CHAPTER

16 Equality and Civil Rights

CHAPTER TOPICS

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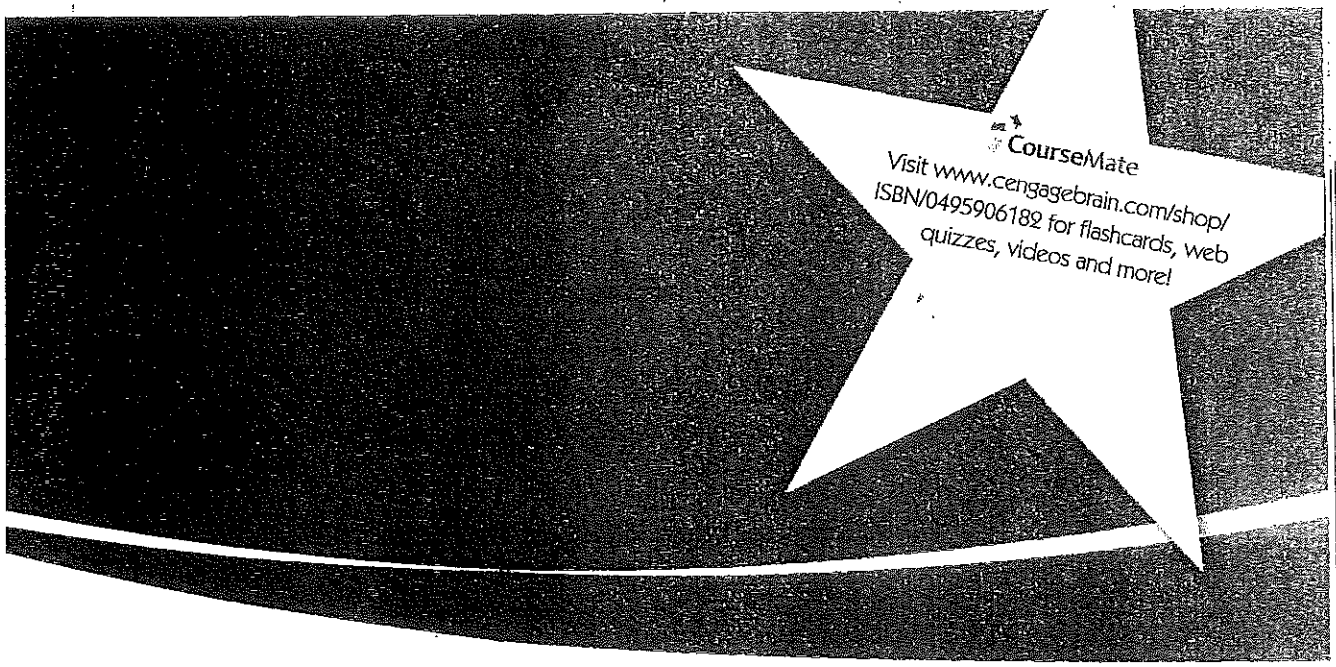

"When we want you, we'll call you; when we don't, git."[1] A rancher's sentiment toward his Mexican workers summarizes the treatment of illegal immigrants, many of them Mexicans or Latin Americans, who routinely cross our southern border in search of better wages and the possibility of a better life. The swings of the economy often signal whether illegal immigrants will be welcomed or sent packing. To be sure, illegal immigrants have provided the United States with cheap labor for a hundred years, undertaking tasks that few, if any, Americans would care to shoulder and providing goods and services at a far lower price than we would otherwise have to pay. They pick our fruit and vegetables, butcher our meat and poultry, clean our homes, flip our burgers, and mow our lawns. But illegal immigrants have also taken up jobs and better pay in other trades, including construction and manufacturing. "Better pay" is relative; it may be better for the illegal immigrant, but it is likely to drive down wages for everyone else. In a strong economy, a rising tide lifts all boats, including illegal ones. But in the Great Recession of today, illegal immigrants can become easy targets in the ebbing economic tide.

All governments provide for the general welfare, which embraces health, education, and fire and police protection. For example, public hospitals cannot decline care; public schools must admit and educate every student. These services ensure a measure of equality, a floor beneath which no one need fall. But does the floor exist for illegal immigrants and their children? Should illegal immigrants or their children be denied public education or health care?

In this chapter, we consider the different ideals of equality and the quest to realize them through government action. We begin with the struggle for racial equality, which continues to cast a long shadow in government policies. This struggle has served as a model for the diverse groups that chose to follow in the same path.*

*The effort to staunch the flow of illegal immigration also pits individual freedom against social order. In this chapter, we focus attention on the modern dilemma of government, the conflict between freedom and equality.

Two Conceptions of Equality

Most Americans support **equality of opportunity**, the idea that people should have an equal chance to develop their talents and that effort and ability should be rewarded equitably. This form of equality offers all individuals the same chance to get ahead; it glorifies personal achievement and free competition and allows everyone to play on a level field where the same rules apply to all. Special recruitment efforts aimed at identifying qualified minority or female job applicants, for example, ensure that everyone has the same chance starting out. Low-bid contracting illustrates equality of opportunity because every bidder has the same chance to compete for work.

IN OUR OWN WORDS

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Americans are far less committed to **equality of outcome**, which means greater uniformity in social, economic, and political power among different social groups. For example, schools and businesses aim at equality of outcome when they allocate admissions or jobs on the basis of race, gender, or disability, which are unrelated to ability. (Some observers refer to these allocations as *quotas;* others call them *goals*. The difference is subtle. A quota *requires* that a specified proportional share of some benefit go to a favored group. A goal *aims* for proportional allocation of benefits, without requiring it.) The government seeks equality of outcome when it adjusts the rules to handicap some bidders or applicants and favor others. The vast majority of Americans, however, consistently favor low-bid contracting and merit-based admissions and employment over preferential treatment.[2] Quota or goal-based policies muster only modest support in national opinion polls, ranging from 10 to 30 percent of the population, depending on how poll questions are worded.[3] The most recent surveys signal a significant decline in support for such egalitarian policies.[4]

Some people believe that equality of outcome can occur in today's society only if we restrict the free competition that is the basis of equality of opportunity. In 1978, Supreme Court Justice Harry Blackmun articulated this controversial position on a divided bench: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[5] In 2007, Chief Justice John G. Roberts, Jr., cast the issue in reverse on a divided bench: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[6] Quota policies generate the most opposition because they confine competition and create barriers to personal achievement. Quotas limit advancement for some individuals and ensure advancement for others. They alter the results by taking into account factors unrelated to ability. Equal outcomes policies that benefit minorities, women, or people with disabilities at the expense of whites, men, or the able-bodied create strong opposition because quotas seem to be at odds with individual initiative. In other words, equality clashes with freedom. To understand the ways government resolves this conflict, we have to understand the development of civil rights in this country.

equality of opportunity
The idea that each person is guaranteed the same chance to succeed in life.

equality of outcome
The concept that society must ensure that people are equal, and governments must design policies to redistribute wealth and status so that economic and social equality

The history of civil rights in the United States is primarily the story of a search for social and economic equality. This search has persisted for more than a century and is ongoing. It began with the battle for civil rights for black

nation and brought about its bloodiest conflict, the Civil War. The struggle of blacks has been a beacon lighting the way for Native Americans, immigrant groups of which Latinos represent the largest component, women, people with disabilities, and homosexuals. Each of these groups has confronted invidious discrimination. Discrimination is simply the act of making or recognizing distinctions. When making distinctions among people, discrimination may be benign (that is, harmless) or invidious (harmful). Sometimes this harm has been subtle, and sometimes it has been overt. Sometimes it has even come from other minorities. Each group has achieved a measure of success in its struggle by pressing its interests on government, even challenging it. These challenges and the government's responses to them have helped shape our democracy.

Remember that civil rights are powers or privileges guaranteed to the individual and protected from arbitrary removal at the hands of the government or other individuals. Sometimes people refer to civil rights as "positive rights" (see the feature "Examples of Positive and Negative Rights: Constitutional Rights and Human Rights" in Chapter 15). In this chapter, we concentrate on the rights guaranteed by the constitutional amendments adopted after the Civil War and by laws passed to enforce those guarantees. Prominent among them is the right to equal protection of the laws. This right remained a promise rather than a reality well into the twentieth century.

The Civil War Amendments

The Civil War amendments were adopted to provide freedom and equality to black Americans. The Thirteenth Amendment, ratified in 1865, provided that

> neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction.

The Fourteenth Amendment was adopted three years later. It provides first that freed slaves are citizens:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

As we saw in Chapter 15, it also prohibits the states from abridging the "privileges or immunities of citizens of the United States" or depriving "any person of life, liberty, or property, without due process of law." The amendment then goes on to guarantee equality under the law, declaring that no state shall

> deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment, adopted in 1870, added a measure of political equality:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

invidious discrimination
Discrimination against persons or groups that works to their harm and is based on animosity.

civil rights
Powers or privileges guaranteed to individuals and protected from arbitrary removal at the hands of government or individuals.

American blacks were thus free and politically equal—at least according to the Constitution. But for many years, the courts sometimes thwarted the efforts of the other branches to protect their constitutional rights.

Congress and the Supreme Court: Lawmaking Versus Law Interpreting

In the years after the Civil War, Congress went to work to protect the rights of black citizens. In 1866, lawmakers passed a civil rights act that gave the national government some authority over the treatment of blacks by state courts. This legislation was a response to the **black codes**, laws enacted by the former slave states to restrict the freedom of blacks. For example, vagrancy and apprenticeship laws forced blacks to work and denied them a free choice of employers. One section of the 1866 act that still applies today grants all citizens the right to make and enforce contracts; the right to sue others in court (and the corresponding ability to be sued); the duty and ability to give evidence in court; and the right to inherit, purchase, lease, sell, hold, or convey property. Later, in the Civil Rights Act of 1875, Congress attempted to guarantee blacks equal access to public accommodations (parks, theaters, and the like).

Although Congress enacted laws to protect the civil rights of black citizens, the Supreme Court weakened some of those rights. In 1873, the Court ruled that the Civil War amendments had not changed the relationship between the state and national governments.[7] State citizenship and national citizenship remained separate and distinct. According to the Court, the Fourteenth Amendment did not obligate the states to honor the rights guaranteed by U.S. citizenship.

In subsequent years, the Court's decisions narrowed some constitutional protections for blacks. In 1876, the justices limited congressional attempts to protect the rights of blacks.[8] A group of Louisiana whites had used violence and fraud to prevent blacks from exercising their basic constitutional rights, including the right to assemble peaceably. The justices held that the rights allegedly infringed on were not nationally protected rights and that therefore Congress was powerless to punish those who violated them. On the very same day, the Court ruled that the Fifteenth Amendment did not guarantee all citizens the right to vote; it simply listed grounds that could not be used to deny that right.[9] And in 1883, the Court struck down the public accommodations section of the Civil Rights Act of 1875.[10] The justices declared that the national government could prohibit only *government* action that discriminated against blacks; private acts of discrimination or acts of omission by a state were beyond the reach of the national government. For example, a person who refused to serve blacks in a private club was outside the control of the national government because the discrimination was a private—not a governmental—act. The Court refused to see racial discrimination as an act that the national government could prohibit. In many cases, the justices tolerated racial discrimination. In the process, they abetted **racism**, the belief that there are inherent differences among the races that determine people's achievement and that one's own race is superior to and thus has a right to dominate others.

black codes
Legislation enacted by former slave states to restrict the freedom of blacks.

racism
A belief that human races have distinct characteristics such that one's own race is superior to, and has a right to rule, others.

The Court's decisions gave the states ample room to maneuver around civil rights laws. In the matter of voting rights, for example, states that wanted to bar black men from the polls simply used nonracial means to do so. One popular tool was the poll tax, first imposed by Georgia in 1877. This was a tax of $1 or $2 on every citizen who wanted to vote. The tax was not a burden for most whites. But many blacks were tenant farmers, deeply in debt to white merchants and landowners; they had no extra money for voting. Other bars to black suffrage included literacy tests, minimum education requirements, and a grandfather clause that restricted suffrage to men who could establish that their grandfathers were eligible to vote before 1867 (three years before the Fifteenth Amendment declared that race could not be used to deny individuals the right to vote).[11] White southerners also used intimidation and violence to keep blacks from the polls.

The Roots of Racial Segregation

From well before the Civil War, racial segregation had been a way of life in the South: blacks lived and worked separately from whites. After the war, southern states began to enact Jim Crow laws to reinforce segregation. (*Jim Crow* was a derogatory term for a black person.) Once the Supreme Court took the teeth out of the Civil Rights Act of 1875, such laws proliferated. They required blacks to live in separate (generally inferior) areas and restricted them to separate sections of hospitals; separate cemeteries; separate drinking and toilet facilities; separate schools; and separate sections of trains, jails, and parks.

In 1892, Homer Adolph Plessy, who was seven-eighths Caucasian, took a seat in a "whites-only" car of a Louisiana train. He refused to move to the car reserved for blacks and was arrested. Plessy argued that Louisiana's law mandating racial segregation on its trains was an unconstitutional infringement on both the privileges and immunities guaranteed by the Fourteenth Amendment and its equal protection clause. The Supreme Court disagreed. The majority in *Plessy* v. *Ferguson* (1896) upheld state-imposed racial segregation.[12] They based their decision on what came to be known as the **separate-but-equal doctrine**, which held that separate facilities for blacks and whites satisfied the Fourteenth Amendment as long as they were equal. (The Court majority used the phrase "equal but separate" to describe the requirement. Justice John Marshall Harlan's dissenting opinion cast the phrase as "separate but equal," the way we have come to refer to the doctrine.)

