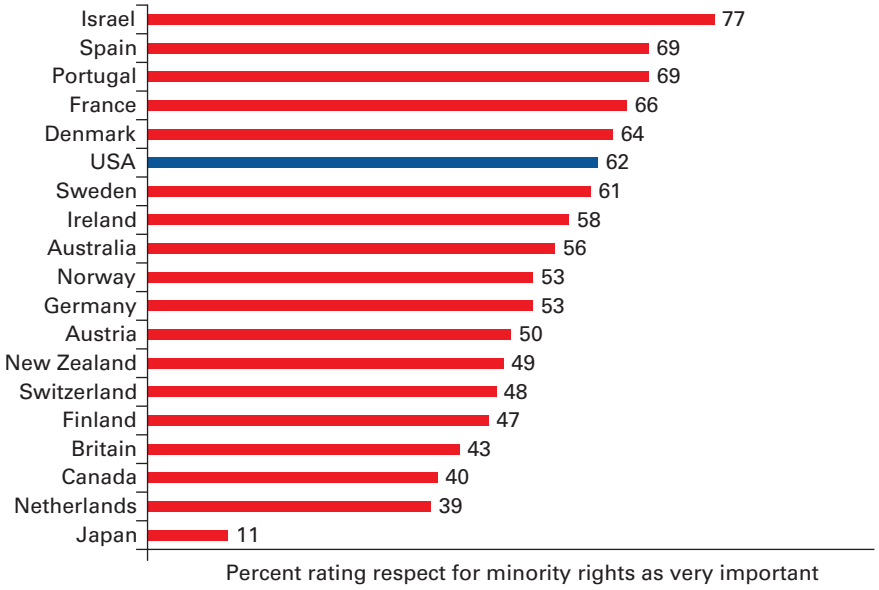
Respect for Minority Rights

Americans rate the importance of protection of minority rights relatively highly compared to other democracies.

Question: There are different opinions about people's rights in a democracy. On a scale of 1 to 7, where 1 is not at all important and 7 is very important, how important is it that government authorities respect and protect rights of minorities?

CRITICAL THINKING QUESTION

Why do you think that Americans tend to strongly believe in protection of minority rights?



SOURCE: Authors' analysis of 2004 International Society Survey Program data.

labor. When men were breadwinners and women were homemakers, married men had a source of cheap domestic labor.

Both African Americans and women made many gains even when they lacked one essential component of democratic power: the vote. They used other rights—such as their First Amendment freedoms—to fight for equality. When Congress protected the right of African Americans to vote in the 1960s, the nature of Southern politics changed dramatically. The democratic process is a powerful vehicle for disadvantaged groups to press their claims.

Civil Rights and the Scope of Government

The Founders might be greatly perturbed if they knew about all the civil rights laws the government has enacted; these policies do not conform to the eighteenth-century idea of limited government. But the Founders would expect the national government to do whatever is necessary to hold the nation together. The Civil War showed that the original Constitution did not adequately deal with issues like slavery that could destroy the society the Constitution's writers had struggled to secure.

Civil rights laws increase the scope and power of government. These laws regulate the behavior of individuals and institutions. Restaurant owners must serve all patrons, regardless of race. Professional schools must admit women. Employers must accommodate people with disabilities and make an effort to find minority workers, whether they want to or not.

However, civil rights, like civil liberties, is an area in which increased government activity in protecting basic rights also represents limits on government and protection of individualism. Remember that much of segregation was *de jure*, established by governments. Moreover, basic to the notion of civil rights is that individuals are not to be judged according to characteristics they share with a group. Thus, civil rights protect the individual against collective discrimination.

The question of where to draw the line in the government's efforts to protect civil rights has received different answers at different points in American history, but few Americans want to turn back the clock to the days of *Plessy v. Ferguson* and Jim Crow laws or to the exclusion of women from the workplace.

Review the Chapter

Listen to Chapter 5 on MyPoliSciLab

The Struggle for Equality

5.1 Differentiate the Supreme Court's three standards of review for classifying people under the equal protection clause, p. 155.

Americans have emphasized equal rights and opportunities rather than equal results. In the Constitution, only the Fourteenth Amendment mentions equality. To determine whether classifications in laws and regulations are in keeping with the amendment's equal protection clause, the Supreme Court developed three standards of review: most classifications need only be reasonable, racial or ethnic classifications are inherently suspect, and classifications based on gender receive intermediate scrutiny.

