CIVIL LIBERTIES AND CIVIL RIGHTS

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Yes, liberties and rights are synonyms in everyday English, which can make the discussion of civil liberties and civil rights in the context of politics very confusing. It is the word civil—having to do with the nonpolitical collective life of citizens—that gives these phrases specific and different meanings. In democracies and other non-authoritarian societies, where citizens hold at least some political power, both civil liberties and civil rights are essential for balancing the power in our public and private lives. In authoritarian societies, there is no nonpolitical life for everyday people. Politics can seep into every corner of daily life.

Civil liberties are individual rights that come from the limitation of government power. By contrast, civil rights empower government to give rights to groups of people who share common characteristics. You could say civil liberties are about equal protection from the law, and civil rights are about the equal protection of the laws.

Civil liberties, the individual freedoms that limit government, are guaranteed by the Bill of Rights and the text of the Constitution itself. These rights include freedom of speech and of religion and the right not to incriminate ourselves or be subject to unreasonable searches and seizures. Some others, like the right to privacy, come from Supreme Court decisions that have interpreted the Bill of Rights broadly. Those civil liberties stand on shakier ground because the Court can (and sometimes does) overturn or modify them.

Civil rights refers to the freedom of groups to participate fully in the public life of a nation. These groups are defined by particular characteristics—like race, gender, or sexual orientation—that are beyond their members’ control. What is protected is the group members’ right to do things like vote, get an education, travel, and get married. As we said earlier, rather than limiting government, the protection of civil rights often empowers government to act. Protections of civil rights are guaranteed by the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the Constitution.

We will understand the civil aspect more clearly after we have discussed the nature of rights and liberties in general.
By the time you finish reading this chapter, you will understand

- The meaning of rights or freedoms in a democracy and why we can’t always have all the rights we want.
- Why we can’t always have all the rights we want
- The value (and cost) of having a Bill of Rights
- The civil liberties that restrict government action
- When groups have the right to be treated equally by the law and when they do not
- How different groups have battled for rights to equal treatment

Rights are so important, so sought after, and so controversial because they are fundamentally about power: they confer power on people and limitations on government. That’s why debates about power have such high stakes.

Rights confer power on people in many ways. Here are three of the most important:

- The ability to claim rights makes one a citizen, not a subject. Rights give citizens power to push back on their government’s actions.
- The ability to deny rights gives citizens power over each other. Historically, some groups of Americans have fought to hang on to the power to deny fellow citizens recognition and protection of their full citizenship rights.
- The ability to use government to fight back against those who would deny their fellow citizens rights is also a form of power. Civil rights movements (described later in this chapter) are efforts to claim and exercise citizenship rights under government protection.

**civil liberties:** the individual freedoms guaranteed by the Constitution that limit government

**civil rights:** the freedom of groups to participate fully in the public life of a nation; protected by the government primarily in the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments
Excellent question, and the narrative we tell about this really matters in terms of power. If we believe we have rights because the government or the Constitution or the Bill of Rights or any other amendments give them to us, then those rights can also be taken away.

That’s why, in the Declaration of Independence, Thomas Jefferson emphasized his belief that Americans’ “unalienable Rights” are conferred by “Nature” and “Nature’s God.” These unalienable rights are called natural rights. In Jefferson’s understanding, if one is born with these rights, no government can take them away. Even though a determined government could violate those rights if it really wanted to, the idea of natural rights forms a powerful story to keep the government in check. Any government that wants to be seen as non-authoritarian is confined by that narrative.

Unfortunately not. Rights are some of those scarce resources we talked about in Chapter 1. This makes them ripe for political battles over power.

The rights of American citizens are limited in two main ways:

1. **First, rights become limited when they clash with other people’s rights.** Some disputes over rights are zero-sum games. In other words, for someone to win, someone else has to lose. When two people’s rights conflict, both can’t get what they want. For instance, when an employer refuses on religious grounds to provide birth control to employees through company-funded insurance, the employer’s freedom of religion might come into conflict with an employee’s right to privacy if she demands birth control as part of her insurance coverage (the courts have ruled the right to privacy includes reproductive rights).

Sometimes clashes over rights happen because a dominant group wants to deny rights to another group that its members see as less deserving or inferior. Denying rights to another group can reinforce the dominant group’s power or, if it feels threatened, reestablish it.