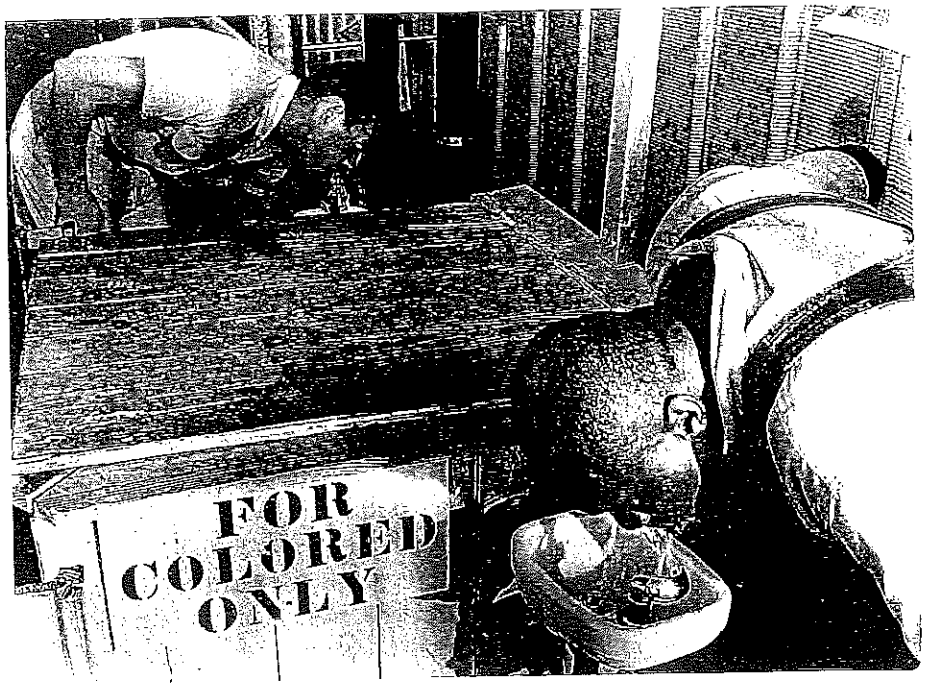
Three years later, the Supreme Court extended the separate-but-equal doctrine to the schools.[13] The justices ignored the fact that black educational facilities (and most other "colored-only" facilities) were far from equal to those reserved for whites.

By the end of the nineteenth century, legal racial segregation was firmly entrenched in the American South. Although constitutional amendments and national laws to protect equality under the law were in place, the Supreme Court's interpretation of those amendments and laws rendered them ineffective. Several decades would pass before any change was discernible.

poll tax
A tax of $1 or $2 on every citizen who wished to vote, first instituted in Georgia in 1877. Although it was no burden on most white citizens, it effectively disenfranchised blacks.

racial segregation
Separation from society because of race.

separate-but-equal doctrine
The concept that providing separate but equivalent facilities for blacks and whites satisfies the equal protection clause of the Fourteenth Amendment.



Separate and Unequal

The Supreme Court gave constitutional protection to racial separation on the theory that states could provide "separate but equal" facilities for blacks. The facilities here appear equal, but the harm inherent in racial separation lies beneath the surface. Separating people by race is inherently unequal, declared the Supreme Court, in its landmark 1954 ruling, *Brown* v. *Board of Education*.

(Bettmann/Corbis)

The Dismantling of School Segregation

Denied the right to vote and to be represented in the government, blacks sought access to power through other parts of the political system. The National Association for the Advancement of Colored People (NAACP), founded in 1909 by W. E. B. Du Bois and others, both black and white, with the goal of ending racial discrimination and segregation, took the lead in the campaign for black civil rights. The plan was to launch a two-pronged legal and lobbying attack on the separate-but-equal doctrine: first by pressing for fully equal facilities for blacks, then by proving the unconstitutionality of segregation. The process would be a slow one, but the strategies involved did not require a large organization or heavy financial backing; at the time, the NAACP had neither.*

Pressure for Equality...

By the 1920s, the separate-but-equal doctrine was so deeply ingrained in American law that no Supreme Court justice would dissent from its continued application to racial segregation. But a few Court decisions offered hope that change would come. In 1935, Lloyd Gaines graduated from Lincoln University, a black college in Missouri, and applied to the state law school.

*In 1939, the NAACP established an offshoot, the NAACP Legal Defense and Education Fund, to work on legal challenges while the parent organization concentrated on lobbying.

The law school rejected him because he was black. Missouri refused to admit blacks to its all-white law school; instead, the state's policy was to pay the costs of blacks admitted to out-of-state law schools. With the support of the NAACP, Gaines appealed to the courts for admission to the University of Missouri Law School. In 1938, the U.S. Supreme Court ruled that he must be admitted.[14] Under the *Plessy* ruling, Missouri could not shift to other states its responsibility to provide an equal education for blacks.

Later cases helped reinforce the requirement that segregated facilities must be equal in all major respects. One was brought by Heman Sweatt, again with the help of the NAACP. The all-white University of Texas Law School had denied Sweatt entrance because of his race. A federal court ordered the state to provide a black law school for him; the state responded by renting a few rooms in an office building and hiring two black lawyers as teachers. Sweatt refused to attend the school and took his case to the Supreme Court.[15]

The Court ruled on *Sweatt* v. *Painter* in 1950. The justices unanimously found that the facilities were inadequate: the separate "law school" provided for Sweatt did not approach the quality of the white state law school. The University of Texas had to give Sweatt full student status. But the Court avoided reexamining the separate-but-equal doctrine.

...and Pressure for Desegregation

These decisions suggested to the NAACP that the time was right for an attack on segregation itself. In addition, public attitudes toward race relations were slowly changing from the predominant racism of the nineteenth and early twentieth centuries toward greater tolerance. Black groups had fought with honor—albeit in segregated military units—in World War II. Blacks and whites were working together in unions and in service and religious organizations. Social change and court decisions suggested that government-imposed segregation was vulnerable.

President Harry S. Truman risked his political future with his strong support of blacks' civil rights. In 1947, he established the President's Committee on Civil Rights. The committee's report, issued later that year, became the agenda for the civil rights movement during the next two decades. It called for national laws prohibiting racially motivated poll taxes, segregation, and brutality against minorities and for guarantees of voting rights and equal employment opportunity. In 1948, Truman ordered the desegregation (the dismantling of authorized racial segregation) of the armed forces.

In 1947, the U.S. Department of Justice had begun to submit briefs to the courts in support of civil rights. The department's most important intervention probably came in *Brown* v. *Board of Education*.[16] This case was the culmination of twenty years of planning and litigation on the part of the NAACP to invalidate racial segregation in public schools.

desegregation
The ending of authorized segregation, or separation by race.

Linda Brown was a black child whose father had tried to enroll her in a white public school in Topeka, Kansas. The white school was close to Linda's home; the walk to the black school meant that she had to cross a dangerous

set of railroad tracks. Brown's request was refused because of Linda's race. A federal district court found that the black public school was equal in quality to the white school in all relevant respects; therefore, according to the *Plessy* doctrine, Linda was required to go to the black public school. Brown appealed the decision.

Brown v. *Board of Education* reached the Supreme Court in late 1951. The justices delayed argument on the sensitive case until after the 1952 national election. *Brown* was merged with four similar cases into a class action, a device for combining the claims or defenses of similar individuals so that they can be tried in a single lawsuit (see Chapter 14). The class action was supported by the NAACP and coordinated by Thurgood Marshall, who would later become the first black justice to sit on the Supreme Court. The five cases squarely challenged the separate-but-equal doctrine. By all tangible measures (standards for teacher licensing, teacher–pupil ratios, library facilities), the two school systems in each case—one white, the other black—were equal. The issue was legal separation of the races.

On May 17, 1954, Chief Justice Earl Warren, who had only recently joined the Court, delivered a single opinion covering four of the cases. (See Chapter 14.) Warren spoke for a unanimous Court when he declared that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal,"[17] depriving the plaintiffs of the equal protection of the laws. Segregated facilities generate in black children "a feeling of inferiority ... that may affect their hearts and minds in a way unlikely ever to be undone."[18] In short, the nation's highest court found that state-imposed public school segregation violated the equal protection clause of the Fourteenth Amendment.

A companion case to *Brown* challenged the segregation of public schools in Washington, D.C.[19] Segregation there was imposed by Congress. The equal protection clause protected citizens only against state violations; no equal protection clause restrained the national government. It was unthinkable for the Constitution to impose a lesser duty on the national government than on the states. In this case, the Court unanimously decided that the racial segregation requirement was an arbitrary deprivation of liberty without due process of law, a violation of the Fifth Amendment. In short, the concept of liberty encompassed the idea of equality.

The Court deferred implementation of the school desegregation decisions until 1955. Then, in *Brown* v. *Board of Education II*, it ruled that school systems must desegregate "with all deliberate speed" and assigned the task of supervising desegregation to the lower federal courts.[20]

Some states quietly complied with the *Brown* decree. Others did little to desegregate their schools. And many communities in the South defied the Court, sometimes violently. Some white business and professional people formed "white citizens' councils." The councils put economic pressure on blacks who asserted their rights by foreclosing on their mortgages and denying them credit at local stores. Georgia and North Carolina resisted desegregation by paying tuition for white students attending private schools. Virginia and other states ordered that desegregated schools be closed.

Anger Erupts in Little Rock

In 1957, the Little Rock, Arkansas, school board attempted to implement court-ordered desegregation: nine black teenagers were to be admitted to Little Rock Central High School. Governor Orval Faubus ordered the National Guard to bar their attendance. A mob blocked a subsequent attempt by the students. Finally, President Dwight D. Eisenhower ordered federal troops to escort the students to the high school. Among them was fifteen-year-old Elizabeth Eckford (*right*). Hazel Brown (*left*) angrily taunted her from the crowd. This image seared the nation's conscience. The violence and hostility led the school board to seek a postponement of the desegregation plan. The Supreme Court, meeting in special session, affirmed the decision in *Brown* v. *Board of Education* and ordered the plan to proceed. Fifty years later, a federal judge declared Little Rock's schools desegregated. But the school district remains riven by racial strife, as a new black majority on the school board clashed with the black school superintendent over jobs, not education.

(ullstein bild/The Image Works)

This resistance, along with the Supreme Court's "all deliberate speed" order, placed a heavy burden on federal judges to dismantle what was the fundamental social order in many communities.[21] Gradual desegregation under *Brown* was in some cases no desegregation at all. In 1969, a unanimous Supreme Court ordered that the operation of segregated school systems stop "at once."[22]

Two years later, the Court approved several remedies to achieve integration, including busing, racial quotas, and the pairing or grouping of noncontiguous school zones. In *Swann* v. *Charlotte-Mecklenburg County Schools,*

the Supreme Court affirmed the right of lower courts to order the busing of children to ensure school desegregation.[23] But these remedies applied only to de jure segregation, government-imposed segregation (for example, government assignment of whites to one school and blacks to another within the same community). Court-imposed remedies did not apply to de facto segregation, which is not the result of government action (for example, racial segregation resulting from residential patterns).

The busing of schoolchildren came under heavy attack in both the North and the South. Desegregation advocates saw busing as a potential remedy in many northern cities, where schools had become segregated as white families left the cities for the suburbs. This "white flight" had left inner-city schools predominantly black and suburban schools almost all white. Public opinion strongly opposed the busing approach, and Congress sought to impose limits on busing as a remedy to segregation. In 1974, a closely divided Court ruled that lower courts could not order busing across school district boundaries unless each district had practiced racial discrimination or school district lines had been deliberately drawn to achieve racial segregation.[24] This ruling meant an end to large-scale school desegregation in metropolitan areas.

The Civil Rights Movement

Although the NAACP concentrated on school desegregation, it also made headway in other areas. The Supreme Court responded to NAACP efforts in the late 1940s by outlawing whites-only primary elections in the South, declaring them to be in violation of the Fifteenth Amendment. The Court also declared segregation on interstate bus routes to be unconstitutional and desegregated restaurants and hotels in the District of Columbia. Despite these and other decisions that chipped away at existing barriers to equality, states still were denying black citizens political power, and segregation remained a fact of daily life.

Dwight D. Eisenhower, who became president in 1953, was not as concerned about civil rights as his predecessor had been. He chose to stand above the battle between the Supreme Court and those who resisted the Court's decisions. He even refused to reveal whether he agreed with the Court's decision in *Brown* v. *Board of Education*. "It makes no difference," Eisenhower declared, because "the Constitution is as the Supreme Court interprets it."[25] Eisenhower did enforce school desegregation when the safety of schoolchildren was involved, but he appeared unwilling to do much more to advance racial equality. That goal seemed to require the political mobilization of the people—black and white—in what is now known as the civil rights movement.

Black churches served as the crucible of the movement. More than places of worship, they served hundreds of other functions. In black communities, the church was "a bulletin board to a people who owned no organs of communication, a credit union to those without banks, and even a kind of people's court."[26] Some of its preachers were motivated by fortune, others by saintliness. One would prove to be a modern-day Moses.

de jure segregation
Government-imposed segregation.

de facto segregation
Segregation that is not the result of government influence.

civil rights movement
The mass mobilization during the 1960s that sought to gain equality of rights and opportunities for blacks in the South and to a lesser extent in the North, mainly through nonviolent, unconventional means of participation.

Civil Disobedience

Rosa Parks, a black woman living in Montgomery, Alabama, sounded the first call to action. That city's Jim Crow ordinances were tougher than those in other southern cities, where blacks were required to sit in the back of the bus while whites sat in the front, both races converging as the bus filled with passengers. In Montgomery, bus drivers had the power to define and redefine the floating line separating blacks and whites: drivers could order blacks to vacate an entire row to make room for one white or order blacks to stand even when some seats were vacant. Blacks could not walk through the white section to their seats in the back; they had to leave the bus after paying their fare and reenter through the rear.[27] In December 1955, Parks boarded a city bus on her way home from work and took an available seat in the front of the bus; she refused to give up her seat when the driver asked her to do so. She was arrested and fined $10 for violating the city ordinance.