African Americans' Civil Rights

5.2 Trace the evolution of protections of the rights of African Americans and explain the application of nondiscrimination principles to issues of race, p. 158.

Racial discrimination is rooted in the era of slavery, which lasted about 250 years and persisted in an era of segregation, especially in the South, into the 1950s. The civil rights movement achieved victories through civil disobedience and through the Court rulings, beginning with *Brown v. the Board of Education,* voiding discrimination in education, transportation, and other areas of life. In the 1960s, Congress prohibited discrimination in public accommodations, employment, housing, and voting through legislation such as the 1964 Civil Rights Act and the 1965 Voting Rights Act. Through their struggle for civil rights, African Americans blazed the constitutional trail for securing equal rights for all Americans.

The Rights of Other Minority Groups

5.3 Relate civil rights principles to progress made by other ethnic groups in the United States, p. 165.

Native Americans, Hispanic Americans, Asian Americans, and Arab Americans and Muslims have suffered discriminatory treatment. Yet each group has benefitted from the application of Court decisions and legislation of the civil rights era. These groups have also engaged in political action to defend their rights.

The Rights of Women

5.4 Trace the evolution of women's rights, and explain how civil rights principles apply to gender issues, p. 170.

After a long battle, women won the vote, with the passage of the Nineteenth Amendment, in 1920. Beginning in the 1960s, a second feminist wave successfully challenged gender-based classifications regarding employment, property, and other economic issues. Despite increased equality, issues remain, including lack of parity in wages, participation in the military, and combating sexual harassment.

Other Groups Active Under the Civil Rights Umbrella

5.5 Show how civil rights principles have been applied to seniors, people with disabilities, and gays and lesbians, p. 175.

Seniors and people with disabilities have successfully fought bias in employment, and the latter have gained greater access to education and public facilities. Gays and lesbians have faced more obstacles to overcoming discrimination and have been more successful in areas such as employment and privacy than in obtaining the right to marry.

Affirmative Action

5.6 Trace the evolution of affirmative action policy and assess the arguments for and against it, p. 180.

Affirmative action policies, which began in the 1960s, are designed to bring about increased employment, promotion, or admission for members of groups that have suffered from discrimination. In recent years, the Supreme Court has applied the inherently suspect standard to affirmative action policies and prohibited quotas and other means of achieving more equal results.

Understanding Civil Rights and Public Policy

5.7 Establish how civil rights policy advances democracy and increases the scope of government, p. 183.

Civil rights policies advance democracy because equality is a basic principle of democratic government. When majority rule threatens civil rights, the latter must prevail. Civil rights policies limit government discrimination but also require an active government effort to protect the rights of minorities.

Learn the Terms

Study and **Review** the **Flashcards**

civil rights, p. 155
Fourteenth Amendment, p. 156
equal protection of the laws, p. 156
Thirteenth Amendment, p. 158
Civil Rights Act of 1964, p. 162
suffrage, p. 163
Fifteenth Amendment, p. 163
poll taxes, p. 163
white primary, p. 163
Twenty-fourth Amendment, p. 163
Voting Rights Act of 1965, p. 163
Nineteenth Amendment, p. 170
Equal Rights Amendment, p. 171
Americans with Disabilities Act of 1990, p. 177
affirmative action, p. 180

Key Cases

Scott v. Sandford (1857)
Plessy v. Ferguson (1896)
Brown v. Board of Education (1954)
Hernandez v. Texas (1954)
Korematsu v. United States (1944)
Reed v. Reed (1971)
Craig v. Boren (1976)
Regents of the University of California v. Bakke (1978)
Adarand Constructors v. Pena (1995)

Test Yourself

Study and **Review** the **Practice Tests**

1. Which of the following best characterizes the original Constitution's treatment of equality?

a. The Constitution treats equality as corresponding with the phrase "all men are created equal."
b. The Constitution treats equality as corresponding with equal results and equal rewards.
c. The Constitution treats equality as corresponding with the equal protection of the laws.
d. The Constitution treats equality as corresponding with equal representation in Congress.
e. The Constitution does not address equality.

2. Courts presume classifications based on race to be

a. constitutional.
b. remedial.
c. offensive.
d. reasonable.
e. inherently suspect.

3. Based on your understanding of the U.S. Constitution, what do you think are the primary reasons why the Framers did not prioritize equality? Be specific and support your answer with examples.