2. **Second, rights are limited when they conflict with a collective good that society values.** A classic example is individual liberty and national security. We could live in complete safety if we gave up all our freedom and lived in a locked-down world. We might be safe, but it wouldn’t be much fun. On the flip side, we could be completely free if we removed all restraints on personal travel, communication,
and privacy, but we’d lose a lot of safety. So, we make trade-offs, like taking off our shoes and going through scanners at the airport before we board planes even while we still value freedom of movement. Solving rights conflicts often involves compromise.

Since rights conflicts are at heart political conflicts, it should come as no surprise that they are solved through the political process. In the United States, that means through congressional legislation, executive action, individual and group efforts on the part of the people, and most of all, judicial decisions. So these are the key actors to remember:

- THE COURTS
- Congress
- The president and the bureaucracy
- The people

3.3 THE BILL OF RIGHTS

Remember from Chapter 2 that the Bill of Rights consists of the first ten amendments to the U.S. Constitution, which the Anti-Federalists demanded as their price for ratification. Their argument was that if this new national government was to be created, it needed to be restricted by appending to the new constitution a list of the things it could not do.

Maybe. Maybe not. Remember that Alexander Hamilton argued in Federalist Paper #84 that a bill of rights might be a dangerous thing, because the founders’ intent was to create a government that was already powerless to do the things the Bill of Rights ruled out. Future politicians might argue that the Bill of Rights lists the only limitations on government and would

Bill of Rights: ten amendments to the Constitution that explicitly limit government by protecting individual rights against it

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All of the founders feared a powerful government; they just differed on ways to limit it. The Federalists thought they had created internal mechanisms—separation of powers, checks and balances—that would keep the government from overreach. The Anti-Federalists wanted to spell out restrictions on the government—limiting powers the Federalists didn’t think the Constitution conferred.

This is an interesting difference, and, as we will see, there is good reason to believe that Hamilton was right.
Chapter 3: Civil Liberties and Civil Rights

It’s pretty clear when you read it that the Bill of Rights is speaking to the national government and specifically to Congress: “Congress shall make no law....” That makes sense since the document they are amending is the U.S. Constitution.

But most Americans don’t interact with the federal government or commit federal crimes. If they have run-ins with the law, it is far more likely to take place at the state level. The Bill of Rights, however, provides no limits on the states. In fact, the Bill of Rights itself tries to reserve rights to the states that are not given explicitly to the federal government. States may have their own bill of rights, but they don’t have to and there are no regulations about what they cover.

Still, Americans are not helpless if a state denies them a basic right. Protections at the state level have been the result of hard-fought legal challenges. In 1870, five years after the Civil War ended, the Supreme Court got an unexpected new tool in its constitutional toolbox that allowed it to address what it felt were the states’ denials of fundamental American rights.

The new tool was the Fourteenth Amendment, intended to stop southern states from denying former slaves their citizenship rights after the Civil War. Its authors didn’t think they were giving the Supreme Court a way to, for instance, force the state of Florida to provide a poor white man with a lawyer if he was accused of breaking a state law. But that is what happened. Using a process called incorporation, the Court was able to fold the guaranteed national rights into required state protections via the Fourteenth Amendment.

Look closely at this portion of the Fourteenth Amendment:

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

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**Fourteenth Amendment:** the 1868 constitutional amendment ensuring that southern states did not deny those free from enslavement their rights as citizens

**incorporation:** Supreme Court action making the protections of the Bill of Rights applicable to the states
That language can be interpreted to mean that no state can deny a citizen any of the rights the federal government guarantees. The Supreme Court didn’t go off and incorporate all the rights in the Bill of Rights in one bang. Instead, it did it selectively over time. As of today, just about every right in the Bill of Rights has been incorporated.

With incorporation, the Supreme Court did what it had done in the past with decisions like *Marbury v. Madison*, establishing judicial review, and *McCulloch v. Maryland*, allowing an elastic interpretation of the necessary and proper clause. It expanded the national power at the expense of the states, changing the balance of federal power.

### 3.4 Civil Liberties—Understanding the First Amendment

Americans’ basic civil liberties cover a lot of ground. They include all the rights the founders felt were necessary to keep the state in check. The most important of those rights they packed into the First Amendment because they wanted to indicate their primary importance. A lot of rights are protected in the First Amendment, which reads:

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

This amendment covers so many rights because, for the founders, these were all fundamental to the full functioning of a democracy. Don’t underestimate “the power of being first.” Being able to say that something comes first gives it prominence and status. For the founders, these rights were all of first importance.