Montgomery's black community responded to Parks's arrest with a boycott of the city's bus system. A **boycott** is a refusal to do business with a company or individual as an expression of disapproval or a means of coercion. Blacks walked or carpooled or stayed at home rather than ride the city's buses. As the bus company moved close to bankruptcy and downtown merchants suffered from the loss of black business, city officials began to harass blacks, hoping to frighten them into ending the boycott. But Montgomery's black citizens now had a leader, a charismatic twenty-six-year-old Baptist minister named Martin Luther King, Jr. King urged the people to hold out, and they did. A year after the boycott began, a federal court ruled that segregated transportation systems violated the equal protection clause of the Constitution. The boycott had proved to be an effective weapon.

In 1957, King helped organize the Southern Christian Leadership Conference to coordinate civil rights activities. He was totally committed to nonviolent action to bring racial issues into the light. To that end, he advocated **civil disobedience**, the willful but nonviolent breach of unjust laws.

One nonviolent tactic was the sit-in. On February 1, 1960, four black freshmen from North Carolina Agricultural and Technical College in Greensboro sat down at a whites-only lunch counter. They were refused service by the black waitress, who said, "Fellows like you make our race look bad." The young men stayed all day and promised to return the next morning to continue what they called a "sit-down protest." Other students soon joined in, rotating shifts so that no one missed classes. Within two days, eighty-five students had flocked to the lunch counter. Although abused verbally and physically, the students would not move. Finally, they were arrested. Soon people held similar sit-in demonstrations throughout the South and then in the North.[28] The Supreme Court upheld the actions of the demonstrators, although the unanimity that had characterized its earlier decisions was gone. (In this decision, three justices argued that even bigots had the right to call on the government to protect their property interests.)[29]

boycott
A refusal to do business with a firm, individual, or nation as an expression of disapproval or as a means of coercion.

civil disobedience
The willful but nonviolent breach of laws that are regarded as unjust.

The Civil Rights Act of 1964

In 1961, a new administration, headed by President John F. Kennedy, came to power. At first Kennedy did not seem to be committed to civil rights. But his stance changed as the movement gained momentum and as more and more whites became aware of the abuse being heaped on sit-in demonstrators, freedom riders (who protested unlawful segregation on interstate bus routes), and those who were trying to help blacks register to vote in southern states. Volunteers were being jailed, beaten, and even killed for advocating activities among blacks that whites took for granted.

In late 1962, President Kennedy ordered federal troops to ensure the safety of James Meredith, the first black to attend the University of Mississippi. In early 1963, Kennedy enforced the desegregation of the University of Alabama. In April 1963, television viewers were shocked to see civil rights marchers in Birmingham, Alabama, attacked with dogs, fire hoses, and cattle prods. (The idea of the Birmingham march was to provoke confrontations with white officials in an effort to compel the national government to intervene on behalf of blacks.) Finally, in June 1963, Kennedy asked Congress for legislation that would outlaw segregation in public accommodations.

Two months later, Martin Luther King, Jr., joined in a march on Washington, D.C. The organizers called the protest "A March for Jobs and Freedom," signaling the economic goals of black America. More than 250,000 people, black and white, gathered peaceably at the Lincoln Memorial to hear King speak. "I have a dream," the great preacher extemporized, "that my little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[30]

Congress had not yet enacted Kennedy's public accommodations bill when he was assassinated on November 22, 1963. His successor, Lyndon B. Johnson, considered civil rights his top legislative priority. Johnson's long congressional experience and exceptional leadership ability as Senate majority leader were put to good use in overcoming the considerable opposition to the legislation. Within months, Congress enacted the Civil Rights Act of 1964, which included a vital provision barring segregation in most public accommodations. This congressional action was in part a reaction to Kennedy's death. But it was also almost certainly a response to the brutal treatment of blacks throughout the South. Viewed from afar, it is probably fair to say that King's efforts were necessary but not sufficient to ensure passage of the law. And Johnson's efforts were sufficient but not necessary to ensure passage. Together, their efforts were necessary and sufficient to ensure enactment.

Congress had enacted civil rights laws in 1957 and 1960, but they dealt primarily with voting rights. The 1964 act was the most comprehensive legislative attempt ever to erase racial discrimination in the United States. Among its many provisions, the act

- Entitled all persons to "the full and equal enjoyment" of goods, services, and privileges in places of public accommodation, without discrimination on the grounds of race, color, religion, or national origin (the inclusion of "national origin" or place of birth would set in motion plans for immigration reform the following year)

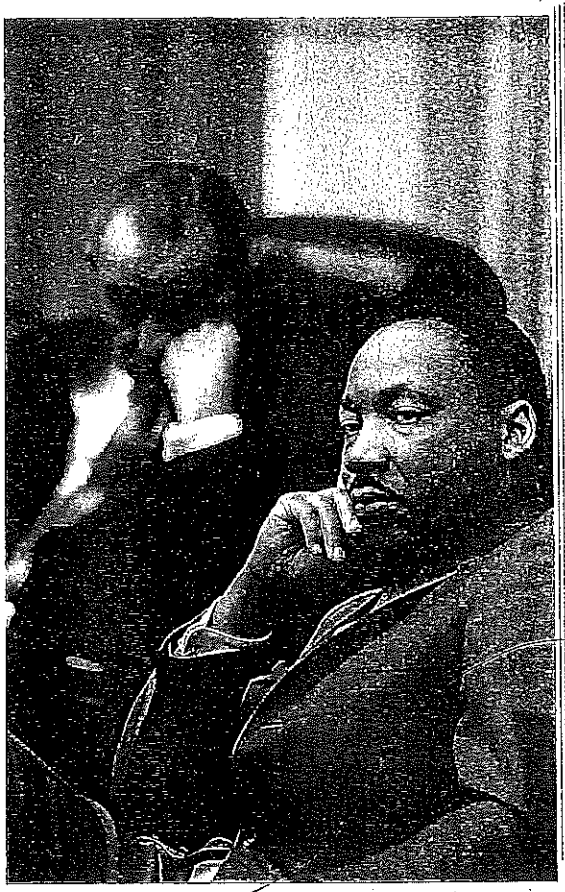
- Established the right to equality in employment opportunities
- Strengthened voting rights legislation
- Created the Equal Employment Opportunity Commission (EEOC) and charged it with hearing and investigating complaints of job discrimination*
- Provided that funds could be withheld from federally assisted programs administered in a discriminatory manner

The last of these provisions had a powerful effect on school desegregation when Congress enacted the Elementary and Secondary Education Act in 1965. That act provided billions of federal dollars for the nation's schools; the threat of losing that money spurred local school boards to formulate and implement new plans for desegregation.

The 1964 act faced an immediate constitutional challenge. Its opponents argued that the Constitution does not forbid acts of private discrimination—the position the Supreme Court itself had taken in the late nineteenth century. But this time, a unanimous Court upheld the law, declaring that acts of discrimination impose substantial burdens on interstate commerce and thus are subject to congressional control.[31] In a companion case, Ollie McClung, the owner of a small restaurant, had refused to serve blacks. McClung maintained that he had the freedom to serve whomever he wanted in his own restaurant. The justices, however, upheld the government's prohibition of McClung's racial discrimination on the grounds that a substantial portion of the food served in his restaurant had moved in interstate commerce.[32] Thus, the Supreme Court vindicated the Civil Rights Act of 1964 by reason of the congressional power to regulate interstate commerce rather than on the basis of the Fourteenth Amendment. Since 1937, the Court had approved ever-widening authority to regulate state and local activities under the commerce clause. It was the most powerful basis for the exercise of congressional power in the Constitution.

President Johnson's goal was a "great society." Soon a constitutional amendment and a series of civil rights laws were in place to help him meet his goal:

- The Twenty-fourth Amendment, ratified in 1964, banned poll taxes in primary and general elections for national office.
- The Economic Opportunity Act of 1964 provided education and training to combat poverty.



When Leaders Confer

Martin Luther King, Jr., was a Baptist minister who believed in the principles of nonviolent protest practiced by India's Mohandas (Mahatma) Gandhi. This photograph captures King at a meeting with President Lyndon Johnson and other civil rights leaders in the White House cabinet room on March 18, 1966. King later joked that he was instructed to reach the White House south gate by "irregular routes," chuckling that he "had to sneak in the back door." King, who won the Nobel Peace Prize in 1964, was assassinated in 1968 in Memphis, Tennessee.

(LBJ Library/Photo by Yoichi R. Okamoto)

*Since 1972, the EEOC has had the power to institute legal proceedings on behalf of employees who allege that they have been victims of illegal discrimination.

- The Voting Rights Act of 1965 empowered the attorney general to send voter registration supervisors to areas in which fewer than half the eligible minority voters had been registered. This act has been credited with doubling black voter registration in the South in only five years.[33]
- The Fair Housing Act of 1968 banned discrimination in the rental and sale of most housing.

The Continuing Struggle over Civil Rights

In the decades that followed, it became clear that civil rights laws on the books do not ensure civil rights in action. In 1984, for example, the Supreme Court was called on to interpret a law forbidding sex discrimination in schools and colleges that receive financial assistance from the national government: Must the entire institution comply with the regulations, or only those portions of it that receive assistance?

In *Grove City College* v. *Bell*, the Court ruled that government educational grants to students implicate the institution as a recipient of government funds; therefore, it must comply with government nondiscrimination provisions. However, only the specific department or program receiving the funds (in Grove City's case, the financial aid program), not the whole institution, was barred from discriminating.[34] Athletic departments rarely receive such government funds, so colleges had no obligation to provide equal opportunity for women in their sports programs.

The *Grove City* decision had widespread effects because three other important civil rights laws were worded similarly. The implication was that any law barring discrimination on the basis of race, sex, age, or disability would be applicable only to programs receiving federal funds, not to the entire institution. So a university laboratory that received federal research grants could not discriminate, but other departments that did not receive federal money could. The effect of *Grove City* was to frustrate enforcement of civil rights laws. In keeping with pluralist theory, civil rights and women's groups shifted their efforts to the legislative branch.

Congress reacted immediately, exercising its lawmaking power to check the law-interpreting power of the judiciary. Congress can revise national laws to counter judicial decisions; in this political chess game, the Court's move is hardly the last one. Legislators protested that the Court had misinterpreted the intent of the antidiscrimination laws, and they forged a bipartisan effort to make that intent crystal clear: if any part of an institution gets federal money, no part of it can discriminate. Their work led to the Civil Rights Restoration Act, which became law in 1988 despite a presidential veto by Ronald Reagan.

Although Congress tried to restore and expand civil rights enforcement, the Supreme Court weakened it again. The Court restricted minority contractor set-asides of state public works funds, an arrangement it had approved in 1980. (A set-aside is a purchasing or contracting provision that reserves a certain percentage of funds for minority-owned contractors.) The five-person majority held that past societal discrimination alone cannot serve as the basis for rigid quotas.[35]

set-aside
A purchasing or contracting provision that reserves a certain percentage of funds for minority-owned contractors.

Buttressed by Republican appointees, the Supreme Court continued to arrow the scope of national civil rights protections in a string of decisions iat suggested the ascendancy of a new conservative majority more concerned ith freedom than equality.[36] To counter the Court's changing interpretations f civil rights laws, liberals turned to Congress to restore and enlarge earlier ourt decisions by writing them into law. The result was a comprehensive new ivil rights bill. The Civil Rights Act of 1991 reversed or altered twelve Court ecisions that had narrowed civil rights protections. The new law clarified and xpanded earlier legislation and increased the costs to employers for inten- onal, illegal discrimination. Continued resentment generated by equal utcomes policies would move the battle back to the courts, however.

Racial Violence and Black Nationalism

ncreased violence on the part of those who demanded their civil rights and hose who refused to honor them marked the mid- and late 1960s. Violence igainst civil rights workers was confined primarily to the South, where vol- inteers continued to work for desegregation and to register black voters. Among the atrocities that incensed even complacent whites were the bomb- ng of dozens of black churches; the slaying of three young civil rights workers in Philadelphia, Mississippi, in 1964 by a group of whites, among hem deputy sheriffs; police violence against demonstrators marching peace- fully from Selma, Alabama, to Montgomery in 1965; and the assassination of Martin Luther King, Jr., in Memphis in 1968.

Black violence took the form of rioting in northern inner cities. Civil rights gains had come mainly in the South. Northern blacks had the vote and were not subject to Jim Crow laws, yet most lived in poverty. Unemployment was high, opportunities for skilled jobs were limited, and earnings were low. The segregation of blacks into the inner cities, although not sanctioned by law, was nevertheless real; their voting power was minimal because they constituted a small minority of the northern population. The solid gains made by southern blacks added to their frustration. Beginning in 1964, northern blacks took to the streets, burning and looting. Riots in 168 cities and towns followed King's assassination in 1968, and many were met with violent responses from urban police forces and the National Guard.

The lack of progress toward equality for northern blacks was an important factor in the rise of the black nationalist movement in the 1960s. The Nation of Islam, or Black Muslims, called for separation from whites rather than integration and for violence in return for violence. Malcolm X was their leading voice until he distanced himself from the Muslims shortly before his assassination by fellow Muslims in 1965. The militant Black Panther Party generated fear with its denunciation of the values of white America. In 1966, Stokely Carmichael, then chairman of the Student Nonviolent Coordinating Committee (SNCC), called on blacks to assert, "We want black power," in their struggle for civil rights. Organizations that had espoused integration and nonviolence now argued that blacks needed power more than white friendship.

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Have we gone too far in pushing equal rights ... or not far enough? After reading the material in this chapter, would you answer that question differently? Take IDEAlog's self-test.

The movement had several positive effects. Black nationalism instilled and promoted pride in black history and black culture. By the end of the decade, U.S. colleges and universities were beginning to institute black studies programs. More black citizens were voting than ever before, and their voting power was evident: increasing numbers of blacks were winning election to public office. In 1967, Cleveland's voters elected Carl Stokes, the first black mayor of a major American city. And by 1969, black representatives formed the Congressional Black Caucus. These achievements were incentives for other groups that also faced barriers to equality.