4. Which of the following statements best characterizes post-Reconstruction developments for African Americans?

a. The Supreme Court continued to strike down antidiscriminatory laws.
b. The departure of federal troops from Southern states led to a surge of segregationist laws.
c. African Americans increasingly sought employment in the federal government, which did not segregate by race.
d. African Americans held seats in Congress and in state legislatures.
e. All of the above are accurate characterizations.

5. Which of the following did the Civil Rights Act of 1964 NOT accomplish?

a. It strengthened voting rights legislation.
b. It forbade discrimination in the sale or rental of housing.
c. It created the Equal Employment Opportunity Commission (EEOC).
d. It forbade discrimination in employment on the basis of race, color, national origin, religion, or gender.
e. It authorized the U.S. Justice Department to initiate lawsuits to desegregate public schools.

6. Civil rights laws and court decisions only restrict *de jure* segregation.

True_____ False_____

7. Discuss the several court cases that built up to the landmark decision in *Brown v. Board of Education*. Why do you think segregation was addressed first in education and not in other areas, such as employment or housing?

8. Although the Fifteenth Amendment appeared to grant African Americans the right to vote, the gap in time between this amendment and its implementation was large. What were some of the primary means used by states to limit voting by African Americans? How were they able to do so in light of the specific wording of the Fifteenth Amendment?

9. Which statement is true?

a. The Supreme Court has held that children not legally admitted to the United States are not protected by the Fourteenth Amendment.

b. Native Americans were always U.S. citizens.

c. *Hernandez v. Texas* helped widen the definition of discrimination beyond race.

d. Asian Americans are a group that has not suffered racial discrimination.

e. The principal form of discrimination against Arab Americans has been in denial of rights to attend mosques.

10. The history of discrimination in the United States often focuses on the discrimination faced by African Americans, but other minority groups have also struggled for civil rights. In what ways were these struggles similar to the struggle of African Americans? In what ways were they different?

11. Which of the following statements best characterizes what occurred after ratification of the Nineteenth Amendment gave women the right to vote?

a. The movement for women's rights turned to promoting equality through public policy.

b. The feminist movement continued to gain strength as women were able to vote for officials who supported their goals.

c. New state laws began to expand opportunities for women in the workplace.

d. The feminist movement lost momentum as it lacked unified support for its goals.

e. A backlash led to more restricted social conditions for women.

12. In *Craig v. Boren*, the Supreme Court held gender discrimination, like racial discrimination, to a strict scrutiny standard.

True_____ False_____

13. What are arguments (social, political, practical, and other) for and against opening up combat branches of the military to women? In what ways, if any, do you believe advances in technology have affected this issue?

14. Which of the following is the standard for evaluating age discrimination claims?

a. the reasonableness standard

b. the medium scrutiny standard

c. the strict scrutiny standard

d. the employer's bias standard

e. The Supreme Court has yet to rule on a proper classification for age discrimination.

15. The Americans with Disabilities Act prohibits employment discrimination against people with disabilities.

True_____ False_____

16. Imagine that you are a justice on the Supreme Court and, not having ruled on this issue before, the Court has an opportunity to set clear precedent on same-sex marriage. Based on your understanding of the Constitution, equality, and previous Court decisions concerning gays and lesbians, would you rule to support or oppose same-sex marriage? Justify your answer.

17. Which statement about affirmative action best reflects current Supreme Court precedent?

a. Quotas or set-asides may be used in both employment and education to redress past discrimination.

b. Quotas or set-asides may be used in employment to redress past discrimination.

c. Racial set-asides can be used by universities and colleges in order to promote diversity.

d. Although racial set-asides are unconstitutional, race may be considered as one among many factors in determining college admissions.

e. Affirmative action in any form is reverse discrimination and is therefore unconstitutional under the Civil Rights Act of 1964.

18. What are some of the arguments for and against affirmative action? In your answer, consider both the historical and the current context of affirmative action. Do you think affirmative action is constitutional? Explain your answer.

19. Which statement is correct?

a. The original Constitution defined equality for future officials to apply.

b. Equality and majority rule do not conflict.

c. The rules of politics prevent a minority of citizens from denying equality to a majority of citizens.

d. Equality is central to the functioning of democracy.

e. Civil rights inevitably work to shrink government.

20. How might civil rights laws, despite their intent to promote democratic values, actually work to threaten the liberties of individuals?

21. Based on what you know about the Framers' conception of equality, how do you think they would view the historical development of civil rights laws?