Religious freedom was at the forefront of the founders’ minds because many of the original colonists had fled England in the first place to avoid an established church. Hence, the first words of the First Amendment: “Congress shall make no law respecting an establishment of religion or
prohibiting the free exercise thereof.” Those two rights are known as the establishment clause and the free exercise clause.

The trouble with those words spelling out religious freedom protection is that they contain an inherent contradiction. If no establishment of religion means there can be no officially endorsed practice of or support for a religion, and the free exercise of religion allows you to practice the religion of your choice, then if, for instance, your religion leads you to want to say a group prayer at the start of your school day or to display religious icons in public places, you are in a fix. Both of those things cannot happen at the same time.

The founders might have been primarily Christian, but they were members of a variety of denominations that differed in fundamental ways. Any effort to establish one of those denominations as the official state religion would have doomed the new country from the start.

Historical as well as present-day conflicts have shown us what happens when political differences are reinforced with religious differences: every conflict is infused with profound meaning, and compromise is impossible because no one wants to compromise on his or her deeply held spiritual beliefs.

Besides, when a government can put the power of an Almighty behind its laws, it is very hard to resist the government if it overreaches. Aggrieved citizens would be rebelling not only against the state but also against God, and who wants to risk eternal damnation for short-term earthly redress of grievances? The entire notion of the divine right of kings was based on the collapse of any distinction between church and state. The founders, in their quest for a limited state, wanted, in Jefferson’s words, to build “a wall of separation” between the two.

In addition, historical examples of religious empires show us that not only does it damage the state when religion merges with politics, but it risks damaging religion as well when political power conflates with religious power.

establishment clause: the First Amendment guarantee that the government will not create and support an official state church

free exercise clause: the First Amendment guarantee that citizens may freely engage in the religious activities of their choice

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In a nation that is largely, but not exclusively, Christian, maintaining a wall of separation between church and state can be hard. Americans and, indeed, members of the Supreme Court are divided on whether we need to keep the two entirely separate, or whether it is okay to allow some state recognition of and support for religion as long as it accommodates all religions.

The trouble with agreeing to accommodate all religions in a predominantly Christian country is that often it is Christianity that is accommodated, leaving nonbelievers and members of other faiths to feel alienated, silenced, or forced to challenge public authorities to have their own rights protected. The efforts of those who want to be more inclusive—by saying “happy holidays” instead of “Merry Christmas,” for instance, or by emphasizing the celebration of non-Christian holidays—has often left Christians feeling under attack. Others’ insistence on having their religious rights respected has led some Christians to feel that their beliefs are disrespected that saying “happy holidays” means there is a “war on Christmas,” for instance.

**3.2: THE SKIMMABLE COURT WATCHER: LEMON V. KURTZMAN AND THE FIRST AMENDMENT**

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**accommodationists:** people who want to support “all” religions equally

**separationists:** people who want a separation between church and state

**Lemon test:** the three-pronged rule used by the courts to determine whether the establishment clause is violated
Chapter 3: Civil Liberties and Civil Rights

What is a constitutional issue—how far church and state can be intermingled—has become a cultural clash that it is almost impossible to solve to everyone’s satisfaction. Legal quarrels over something so deeply felt as religious beliefs tend to explode into something divisive and difficult to solve politically, underscoring the founders’ desire to keep religious disputes out of the political sphere.

The First Amendment not only prohibits the establishment of religion but also says Congress can’t prohibit the free exercise of religion. That sounds unobjectionable on its face, but, in practice, exercising your religion can frequently crash into other people’s rights. We have already pointed out the internal conflict between the establishment and free exercise clauses, but the free exercise of religion is even more complicated than that.

Americans have an absolute right to believe what they want to believe. It is when their beliefs cross into action that they can conflict with other people’s actions or the state’s obligation to exercise its police power to protect the health, well-being, and security of all citizens.

The question of when and how much the state can regulate religion is a tricky one. The Supreme Court has danced around this issue for decades. For many years, the Court had said that the government had to demonstrate a compelling reason to infringe on religious practice, but in 1990 the Court reversed course and put the burden of proof back on religious groups to show that the state regulation violated the groups’ rights. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which returned the burden of proof to the state. The Supreme Court struck the law down until it was amended to apply only to the federal government. Many states have since passed their own RFRA’s. It’s been a bit like legal ping pong, which shows you how controversial the issue is.