Civil Rights for Other Minorities

Recent civil rights laws and court decisions protect members of all minority groups. The Supreme Court underscored the breadth of this protection in an important decision in 1987.[37] The justices ruled unanimously that the Civil Rights Act of 1866 (known today as Section 1981) offers broad protection against discrimination to all minorities. Previously, members of white ethnic groups could not invoke the law in bias suits. Under the 1987 decision, members of any ethnic group can recover money damages if they prove they have been denied a job, excluded from rental housing, or subjected to another form of discrimination prohibited by the law. The 1964 Civil Rights Act offers similar protections but specifies strict procedures for filing suits that tend to discourage litigation. Moreover, the remedies in most cases are limited. In job discrimination, for example, back pay and reinstatement are the only remedies. Section 1981 has fewer hurdles and allows litigants to seek punitive damages (damages awarded by a court as additional punishment for a serious wrong). In some respects, then, the older law is a more potent weapon than the newer one in fighting discrimination.

Clearly, the civil rights movement has had an effect on all minorities. Here we examine the civil rights struggles of four groups: Native Americans, immigrant groups (the largest of which are Latinos), people with disabilities, and homosexuals.

Native Americans

During the eighteenth and nineteenth centuries, the U.S. government took Indian lands, isolated Native Americans on reservations, and denied them political and social rights. The government's dealings with the Indians were often marked by violence and broken promises. The agencies responsible for administering Indian reservations kept Native Americans poor and dependent on the national government.

The national government switched policies at the beginning of the twentieth century, promoting assimilation instead of separation. The government banned the use of native languages and religious rituals; it sent Indian children to boarding schools and gave them non-Indian names. In 1924, Indians received U.S. citizenship. Until that time, they had been considered members

of tribal nations whose relations with the U.S. government were determined by treaties. The Native American population suffered badly during the Great Depression, primarily because the poorest Americans were affected most severely but also because of the inept administration of Indian reservations. (Today, Native Americans make up less than 1 percent of the population.) Poverty persisted on the reservations well after the Depression was over, and Indian land holdings continued to shrink through the 1950s and into the 1960s—despite signed treaties and the religious significance of portions of the lands they lost. In the 1960s, for example, a part of the Hopi Sacred Circle, which is considered the source of all life in the Hopi tribal religion, was strip-mined for coal.

Anger bred of poverty, unemployment, and frustration with an uncaring government exploded in militant action in late 1969, when several American Indians seized Alcatraz Island, an abandoned island in San Francisco Bay. The group cited an 1868 Sioux treaty that entitled them to unused federal lands; they remained on the island for a year and a half. In 1973, armed members of the American Indian Movement seized eleven hostages at Wounded Knee, South Dakota, the site of an 1890 massacre of two hundred Sioux (Lakota) by U.S. cavalry troops. They remained there, occasionally exchanging gunfire with federal marshals, for seventy-one days, until the government agreed to examine the treaty rights of the Oglala Sioux.[38]

In 1946, Congress enacted legislation establishing an Indian claims commission to compensate Native Americans for land that had been taken from them. In the 1970s, the Native American Rights Fund and other groups used that legislation to win important victories in the courts. The tribes won the return of lands in the Midwest and in the states of Oklahoma, New Mexico, and Washington. In 1980, the Supreme Court ordered the national government to pay the Sioux $117 million plus interest for the Black Hills of South Dakota, which had been stolen from them a century before. Other cases, involving land from coast to coast, are still pending.

The special status accorded Indian tribes in the Constitution has proved attractive to a new group of Indian leaders. Some of the 565 recognized tribes have successfully instituted casino gambling on their reservations, even in the face of state opposition to their plans. The tribes pay no taxes on their profits, which has helped them make gambling a powerful engine of economic growth for themselves and has given a once impoverished people undreamed-of riches and responsibilities. Congress has allowed these developments, provided that the tribes spend their profits on Indian assistance programs.

It is important to remember that throughout American history, Native Americans have been coerced physically and pressured economically to assimilate into the mainstream of white society. The destiny of Native Americans as viable groups with separate identities depends in no small measure on curbing their dependence on the national government.[39] The wealth created by casino gambling and other ventures funded with gambling profits may prove to be Native Americans' most effective weapon for regaining their heritage.

Immigrant Groups

The Statue of Liberty stands at the entrance to New York harbor, a gift from the people of France to commemorate the centennial of the United States. It is an icon of the United States in the world, capturing the belief that this country is a beacon of liberty for countless immigrants far and wide. We are a nation of immigrants. But the truth is more complex. Until 1965, the laws that governed immigration were rooted in invidious discrimination. Liberty's beacon drew millions of undocumented or illegal immigrants. Efforts to stem this tide brought unanticipated consequences, but further reform has failed to stop the flow of illegal immigrants to these shores.

For most of the first half of the twentieth century, immigration rules established a strict quota system that gave a clear advantage to Northern and Western Europeans and guaranteed that few Southern or Eastern Europeans, Asians, Africans, and Jews would enter the country by legal means. This was akin to the same unjustified discrimination that had subjugated blacks since the end of the Civil War. In the same spirit that championed civil rights for African Americans, a once reluctant Congress changed the rules to end discrimination on the basis of national origin. In 1965, President Lyndon Johnson signed a new immigration bill into law at the Statue of Liberty. Henceforth, the invidious quota system was gone; everyone was supposed to have an equal chance of immigrating to the United States. Upon signing the bill, Johnson remarked that there was nothing revolutionary about the law. "It will not reshape the structure of our daily lives or add importantly to either our wealth or our power." Within a few years, Johnson's prediction proved fundamentally wrong.

One purpose of the new law was to reunite families. It gave preference to relatives of immigrants already here, but since the vast majority of these legal immigrants came from Northern or Western Europe, the expectation was that reuniting families would continue the earlier preferences. Another provision gave preference in much smaller numbers to immigrants with much needed skills, such as doctors and engineers. It never occurred to the law's designers that African doctors, Indian engineers, Philippine nurses, or Chinese software programmers would be able to immigrate. Word trickled out to those newly eligible to come. Once here, these immigrants petitioned for their relatives to come. And those family members petitioned for yet others. As a result of this "chain migration," entire extended families established themselves in the United States, and the law did nothing to staunch the flow of illegal immigrants.

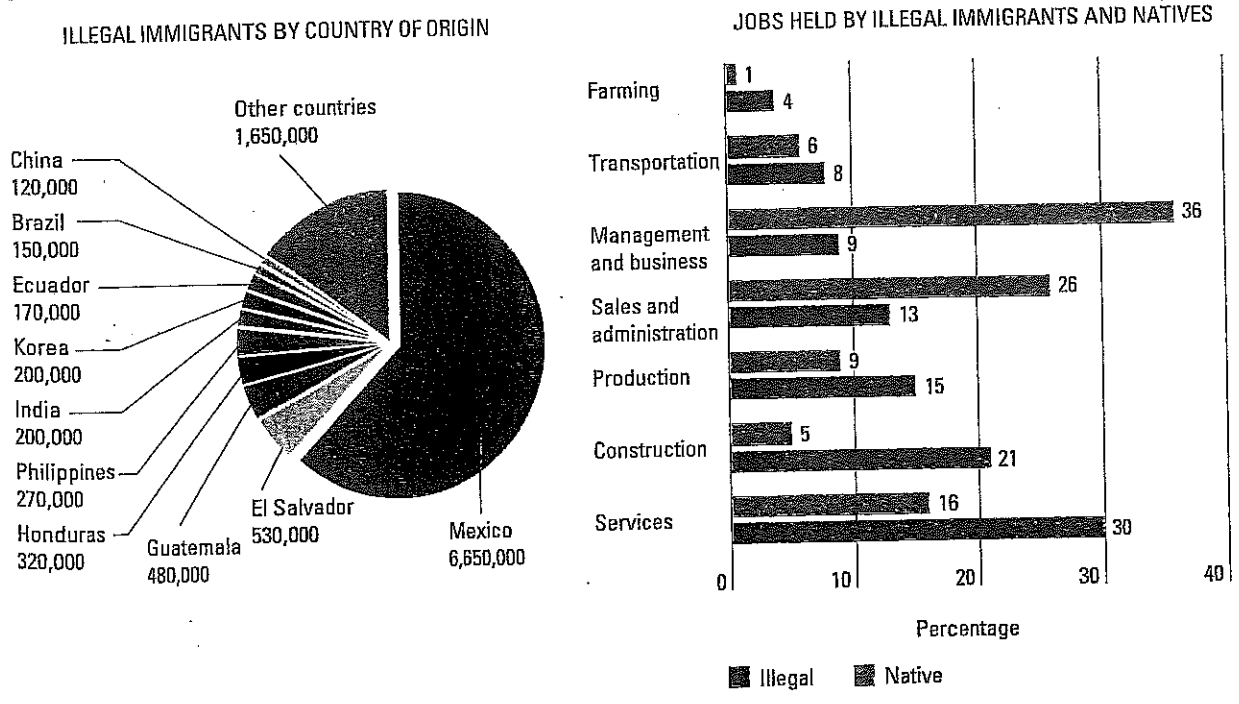
The demand for cheap labor in agriculture and manufacturing proved an enticing lure to many of the poor with access to America's southern border. The personal risk in crossing the border illegally was often outweighed by the possible gain in employment and a new, though illegal, start. There was no risk of imprisonment, merely a return to south of the border and perhaps another attempt to cross into a "promised land." During the post-1965 period, millions of men and women chose personal risk for the possibility of a better future.

In 1986, Congress sought to fix a system that by all accounts was broken. It sought to place the burden of enforcement on employers by imposing fines for hiring undocumented workers and then by offering amnesty to resident illegal immigrants who were in the United States for at least five years. But lax government enforcement and ease in obtaining falsified worker documents such as a "green card" doomed the enforcement strategy. Illegal immigrants continued to enter the United States, the majority from Mexico (see Figure 16.1).

By 2006, politicians were ready for another round of reform, motivated by over 11 million illegal immigrants in the United States (triple the number since the previous reform effort twenty years earlier); state and local governments in border states that were hit hard for the cost of public services (for example, health and education) for illegal immigrants; and the threat to national security in a post-9/11 world posed by porous, unguarded borders.

While the public is opposed to illegal immigrants obtaining driver's licenses or health care, it is important to note that in 2005, illegal immigrants paid an estimated $7 billion in Social Security taxes with little or nothing in return from the government.

FIGURE 16.1 Illegal Immigrants in the United States, 2009



In 2009, there were 31.2 million foreign-born people living in America. The Department of Homeland Security "estimates that the unauthorized immigrant population living in the United States decreased to 10.8 million in January 2009 from 11.6 million in January 2008. Between 2000 and 2009, the unauthorized population grew by 27 percent."

Sources: Michael Hoefer, Nancy Rytina, and Bryan C. Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009," Office of Immigration Statistics of the DHS, January 2010, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf; Jeffrey S. Passel and D'Vera Cohn, "Table 5: Comparing Occupations of US-Born and Unauthorized Immigrant Workers, 2008," in *A Portrait of Unauthorized Immigrants in the United States* (Washington, D.C.: Pew Hispanic Center, 14 April 2009), http://pewhispanic.org/files/reports/107.pdf.

Arizonans Protest

Protesters gathered outside the Arizona Capitol Saturday, May 1, 2010 in Phoenix to demonstrate their opposition to Arizona's controversial new immigration bill. A federal judge held key provisions void on federalism grounds shortly before the law was to take effect.

(AP Photo/Matt York)

Taking a lesson from the civil rights struggle fi African Americans, immigrant organizers in 2006 pul licly voiced their opposition to new legislation th would fence off large sections of the U.S.-Mexican bo der and make illegal aliens criminals who face penalti in excess of a year in prison. Immigrants from a wic range of ethnic communities responded with larg scale, peaceful protests across the United States. The point was to demonstrate their quest for legal status ar their deep resistance to the concept that their me presence was to be taken as a criminal act. But a maj overhaul of immigration policy orchestrated by the Bus administration and Senate Democrats failed in 200 Republicans abandoned the president as conservati critics, abetted by talk radio programs, insisted on labe ing the effort a form of amnesty for lawbreakers. F their part, Democrats brought the bill to the Senate flo without committee hearings, hoping that any bill wou be better than no bill. Senator Edward M. Kennec (D-Mass.), the bill's chief Democratic architect, sa many senators "voted their fears, not their hopes."

Frustration brought about by hard economic tim tends to make illegal immigrants easy targets. This especially the case in Arizona, which experiences th greatest number of illegal border crossings from Me ico and has a large Hispanic population. With a sur in violence resulting from drug smuggling and huma trafficking at its border, the Arizona legislature backed by strong public opinion—adopted the stricte state immigration law in the nation in 2010. Amor its many provisions, the Support Our Law Enforc ment and Safe Neighborhoods Act makes it a crin for an alien to be in Arizona without carrying leg documents and obligates the police to determine person's immigration status if there's a reasonab suspicion that the person is an illegal alien. It al steps up state and local law enforcement of feder immigration laws and cracks down on those shelte ing, hiring, and transporting illegal aliens. In July 2010, a federal judge Phoenix struck down key provisions of the law on federalism grounds, citir Article I, Section 8, of the Constitution, which vests exclusive power over nat ralization (the process of citizenship)—and by implication over exclusion and d portation of aliens—in the national government, not the states. (See Chapter 4.)

Many Latinos have a rich and deep-rooted heritage in America, but un the 1920s, that heritage was largely confined to the southwestern states, pa ticularly California. Then unprecedented numbers of Mexican immigran came to the United States in search of employment and a better lif

Businesspeople who saw in them a source of cheap labor welcomed them. Many Mexicans became farm workers; others settled mainly in crowded, low-rent, inner-city districts in the Southwest, forming their own barrios, or neighborhoods, within the cities, where they maintained the customs and values of their homeland.

Like blacks who had migrated to northern cities, most new Latino immigrants found poverty and discrimination. And like poor blacks and Native Americans, they suffered disproportionately during the Great Depression. About one-third of the Mexican American population (mainly those who had been migratory farm workers) returned to Mexico during the 1930s.

World War II gave rise to another influx of Mexicans, who this time were primarily courted to work farms in California. But by the late 1950s, most farm workers—blacks, whites, and Hispanics—were living in poverty. Latinos who lived in cities fared little better. Yet millions of Mexicans continued to cross the border into the United States, both legally and illegally. The effect was to depress wages for farm labor in California and the Southwest.

In 1965, Cesar Chavez led a strike of the United Farm Workers union against growers in California. The strike lasted several years and eventually, in combination with a national boycott, resulted in somewhat better pay, working conditions, and housing for farm workers.

In the 1970s and 1980s, the Latino population continued to grow, and to grow rapidly. The 20 million Latinos living in the United States in the 1970s were still mainly Puerto Rican and Mexican American, but they were joined by immigrants from the Dominican Republic, Colombia, Cuba, and Ecuador. Although civil rights legislation helped them to an extent, they were among the poorest and least educated groups in the United States. Their problems were similar to those faced by other nonwhites, but most also had to overcome the further difficulty of learning and using a new language.

One effect of the language barrier is that voter registration and voter turnout among Hispanics are lower than among other groups. The creation of nine Hispanic-majority congressional districts ensured a measure of representation. These majority minority districts remain under scrutiny as a result of Supreme Court decisions prohibiting race-based districting. Also, voter turnout depends on effective political advertising, and Hispanics have not been targeted as often as other groups with political messages in Spanish. But despite these stumbling blocks, Hispanics have started to exercise a measure of political power.

Hispanics occupy positions of power in national and local arenas. Hispanics or Latinos constitute nearly 13 percent of the population and 4 percent of Congress. The 109th Congress (2005–2007) convened with a diverse group of twenty-six members of Hispanic descent: twenty-four in the House and two in the Senate. The National Hispanic Caucus of State Legislators, which has over three hundred members, is an informal bipartisan group dedicated to voicing and advancing issues affecting Hispanic Americans. The appointment of Sonia Sotomayor to the U.S. Supreme Court in 2009, and the growing number of Hispanics appointed to the lower federal courts,

signaled yet another milestone in the quest for equality for America's largest minority group.

Americans with Disabilities

Minority status is not confined to racial and ethnic groups. After more than two decades of struggle, 43 million Americans with disabilities gained recognition in 1990 as a protected minority with the enactment of the Americans with Disabilities Act (ADA). The law extends the protections embodied in the Civil Rights Act of 1964 to people with physical or mental disabilities, including people with AIDS, alcoholism, and drug addiction. It guarantees them access to employment, transportation, public accommodations, and communication services.

The roots of the disabled rights movement stem from the period after World War II. Thousands of disabled veterans returned to a country and a society that were insensitive to their needs. Institutionalization seemed the best way to care for people with disabilities, but this approach came under increasing fire as people with disabilities and their families sought care at home.

Advocates for persons with disabilities found a ready model in the existing civil rights laws. Opponents argued that the changes mandated by the 1990 law (such as access for those confined to wheelchairs) could cost billions of dollars, but supporters replied that the costs would be offset by an equal or greater reduction in federal aid to people with disabilities, who would rather be working.

The law's enactment set off an avalanche of job discrimination complaints filed with the national government's discrimination watchdog agency, the EEOC. By 2005, the EEOC had received almost 220,000 ADA-related complaints. Curiously, most complaints came from already employed people, both previously and recently disabled. They charged that their employers failed to provide reasonable accommodations as required by the law. The disabilities cited most frequently were back problems, mental illness, heart trouble, neurological disorders, and substance abuse.[40]

A deceptively simple question lies at the heart of many ADA suits: What is the meaning of *disability?* According to the EEOC, a disability is "a physical or mental impairment that substantially limits one or more major life activities." This deliberately vague language has thrust the courts into the role of providing needed specificity, a path that politicians have feared to tread.[41]

Congress moved a step closer in 2008 to passing a revision to the ADA. The legislation would increase protections for people with disabilities by making it easier for workers to prove discrimination. The legislation would give protection to people with epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, and other ailments. Federal court decisions had denied protection under the ADA because the disabling conditions were controlled by medication or were in remission. The House passed the bill by a wide margin, but the legislation remained stalled in the Senate.

A change in the nation's laws, no matter how welcome, does not ensure a change in people's attitudes. Laws that end racial discrimination do not

extinguish racism, and laws that ban biased treatment of people with disabilities cannot mandate their acceptance. But civil rights advocates predict that bias against people with disabilities, like similar biases against other minorities, will wither as they become full participants in society.

Homosexual Americans

June 27, 1969, marked the beginning of an often overlooked movement for civil rights in the United States. On that Friday evening, plainclothes officers of the New York City police force raided a gay bar in Greenwich Village known as the Stonewall Inn. The police justified the raid because of their suspicions that Stonewall had been operating without a proper liquor license. In response, hundreds of citizens took to the streets in protest. Violent clashes and a backlash against the police involving hundreds of people ensued for several nights, during which cries of "Gay power!" and "We want freedom!" could be heard. The event became known as the Stonewall Riots and served as the touchstone for the gay liberation movement in the United States.[42]

Stonewall led to the creation of several political interest groups that have fought for the civil liberties and civil rights of members of the gay and lesbian communities. One in particular, the National Gay and Lesbian Task Force (NGLTF), successfully lobbied the U.S. Civil Service Commission in 1973 to allow gay people to serve in public employment. More recently, in 1999, the NGLTF founded the Legislative Lawyering Program, designed to work for progressive legislation at both the federal and state levels. Another organization, the Human Rights Campaign, founded in 1980, today boasts a membership of over 700,000. One of its current priorities is to seek passage of an employment nondiscrimination act to prevent U.S. citizens from being fired from their jobs for being gay.

Although once viewed as being on the fringe of American society, the gay community today maintains a visible presence in national politics. Two openly gay members serve in the U.S. House of Representatives (110th Congress): Barney Frank (D-Mass.) and Tammy Baldwin (D-Wisc.). But gay and lesbian issues seem less paramount than other issues to the American public. In the 2004 election, the economy and the Iraq war were more important to voters than same-sex marriage.[43] Financial support for candidates and groups favoring gay and lesbian rights has declined since 2000.[44]

Gays and lesbians have made significant progress since the early 1970s, but they still have a long way to go to enjoy the complete menu of civil rights now written into laws that protect other minority groups. In addition to some of the civil liberties concerns noted in Chapter 15, gays and lesbians are still unable to serve openly in the U.S. military, despite attempts by the Clinton administration, and later the Bush administration, to improve conditions through its "don't ask, don't tell" policy, which some observers maintain has actually made things worse for homosexuals in uniform. In 2010, President Obama indicated his plan to repeal the policy within a year through a coordinated effort with Congress and the military.[45] Also, because domestic partner benefits are not recognized uniformly across the United States, same-sex

partners are unable to take full advantage of laws that allow citizens to leave their personal estates to family members. And finally, they often cannot sign onto their partner's health-care plans (except when company policies allow it); heterosexual couples enjoy this employment benefit almost without exception.

The demand for equality found a new voice in 2003 when the highest court in Massachusetts held, in a 4–3 ruling, that same-sex couples have a state constitutional right to the "protections, benefits, and obligations of civil marriage." The majority rested its holding on the Massachusetts Constitution, which affirms the dignity and equality of all individuals. The justices acknowledged that the Massachusetts Constitution is more protective of equality and liberty than the federal Constitution, enabling actions that the U.S. Supreme Court might be unwilling or unable to take.[46]

The decision challenged the state legislature, which sought a compromise to avoid an affirmation of same-sex marriage. The High Court rejected this maneuver, setting the stage for a state constitutional amendment limiting marriages to unions between a man and a woman. At least thirty-seven states prohibit recognition of marriages between same-sex couples. Only residents of states that recognize the validity of same-sex marriage may legally marry today in Massachusetts. But it will be years before the lengthy amendment process runs its course.

In 2008, the California Supreme Court ruled 4–3 that same-sex couples have a state constitutional right to marry. State law and a statewide initiative approved in 2000 defined marriage as a union between a man and a woman. The question before the court was whether those laws violated provisions of the state constitution protecting equality and the right to marry. "In view of the substance and significance of the fundamental constitutional right to form a family relationship," wrote Chief Justice Ronald

Going to the Chapel

Julie and Hillary Goodridge, along with their daughter, Annie, were the first gay couple to obtain a marriage license from Boston registrar Judith A. McCarthy in May 2004. After affirming the truth of the information they provided and paying the requisite fee, they headed to the altar. Armed with their license, a minister pronounced the couple "fully and legally married." Marital bliss ran out for the Goodridges two years later. They filed for divorce in 2006.

(DAVID L. RYAN/Boston Globe/Landov)

M. George, "the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples."[47]

The ruling was celebrated in San Francisco's large gay community and denounced by religious and conservative groups throughout the state who supported a ballot initiative that would amend the state constitution to ban same-sex marriages and overturn the decision. The initiative passed in 2008, overturning the ruling by defining marriage in the state constitution as a union between one man and one woman. The initiative is now under constitutional challenge in the federal courts, and it is likely that the U.S. Supreme Court will finally decide the matter. While conceding that Californians could define their own rules, attorney Theodore Olson argued that those rules could not take away a fundamental right. The case boils down to marriage and equality. Is marriage a fundamental constitutional right? If so, then everyone is entitled to exercise that right unless the government has compelling reasons to curtail it.[48]

A 2000 Supreme Court decision, *Boy Scouts of America* v. *Dale*, illustrates both the continuing legal struggles of gays and lesbians for civil rights and the modern conflict between freedom and equality. James Dale began his involvement in scouting in 1978 and ten years later achieved the esteemed rank of Eagle Scout. In 1989, he applied to and was accepted for the position of assistant scoutmaster of Troop 73 in New Jersey. Shortly after, in 1990, the Boy Scouts revoked Dale's membership in the organization when it learned that he had become a campus activist with the Rutgers University Lesbian/Gay Alliance. The Boy Scouts argued that because homosexual conduct was inconsistent with its mission, the organization enjoyed the right to revoke his membership. Dale argued that the Scouts' actions violated a New Jersey law that prohibited discrimination on the basis of sexual orientation in places of public accommodation. The U.S. Supreme Court resolved this conflict in a narrow 5–4 decision and sided with the Scouts. The majority opinion, authored by Chief Justice William H. Rehnquist, maintained that New Jersey's public accommodations law violated the Boy Scouts' freedom of association, outweighing Dale's claim for equal treatment. The dissenters, led by Justice John Paul Stevens, maintained that equal treatment outweighed free association. They reasoned that allowing Dale to serve as an assistant scoutmaster did not impose serious burdens on the Scouts or force the organization "to communicate any message that it does not wish to endorse."[49]

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Do you support a constitutional amendment that would bar marriages between gay and lesbian couples? Take IDEAlog's self-test.

Gender and Equal Rights: The Women's Movement

Together with unconventional political activities such as protests and sit-ins, conventional political tools such as the ballot box and the lawsuit have brought minorities in America a measure of equality. The Supreme Court, once responsible for perpetuating inequality for blacks, has expanded the array of legal tools available to all minorities to help them achieve social equality. Women, too, have benefited from this change.

Protectionism

Until the early 1970s, laws that affected the civil rights of women were based on traditional views of the relationship between men and women. At the heart of these laws was **protectionism**—the notion that women must be sheltered from life's harsh realities. Thomas Jefferson, author of the Declaration of Independence, believed that "were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."[50] And "protected" they were, through laws that discriminated against them in employment and other areas. With few exceptions, women were also "protected" from voting until early in the twentieth century.

The demand for women's rights arose from the abolition movement and later was based primarily on the Fourteenth Amendment's prohibition of laws that "abridge the privileges or immunities of citizens of the United States." However, the courts consistently rebuffed challenges to protectionist state laws. In 1873, the Supreme Court upheld an Illinois statute that prohibited women from practicing law. The justices maintained that the Fourteenth Amendment had no bearing on a state's authority to regulate admission of members to the bar.[51]

Protectionism reached a peak in 1908, when the Court upheld an Oregon law limiting the number of hours women could work.[52] The decision was rife with assumptions about the nature and role of women, and it gave wide latitude to laws that "protected" the "weaker sex." It also led to protectionist legislation that barred women from working more than forty-eight hours a week and from working at jobs that required them to lift more than thirty-five pounds. (The average work week for men was sixty hours or longer.) In effect, women were locked out of jobs that called for substantial overtime (and overtime pay) and were shunted to jobs that men believed suited their abilities.

Protectionism can take many forms. Some employers hesitate to place women at risk in the workplace. Some have excluded women of childbearing age from jobs that involve exposure to toxic substances that could harm a developing fetus. Usually such jobs offer more pay to compensate for their higher risk. Although they too face reproductive risks from toxic substances, men have experienced no such exclusions.

In 1991, the Supreme Court struck down a company's fetal protection policy in strong terms. The Court relied on amendments to the 1964 Civil Rights Act providing for only a very few narrow exceptions to the principle that unless some workers differ from others in their ability to work, they must be treated the same as other employees. "In other words," declared the majority, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[53]

protectionism
The notion that women must be protected from life's cruelties; until the 1970s, the basis for laws affecting women's civil rights.

Political Equality for Women

With a few exceptions, women were not allowed to vote in this country until 1920. In 1869, Francis and Virginia Minor sued a St. Louis, Missouri, registrar for not allowing Virginia Minor to vote. In 1875, the Supreme Court

held that the Fourteenth Amendment's privileges and immunities clause did not confer the right to vote on all citizens or require that the states allow women to vote.[54]

The decision clearly slowed the movement toward women's suffrage, but it did not stop it. In 1878, Susan B. Anthony, a women's rights activist, convinced a U.S. senator from California to introduce a constitutional amendment requiring that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The amendment was introduced and voted down several times over the next twenty years. Meanwhile, as noted in Chapter 7, a number of states, primarily in the Midwest and West, did grant limited suffrage to women.

The movement for women's suffrage became a political battle to amend the Constitution. In 1917, police arrested 218 women from twenty-six states when they picketed the White House, demanding the right to vote. Nearly one hundred went to jail, some for days and others for months. The movement culminated in the adoption in 1920 of the **Nineteenth Amendment**, which gave women the right to vote. Its wording was that first suggested by Anthony.

The right of women to vote does not ensure that women representatives will be elected to public office. Beginning in the 1990s, several countries sought to ensure elected representation of women by the use of gender quotas. The results have been mixed. (See "Politics of Global Change: Gender Quotas for Representatives in Lower Legislative Houses.")

Meanwhile, the Supreme Court continued to act as the benevolent protector of women. Women entered the work force in significant numbers during World War I and did so again during World War II, but they received lower wages than the men they replaced. Again, the justification was the "proper" role of women as mothers and homemakers. Because society expected men to be the principal providers, it followed that women's earnings were less important to the family's support. This thinking perpetuated inequalities in the workplace. Economic equality was closely tied to social attitudes. Because society expected women to stay at home, the assumption was that they needed less education than men did. Therefore, they tended to qualify only for low-paying, low-skilled jobs with little chance for advancement.

Prohibiting Sex-Based Discrimination

The movement to provide equal rights to women advanced a step with the passage of the Equal Pay Act of 1963, which required equal pay for men and women doing similar work. However, state protectionist laws still had the effect of restricting women to jobs that men usually did not want. Where employment was stratified by sex, equal pay was an empty promise. To remove the restrictions of protectionism, women needed equal opportunity for employment. They got it in the Civil Rights Act of 1964 and later legislation.

The objective of the Civil Rights Act of 1964 was to eliminate racial discrimination in America. The original wording of Title VII of the act prohibited employment discrimination based on race, color, religion, and national

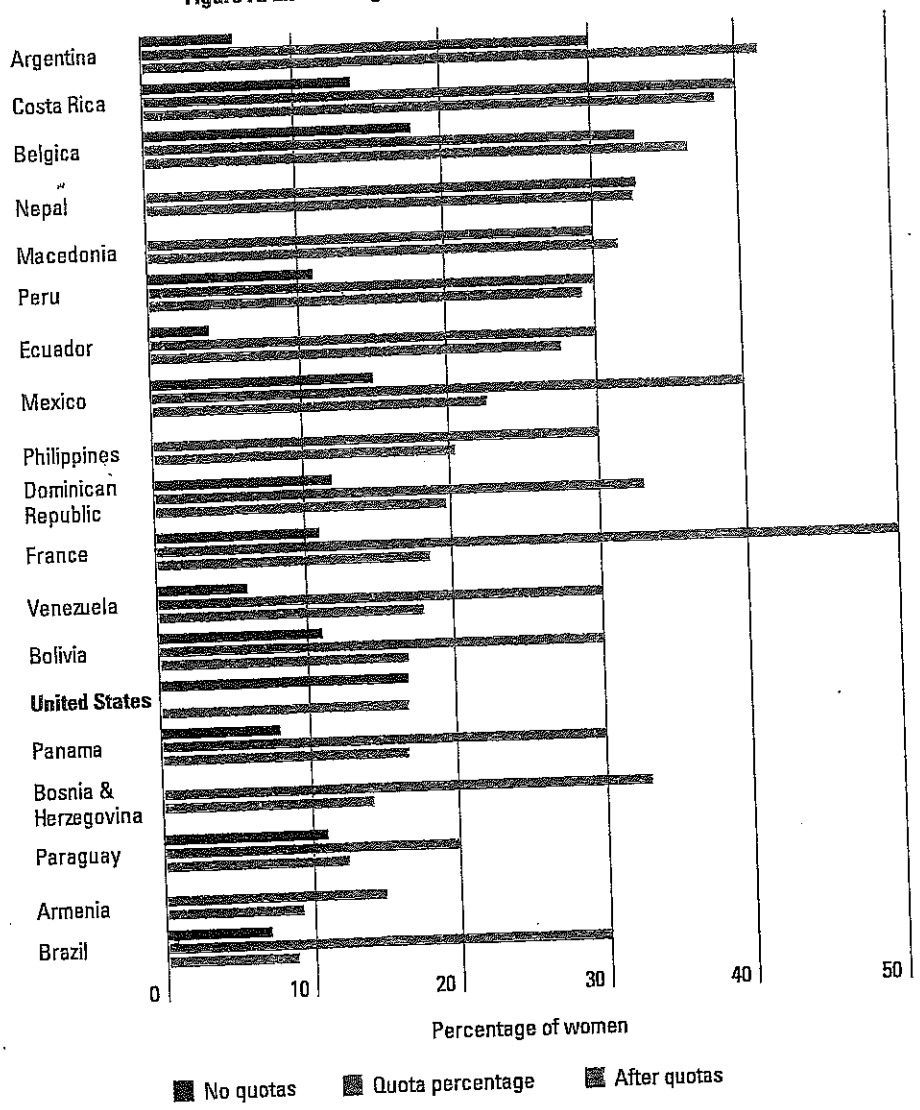
Nineteenth Amendment The amendment to the Constitution, adopted in 1920, that ensures women of the right to vote.

Politics of Global Change

Gender Quotas for Representatives in Lower Legislative Houses

One way to assure the election of women to public office is to mandate it. Several countries have taken this step, with mixed results. One approach is to establish a quota system that women must constitute a certain percentage or number of elective positions. The philosophical justification behind this idea is tied to the

Figure A: Effect of Legal Gender Quotas in Lower Chambers, by Country

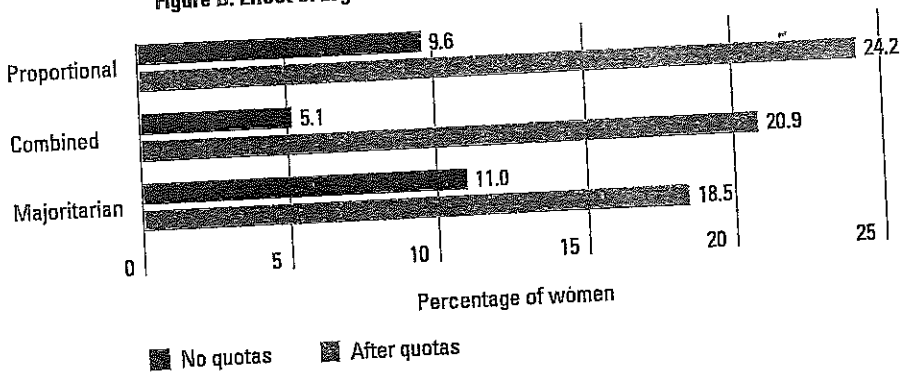


notion of equality of outcome. While women constitute 50 percent of the population, they tend to be under represented in political offices. The establishment of legal quotas aims at solving this disparity.

But not all gender quota systems are created equal. Some nations, such as Nepal and the Philippines, include quotas in their constitutions. Other nations, such as most of Latin America, include quotas in their electoral laws. And in some cases—Germany, Italy, Norway, and Sweden, for example—several political parties advance a voluntary quota system regardless of their country's legislation. Gender quota systems vary also according to the level at which they are applied. In some cases they regulate the number of candidacies that must be held by women, whereas in others they mandate the number or percentage of elected positions held by women.

Have these quota systems achieved their desired level of gender equality? Figure A identifies eighteen countries with gender quota systems (and the United States, which lacks such a system), their gender goals, and in thirteen cases the pre- and post-quota results. First, only in two cases (Argentina and Nepal) did actual electoral results match the established quota. Second, note the wide variance regarding the ultimate effectiveness of gender quotas. Women's representation increased significantly in some countries such as Argentina, Costa Rica, and Ecuador, but in most countries, the result is not as spectacular (an increase of less than 10 percent). What explains this disparity among cases? Figure B offers a hint. The main reason is the electoral system itself. Quotas are most effective in proportional representation systems with closed lists of candidates, provided women are positioned in competitive places. Quotas are least effective in majoritarian electoral systems. Electoral systems combining features of majoritarian and proportional representation schemes fit in the middle. However, women's representation has steadily increased in the past decade. Whether this trend is explained by means of institutional engineering or by societal transformations remains a matter of continuing research.

Figure B: Effect of Legal Gender Quotas in Lower Chambers, by Electoral System



origin—but not gender. In an effort to scuttle the provision during House debate, Democrat Howard W. Smith of Virginia proposed an amendment barring job discrimination based on sex. Smith's intention was to make the law unacceptable; his effort to ridicule the law brought gales of laughter to the debate. But Democrat Martha W. Griffiths of Michigan used Smith's strategy against him. With her support, Smith's amendment carried, as did the act.[55] Congress extended the jurisdiction of the EEOC to cover cases of invidious sex discrimination, or sexism.

sexism
invidious sex discrimination.

Subsequent women's rights legislation was motivated by the pressure for civil rights, as well as by a resurgence of the women's movement, which

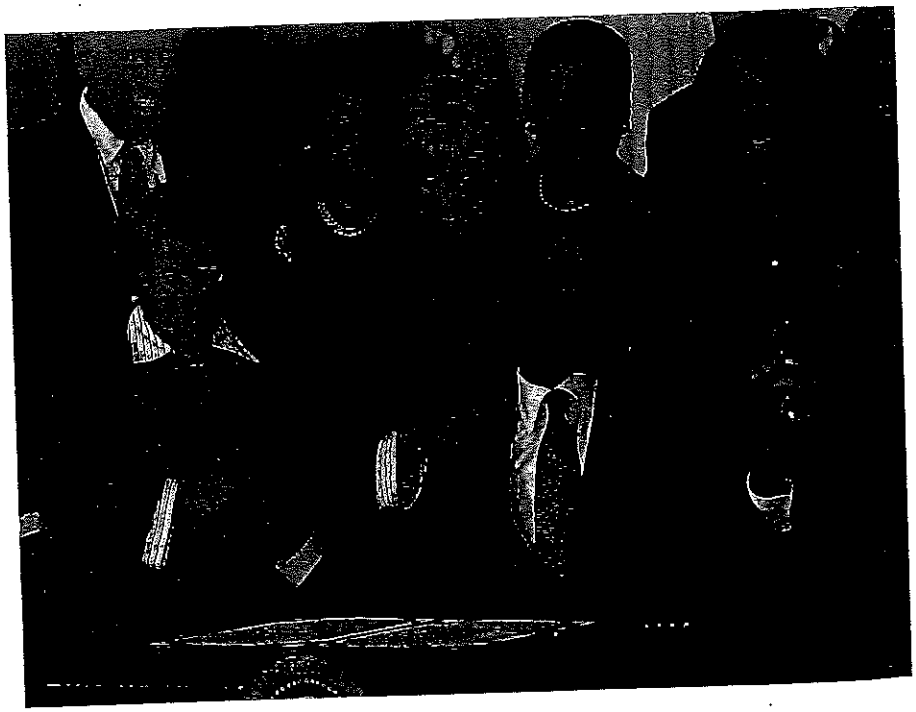
had subsided in 1920 after the adoption of the Nineteenth Amendment. Or particularly important law was Title IX of the Education Amendments 1972, which prohibited sex discrimination in federally aided education pr grams. Another boost to women came from the Revenue Act of 1972, whic provided tax credits for child-care expenses. In effect, the act subsidize parents with young children so that women could enter or remain in th work force. However, the high-water mark in the effort to secure women rights was the equal rights amendment, as we shall explain shortly.

In 2007, a conservative Supreme Court tightened the rules over pay di crimination lawsuits under Title VII.[56] The case involved a woman who d not learn of the pay disparity with sixteen men in her office until years lat because salary information is secret. But the law required her to file a com plaint within 180 days of pay setting. The 5–4 decision prompted a bitt oral dissent by Justice Ruth Bader Ginsburg.

True to the pluralist character of American democracy, the Obam administration and a Democratic Congress reversed the 2007 decision b passing the Lilly Ledbetter Fair Pay Act. The act allows the filing of com plaints beyond the 180-day period.[57] Pay equity for women still remains hope, not a reality.

Stereotypes Under Scrutiny

After nearly a century of protectionism, the Supreme Court began to take closer look at gender-based distinctions. In 1971, it struck down a state la that gave men preference over women in administering the estate of a pe son who died without naming an administrator.[58] The state maintained th the law reduced court workloads and avoided family battles; however, th



A Journey of a Thousand Miles Begins with the First Step

With his final pen stroke on the very first piece of legislation of his administration, the president handed the pen to one of its proponents. Standing fourth from the left is Lilly Ledbetter. The law extends the period for filing equal-pay complaints; it does not mandate equal pay for equal work.

(Stephen Crowley/The New York Times/Redux)

traditional role, state legislators began to realize that supporting the amendment involved risk. Given the exaggerations and counter-exaggerations, lawmakers ducked. Because it takes an extraordinary majority to amend the Constitution, it takes only a committed minority to thwart the majority's will.

Despite its failure, the movement to ratify the ERA produced real benefits. It raised the consciousness of women about their social position, spurred the formation of the National Organization for Women (NOW) and other large organizations, contributed to women's participation in politics, and generated important legislation affecting women.[65]

The failure to ratify the ERA stands in stark contrast to the quick enactment of many laws that now protect women's rights. Such legislation had little audible opposition. If years of racial discrimination called for government redress, then so did years of gender-based discrimination. Furthermore, laws protecting women's rights required only the amending of civil rights bills or the enactment of similar bills.

Some scholars argue that for practical purposes, the Supreme Court has implemented the equivalent of the ERA through its decisions. It has struck down distinctions based on sex and held that stereotyped generalizations about sexual differences must fall.[66] In recent rulings, the Court has held that states may require employers to guarantee job reinstatement to women who take maternity leave, that sexual harassment in the workplace is illegal, and that the existence of a hostile work environment may be demonstrated by a reasonable perception of abuse rather than by proven psychological injury.[67]

But the Supreme Court can reverse its decisions, and legislators can repeal statutes. Without an equal rights amendment, argue some feminists, the Constitution will continue to bear the sexist imprint of a document written by men for men. Until the ERA becomes part of the Constitution, said the late feminist Betty Friedan, "We are at the mercy of a Supreme Court that will interpret equality as it sees fit."[68]

Affirmative Action: Equal Opportunity or Equal Outcome?

In his vision of a Great Society, President Johnson linked economic rights with civil rights and equality of outcome with equality of opportunity. "Equal opportunity is essential, but not enough," he declared. "We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result."[69] This commitment led to affirmative action programs to expand opportunities for women, minorities, and people with disabilities.

Affirmative action is a commitment by a business, employer, school, or other public or private institution to expand opportunities for women, blacks, Hispanic Americans, and members of other minority groups. Affirmative action aims to overcome the effects of present and past discrimination. It embraces a range of public and private programs, policies, and procedures, including special recruitment, preferential treatment, and quotas in job

affirmative action
Any of a wide range of programs, from special recruitment efforts to numerical quotas, aimed at expanding opportunities for women and minority groups.

training and professional education, employment, and the awarding of government contracts. The point of these programs is to move beyond equality of opportunity to equality of outcome.

Establishing numerical goals (such as designating a specific number of places in a law school for minority candidates or specifying that 10 percent of the work on a government contract must be subcontracted to minority-owned companies) is the most aggressive form of affirmative action, and it generates more debate and opposition than any other aspect of the civil rights movement. Advocates claim that such goal setting for college admissions, training programs, employment, and contracts will move minorities, women, and people with disabilities out of their second-class status. President Johnson explained why aggressive affirmative action was necessary:

> You do not take a person who for years has been hobbled by chains, liberate him, bring him up to the starting line of a race, and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity; all our citizens must have the ability to walk through those gates.[70]

Arguments for affirmative action programs (from increased recruitment efforts to quotas) tend to use the following reasoning: certain groups have historically suffered invidious discrimination, denying them educational and economic opportunities. To eliminate the lasting effects of such discrimination, the public and private sectors must take steps to provide access to good education and jobs. If the majority once discriminated to hold groups back, discriminating to benefit those groups is fair. Therefore, quotas are a legitimate means to provide a place on the ladder to success.[71]

Affirmative action opponents maintain that quotas for designated groups necessarily create invidious discrimination (in the form of reverse discrimination) against individuals who are themselves blameless. Moreover, they say, quotas lead to the admission, hiring, or promotion of the less qualified at the expense of the well qualified. In the name of equality, such policies thwart individuals' freedom to succeed.

Government-mandated preferential policies probably began in 1965 with the creation of the Office of Federal Contract Compliance. Its purpose was to ensure that all private enterprises doing business with the federal government complied with nondiscrimination guidelines. Because so many companies do business with the federal government, a large portion of the American economy became subject to these guidelines. In 1968, the guidelines required "goals and timetables for the prompt achievement of full and equal employment opportunity." By 1971, they called for employers to eliminate "underutilization" of minorities and women, which meant that employers had to hire minorities and women in proportion to the government's assessment of their availability.[72]

Preferential policies are seldom explicitly legislated. More often, such policies are the result of administrative regulations, judicial rulings, and

initiatives in the private sector to provide a remedial response to specific discrimination or to satisfy new legal standards for proving nondiscrimination. Quotas or goals enable administrators to assess changes in hiring, promotion, and admissions policies. Racial quotas are an economic fact of life today. Employers engage in race-conscious preferential treatment to avoid litigation. Cast in value terms, equality trumps freedom. Do preferential policies in other nations offer lessons for us? (See "Compared with What? How Others Struggle with Affirmative Action" to learn the answer.)

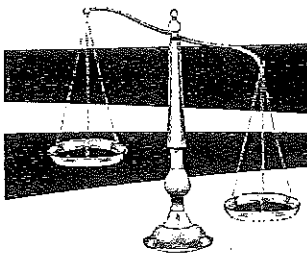
Reverse Discrimination

The Supreme Court confronted an affirmative action quota program for the first time in *Regents of the University of California* v. *Bakke*.[73] Allan Bakke, a thirty-five-year-old white man, had twice applied for admission to the University of California Medical School at Davis and was rejected both times. As part of the university's affirmative action program, the school had reserved sixteen places in each entering class of one hundred for qualified minority applicants in an effort to redress long-standing and unfair exclusion of minorities from the medical profession. Bakke's academic qualifications exceeded those of all the minority students admitted in the two years his applications were rejected. Bakke contended, first in the California courts and then in the Supreme Court, that he was excluded from admission solely on the basis of his race. He argued that the equal protection clause of the Fourteenth Amendment and the Civil Rights Act of 1964 prohibited this reverse discrimination.

The Court's decision in *Bakke* contained six opinions and spanned 154 pages, but no opinion commanded a majority. Despite the confusing multiple opinions, the Court struck down the school's rigid use of race, thus admitting Bakke, and it approved of affirmative action programs in education that use race as a *plus* factor (one of many such factors) but not as the *sole* factor. Thus, the Court managed to minimize white opposition to the goal of equality (by finding for Bakke) while extending gains for racial minorities through affirmative action.

True to the pluralist model, groups opposed to affirmative action continued their opposition in federal courts and state legislatures. They met with some success. The Supreme Court struck down government-mandated set-aside programs in the U.S. Department of Transportation.[74] Lower federal courts took this as a signal that other forms of affirmative action were ripe for reversal.

By 2003—twenty-five years after *Bakke*—the Supreme Court reexamined affirmative action in two cases, both challenging aspects of the University of Michigan's racial preferences policies. In *Gratz* v. *Bollinger*, the Court considered the university's undergraduate admissions policy, which conferred 20 points automatically to members of favored groups (100 points guaranteed admission). In a 6–3 opinion, Chief Justice William H. Rehnquist argued that such a policy violated the equal protection clause because it lacked the narrow tailoring required for permissible racial preferences and it



Compared with What?

How Others Struggle with Affirmative Action

Compared with other countries around the world, Americans are not alone in their disagreements over affirmative action. Controversies, even bloodshed, have arisen where the government treats certain groups of citizens preferentially. One study found several common patterns among countries that had enacted preferential policies. Although begun as temporary measures, preferential policies tended to persist and even to expand to include more groups. The policies usually sought to improve the situation of disadvantaged groups as a whole, but they often benefited the better-off members of such groups more so than the worse-off members. Finally, preferential policies tended to increase antagonisms among different groups within a country.

Of course, there were variations across countries in terms of who benefited from such policies, what types of benefits were bestowed, and even the names the policies were given. In India, such policies carry the label "positive discrimination." But that isn't the only way India differs from the United States when it comes to preferential policies.

Although India is the world's largest democracy, its society is rigidly stratified into groups called castes. The government forbids caste-based discrimination, but members of the lower castes (the lowest being the Dalits, or "untouchables") were historically restricted to the least prestigious and lowest-paying jobs. To improve their status, India has set aside government jobs for the lower castes, who make up half of India's population of 1 billion. India now reserves 27 percent of government jobs for the lower castes and an additional 23 percent for untouchables and remote tribe members. Gender equality has also improved since a 1993 constitutional amendment that set aside one-third of all seats in local government councils for women. By 2004, 900,000 women had been elected to public office, and 80,000 of them now lead local governing bodies. Positive discrimination in India has intensified tensions between the lower and upper castes. In 1990, soon after the new quotas were established, scores of young upper-caste men and women set themselves ablaze in protest. And when Indian courts issued a temporary injunction against the positive-discrimination policies, lower-caste terrorists bombed a train and killed dozens of people. Adding further strain, a 2010 proposal to create a one-third set-aside for women in the parliament and state legislatures has met stiff resistance from the political parties representing the lower castes. The Dalits view the proposal as a threat to their monopoly quota. Lower-caste women oppose the idea while feminists from higher-caste parties support it. The issue is not the use of quotas but which group should benefit from quotas. No longer considered temporary, quotas have become a fact of life in the world's largest democracy.

In Brazil, the state of Rio de Janeiro set aside racial quotas for black and native Brazilians applying to the state university system in 2000. However, the initiative backfired when many white students claimed African heritage to benefit from the quota

in a very competitive setting. Brazil is a mixed-race society: 42 percent of its population is racially mixed. Critics of affirmative action argue that it is difficult to determine with precision "to which race each Brazilian belongs." A former minister of education, Paulo Renato Souza, claims that the real task is to improve access to public education for poor Brazilians and therefore racial quotas are misleading. Other critics argue that with 42 percent of the population identifying as mixed race, a quota would turn Brazil into a two-color nation. Supporters of the affirmative action program oddly include a private college in São Paulo that sets aside 50 percent of its places for black students. The president of the university says that a "large part of the public, if they didn't have this opportunity, would find it difficult to study elsewhere." The legitimacy of racial quotas at the University of Brasília is now under review by the federal Supreme Court.

In South Africa, the gradual development of policies of affirmative action for blacks ended with the establishment of the Broad-Based Black Economic Empowerment Act, which aims at promoting equality in the workplace. Government employment legislation sets aside 80 percent of new jobs for black people and favors black-owned companies as subcontractors. Supporters of these policies argue that opponents still share the mind-set prevailing during the apartheid regime and that "many of these people cannot accept the fact that now we are all equal." Critics underline that the blacks that have been empowered by these policies "have largely been senior members of the ruling African National Congress. The bulk of the 'empowerment' seems to involve just four very rich men, three of them contenders for the presidency in 2009."

All governments broker conflict to varying degrees. Under a majoritarian model, group demands could lead quickly to conflict and instability because majority rule leaves little room for compromise. A pluralist model allows different groups to get a piece of the pie. By parceling out benefits, pluralism mitigates disorder in the short term. But in the long term, repeated demands for increased benefits can spark instability. A vigorous pluralist system should provide acceptable mechanisms (legislative, executive, bureaucratic, judicial) to vent such frustrations and yield new allocations of benefits.

Sources: Trudy Rubin, "Will Democracy Survive in India?" *Record* (Bergen County, N.J.), 19 January 1998, p. A12; Alex Spillius, "India's Old Warriors to Launch Rights Fight," *Daily Telegraph*, 20 October 1997, p. 12; Robin Wright, "World's Leaders: Men, 187, Women, 4," *Los Angeles Times*, 30 September 1997, p. A1; "Indian Eunuchs Demand Government Job Quotas," *Agence France Presse*, 22 October 1997; Juergen Hein and M. V. Balaji, "India's First Census of New Millennium Begins on February 9," *Deutsche Presse-Agentur*, 7 February 2001; Gillian Bowditch, "You Can Have Meritocracy or Equality, but Not Both," *Sunday Times*, Features Section: Scotland News, 19 January 2003, p. 21; Press Trust of India, "About a Million Women Elected to Local Bodies in India," 10 February 2004; Somini Sengupta, "Quotas to Aid India's Poor vs. Push for Meritocracy," *New York Times*, 23 May 2006, p. A3; "Caste in Doubt," *The Economist*, 12 June 2010, p. 46; Robert Plummer, "Black Brazil Seeks a Better Future," *BBC News*, 25 September 2006, http://news.bbc.co.uk/2/hi/americas/5357842.stm; Pueng Vongs, "Around the World, Countries Grapple with Affirmative Action," *New America Media*, 10 July 2003, http://news.newamericamedia.org/news/view_article.html?article_id=3e26118fcdf4f0a57da467de3eeb43d0; Robert Guest, "The World's Most Extreme Affirmative Action Program: Aiming for Prosperity Would Be Better," *Wall Street Journal*, 26 December 2004, http://www.opinionjournal.com/extra/?id=110006066; Simon Woods, "Race against Time," *Observer Magazine*, 22 January 2006, http://observer.guardian.co.uk/magazine/story/0,,1691343,00.html; Rafael Ribeiro, "Cotas estão paradas no Congresso: Projeto propõe critérios raciais e sociais para ingresso na universidade," *Diário de São Paulo*, 10 April 2010, http://www.diariosp.com.br/Noticias/Dia-a-dia/3379/Cotas+estao+paradas+no+Congresso; Shikha Dalmia, "India's Government by Quota," *Wall Street Journal*, 1–2 May 2010, p. A13.

failed to provide for individualized consideration of each candidate.[75] In th second case, *Grutter* v. *Bollinger*, the Court considered the University o Michigan's law school admissions policy, which gave preference to minorit applicants with lower GPAs and standardized test scores over white appl cants. This time, the Court, in a 5–4 decision authored by Justice Sandr Day O'Connor, held that the equal protection clause did not bar the school narrowly tailored use of racial preferences to further a compelling intere that flowed from a racially diverse student body.[76] Since each applicant judged individually on his or her merits, race remains only one among mar factors that enter into the admissions decision.

The issue of race-based classifications in education arose again in 200 when parents challenged voluntary school integration plans based on race : *Parents Involved in Community Schools* v. *Seattle School District No. 1*. Chief Justice John G. Roberts, Jr., writing for the 5–4 majority on a bitter divided bench, invalidated the plans, declaring that the programs we "directed only to racial balance, pure and simple," which the equal protectio clause of the Fourteenth Amendment forbids. "The way to stop discriminatio on the basis of race is to stop discriminating on the basis of race," he said.

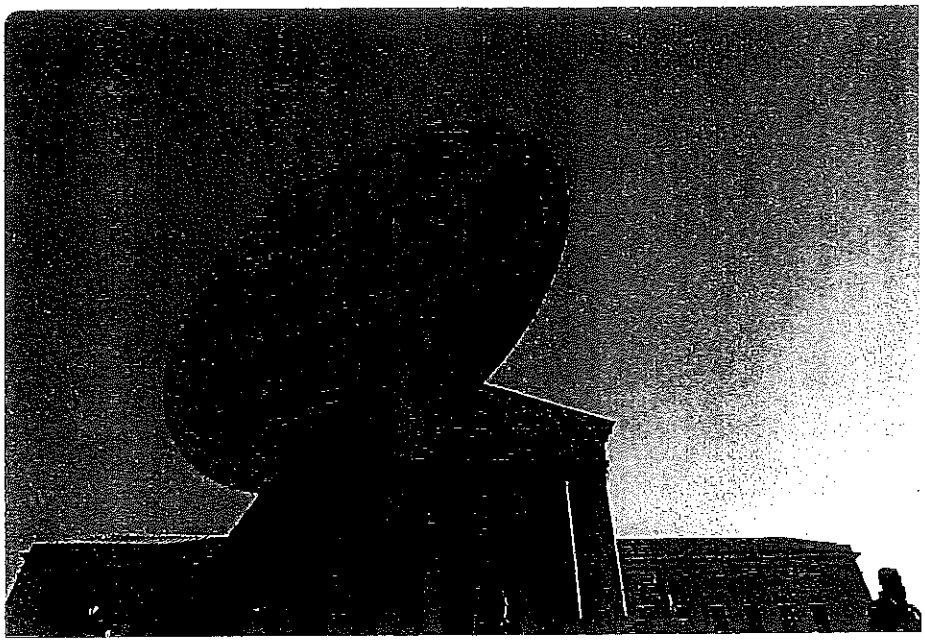
Justice Anthony Kennedy, who cast the fifth and deciding vote, wro separately to say that achieving racial diversity and avoiding racial isolatio were "compelling interests" that schools could constitutionally pursue long as they "narrowly tailored" their programs to avoid racial labeling an sorting of individual children. Kennedy's opinion, and his key role as th "swing" vote, will likely determine the design of such programs to pass leg muster. In a broader sense, Kennedy's vote may prove to be the most impo tant vote in a growing number of 5–4 decisions.

Justice Stephen G. Breyer, writing for the minority and speaking from th bench, used pointed language, declaring: "This is a decision that the Court an the nation will come to regret." A sign of growing frustration among the jus ces is the increased frequency with which they have read their dissents aloud, tactic used to express great distress with the majority opinion.

The Politics of Affirmative Action

A comprehensive review of nationwide surveys conducted over the pa twenty-five years reveals an unsurprising truth: that blacks favor affirmati action programs and whites do not. The gulf between the races was wider the 1970s than it is today, but the moderation results from shifts amo blacks, not whites. Perhaps the most important finding is that "whites' vie have remained essentially unchanged over twenty-five years."[78]

How do we account for the persistence of equal outcomes policies? A m jority of Americans have consistently rejected explicit race or gender pr ferences for the awarding of contracts, employment decisions, and colle admissions, regardless of the groups such preferences benefit. Neverthele preference policies have survived and thrived under both Democrats a Republicans because they are attractive. They encourage unprotected groups strive for inclusion. The list of protected groups includes African Americ



Affirmative Action Arena

The courts have become the institution of last resort for America's race policy. It is easy to see why. Legislative language may be purposefully ambiguous in order to secure a majority. Executive implementation of the law is sure to encounter objections from legislative losers, casting the conflict in the courts. This is a core feature of pluralism. Now a decidedly conservative Supreme Court led by Chief Justice John G. Roberts, Jr., is far less sympathetic to the racial preference policies of a previous generation.

(© AP Photo/Haraz N. Ghanbari)

Hispanic Americans, Native Americans, Asian Pacific Americans, and subcontinent Asian Americans.[79] Politicians have a powerful motive—votes—to expand the number of protected groups and the benefits such policies provide.

Recall that affirmative action programs began as temporary measures, ensuring a jump-start for minorities shackled by decades or centuries of invidious discrimination. For example, fifty years ago, minority racial identity was a fatal flaw on a medical or law school application. Today it is viewed as an advantage, encouraging applicants to think in minority-group terms. Thinking in group terms and conferring benefits on such grounds generates hostility from members of the majority, who see the deck stacked against them for no other reason than their race. It is not surprising that affirmative action has become controversial, since many Americans view it as a violation of their individual freedom.

Recall Lyndon Johnson's justification for equal outcomes policies. Though free to compete, a person once hobbled by chains cannot run a fair race. Americans are willing to do more than remove the chains. They will support special training and financial assistance for those who were previously shackled. The hope is that such efforts will enable once-shackled runners to catch up with those who have forged ahead. But Americans stop short at endorsing equal outcomes policies because they predetermine the results of the race.[80]

IDEALOG.ORG

Do you support or oppose affirmative action programs for racial minorities? Take IDEAlog's self-test.

The conflict between freedom and equality will continue as other individuals and groups continue to press their demands through litigation and legislation. The choice will depend on whether and to what extent Americans still harbor deep-seated racial prejudice.

Summary

Americans want equality, but they disagree on the extent to which government should guarantee it. At the heart of this conflict is the distinction between equal opportunities and equal outcomes. Today, immigrant groups are vocal advocates for a share of the American dream, including tax-paying illegal immigrants and their children who may require health care and public education. Their quest follows the long path toward equality forged by African Americans.

Congress enacted the Civil War amendments—the Thirteenth, Fourteenth, and Fifteenth amendments—to provide full civil rights to black Americans. In the late nineteenth century, however, the Supreme Court interpreted the amendments very narrowly, declaring that they did not restrain individuals from denying civil rights to blacks and did not apply to the states. The Court's rulings had the effect of denying the vote to most blacks and of institutionalizing racism, making racial segregation a fact of daily life.

Through a series of court cases spanning two decades, the Court slowly dismantled segregation in the schools. The battle for desegregation culminated in the *Brown* cases in 1954 and 1955, in which a now-supportive Supreme Court declared segregated schools to be inherently unequal and therefore unconstitutional. The Court also ordered the desegregation of all schools and upheld the use of busing to do so.

Gains in other spheres of civil rights came more slowly. The motivating force was the civil rights movement, led by Martin Luther King, Jr., until his assassination in 1968. King believed strongly in civil disobedience and nonviolence, strategies that helped secure for blacks equality in voting rights, public accommodations, higher education, housing, and employment opportunity.

Civil rights activism and the civil rights movement worked to the benefit of all minority groups—in fact, they benefited all Americans. Native Americans obtained some redress for past injustices. Immigrant groups press government for a stake in the American experience as they work to gain a better life in jobs that few ci will do. Latinos have come to recognize the impor of group action to achieve economic and political e ity. Disabled Americans won civil rights prote enjoyed by African Americans and others. Anc rights legislation removed the protectionism that in effect, legalized discrimination against women ir cation and employment. Homosexuals aim to follc same path, but their quest for equality has been tru by occasional conflicts with freedom.

Despite legislative advances in the area of wc rights, the states did not ratify the equal rights a ment. Still, the struggle for ratification produced s positive results, heightening awareness of women' in society and mobilizing their political power legislation and judicial rulings implemented much amendment's provisions in practice. The Supreme now judges sex-based discrimination with "sk scrutiny," meaning that distinctions based on s almost as suspect as distinctions based on race.

Government and business instituted affi action programs to counteract the results of pa crimination. These provide preferential treatm women, minorities, and people with disabilitie number of areas that affect individuals' econon portunity and well-being. In effect, such progra criminate to remedy earlier discrimination. But in reversal beginning in 2007, government acts c discrimination, however well intentioned, are bounds for all but the most compelling reasons programs make race the determining factor in a contracts, offering employment, or granting ad to educational institutions, the courts will be ingly skeptical of their validity. However, the pc affirmative action suggest that such programs a to remain persistent features on our political lanc

We can guarantee equal outcomes only restrict the free competition that is an integral equal opportunity. Many Americans object to

t restrict individual freedom, such as quotas and set-
ides that arbitrarily change the outcome of the race.
: challenge of pluralist democracy is to balance the
ed for freedom with demands for equality.

:Y CASES

ssy v. *Ferguson* (racial segregation constitutional, 1896)
own v. *Board of Education* (racial segregation unconstitutional, 1954)
own v. *Board of Education II* (racial desegregation implementation, 1955)
gents of the University of California v. *Bakke* (affirmative action, 1978)
United States v. *Virginia* (gender equality, 1996)
Boy Scouts of America v. *Dale* (association rights, Boy Scouts versus gays, 2000)
Gratz v. *Bollinger* (affirmative action, 2003)
Grutter v. *Bollinger* (affirmative action, 2003)
Parents Involved in Community Schools v. *Seattle School District No. 1* (public school racial diversity, 2007)

Stereo types under scrutiny.

Court dismissed those objections, because they were not important enough to justify making gender-based distinctions between individuals. Two years later, the justices declared that paternalism operated to "put women not on a pedestal, but in a cage."[59] They then proceeded to strike down several laws that either prevented or discouraged departures from traditional sex roles. In 1976, the Court finally developed a workable standard for reviewing such laws: gender-based distinctions are justifiable only if they serve some important government purpose.[60]

The objective of the standard is to dismantle laws based on sexual stereotypes while fashioning public policies that acknowledge relevant differences between men and women. Perhaps the most controversial issue is the idea of *comparable worth*, which requires employers to pay comparable wages for different jobs, filled predominantly by one sex or the other, that are of about the same worth to the employer. Absent new legislation, the courts remain reluctant and ineffective vehicles for ending wage discrimination.[61]

The courts have not been reluctant to extend to women the *constitutional* guarantees won by blacks. In 1994, the Supreme Court extended the Constitution's equal protection guarantee by forbidding the exclusion of potential jurors on the basis of their sex. In a 6–3 decision, the justices held that it is unconstitutional to use gender, and likewise race, as a criterion for determining juror competence and impartiality. "Discrimination in jury selection," wrote Justice Harry A. Blackmun for the majority, "whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[62] The 1994 decision completed a constitutional revolution in jury selection that began in 1986 with a bar against juror exclusions based on race.

In 1996, the Court spoke with uncommon clarity when it declared that the men-only admissions policy of the Virginia Military Institute (VMI), a state-supported military college, violated the equal protection clause of the Fourteenth Amendment. Virginia defended the school's policy on the grounds that it was preserving diversity among America's educational institutions.

In an effort to meet women's demands to enter VMI—and stave off continued legal challenges—Virginia established a separate-but-equal institution, the Virginia Women's Institute for Leadership (VWIL). The program was housed at Mary Baldwin College, a private liberal arts college for women, and students enrolled in VWIL received the same financial support as students at VMI.

The presence of women at VMI would require substantial changes in the physical environment and the traditional close scrutiny of the students. Moreover, the presence of women would alter the manner in which cadets interact socially. Was the uniqueness of VMI worth preserving at the expense of women who could otherwise meet the academic, physical, and psychological stress imposed by the VMI approach?

In a 7–1 decision, the High Court voted no. Writing for a six-member majority in *United States* v. *Virginia*, Justice Ruth Bader Ginsburg applied a demanding test she labeled "skeptical scrutiny" to official acts that deny individuals rights or responsibilities based on their sex. "Parties who seek to

defend gender-based government action," she wrote, "must demonstrate an 'exceedingly persuasive justification' for that action." Ginsburg declared that "women seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection." Ginsburg went on to note that the VWIL program offered no cure for the "opportunities and advantages withheld from women who want a VMI education and can make the grade."[63] The upshot is that distinctions based on sex are almost as suspect as distinctions based on race.

Three months after the Court's decision, VMI's board of directors finally voted 9–8 to admit women. This ended VMI's distinction as the last government-supported single-sex school. However, school officials made few allowances for women. Buzz haircuts and fitness requirements remained the standard for all students. "It would be demeaning to women to cut them slack," declared VMI's superintendent.[64]

The Equal Rights Amendment

Policies protecting women, based largely on gender stereotypes, have been woven into the legal fabric of American life. This protectionism has limited the freedom of women to compete with men socially and economically on an equal footing. However, the Supreme Court has been hesitant to extend the principles of the Fourteenth Amendment beyond issues of race. When judicial interpretation of the Constitution imposes a limit, then only a constitutional amendment can overcome it.

The National Women's Party, one of the few women's groups that did not disband after the Nineteenth Amendment was enacted, introduced the proposed **equal rights amendment (ERA)** in 1923. The ERA declared that "equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." It remained bottled up in committee in every Congress until 1970, when Representative Martha Griffiths filed a discharge petition to bring it to the House floor for a vote. The House passed the ERA, but the Senate scuttled it by attaching a section calling for prayer in the public schools.

A national coalition of women's rights advocates generated enough support to get the ERA through Congress in 1972. Its proponents then had seven years to get the amendment ratified by thirty-eight state legislatures, as required by the Constitution. By 1977, they were three states short of that goal, and three states had rescinded their earlier ratification. Then, in an unprecedented action, Congress extended the ratification deadline. It didn't help. The ERA died in 1982, still three states short of adoption.

equal rights amendment (ERA)
A failed constitutional amendment introduced by the National Women's Party in 1923, declaring that "equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex."

Why did the ERA fail? There are several explanations. Its proponents mounted a national campaign to generate approval, while its opponents organized state-based anti-ERA campaigns. ERA proponents hurt their cause by exaggerating the amendment's effects; such claims only gave ammunition to the amendment's opponents. For example, the puffed-up claim that the amendment would make wife and husband equally responsible for their family's financial support caused alarm among the undecided. As the opposition grew stronger, especially from women who wanted to maintain their