The issue of religious freedom from state regulation became even more controversial during Barack Obama’s administration. Some employers balked at the Affordable Care Act’s requirement that they provide their employees with health insurance that included contraception as part of basic coverage. They argued that this violated their deeply held religious convictions. The law had already exempted religious employers from the requirement, but in what has become known as the *Hobby Lobby* case, the Court ruled in 2014 that corporations that were not publicly traded did not have to provide coverage if doing so would violate their owners’ beliefs.
Another issue that has raised a religious controversy stems from **marriage equality**. In 2015 the Supreme Court surprised many Americans with its ruling in *Obergefell v. Hodges*, which held that the equal protection clause and the due process clause guaranteed gays the right to marry. Furthermore, same-sex marriages had to be recognized as legal in all fifty states. Public opinion had swung sharply toward support of marriage equality in the years leading up to the ruling, but not all Americans agreed that it should be legal.

Some people in the wedding industry (notably, wedding cake bakers) argued that the ruling required them to violate their consciences because it coerced them to provide support for a practice that ran counter to their religious beliefs. This issue of coerced speech arrived at the Supreme Court in 2018. In a narrow ruling in what has come to be called the *Masterpiece Cake Shop* case, the Court didn’t resolve the question of whether someone’s religious beliefs would allow them to discriminate in whom they served, but it did side with the baker because it found that he had faced a local Colorado process hostile to his religious beliefs. The Court also made it clear that more rulings on this subject could follow in the future.

Although the Court has not yet settled the issue of whether religious liberty could exempt someone from providing services in the marketplace, in May 2017, President Donald Trump issued an executive order protecting religious freedom. In October, then-Attorney General Jeff Sessions fleshed out that order with a memo that said, among other things,

> Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. Except in the narrowest of circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance should be reasonably accommodated in all government activity, including employment, contracting and programming.

Sessions’s clear intent was to force laws to accommodate religious beliefs and ignored the “excessive entanglement” concerns of the *Lemon* Test. How far this results in the denial of civil rights to other groups has yet to be seen, but whichever way it turns out, it is an excellent example of how our own natural rights can be limited by the requirement to respect the rights of others.

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**marriage equality**: the idea that marriage should not be reserved for heterosexual couples and that all marriages should be equal before the law
As important to the founders as freedom from an established religion was freedom of expression—including freedom of speech, freedom of the press, and freedom of assembly to air one’s views. There are a lot more ways for people to express their opinions today than there were in the eighteenth century. At that time, speech, press, and assembly pretty much covered the options.

Freedom of expression is important for many reasons but chiefly because it includes the right to criticize the government. If government is going to be accountable to citizens, they have to know what government is doing with the authority they give it, whether it is carrying out their wishes and protecting their rights, or whether it is corrupt or has conflicts of interest. They also need to keep themselves and their fellow citizens informed so they can make (one hopes) wise choices at the ballot box. Furthermore, denying free speech sets a dangerous precedent—if we can stop our opponents from speaking out today, they might stop us from speaking out tomorrow.

The Court has allowed the burning of the U.S. flag as protected speech; it has recognized that what is seen as pornographic in a small midwestern town may not be in New York’s Times Square; it has permitted the wearing of arm bands and the wearing of a T-shirt protesting the Vietnam War with the words “Fuck the draft”; and it has allowed people not to pledge allegiance to the flag. It has even ruled that giving money to political causes is a form of expression and cannot be limited.

In the United States, all rights have limits and speech is no exception. Just like there are limits to religious freedom, there are limits to our freedom of expression. The Supreme Court has at various times ruled that speech (and symbolic speech) can be limited for purposes of national security during war (sedition), because it is obscene, because it is intended to start a fight (fighting words), or because it maliciously damages a reputation (libel when printed; slander when spoken).

freedom of expression: the ability to express one’s views without government restraint
freedom of assembly: the right of the people to gather peacefully and to petition government
sedition: speech that criticizes the government in order to promote rebellion
fighting words: speech intended to incite violence
libel: written defamation of character
slander: spoken defamation of character
The Court has come up with a series of tests (like the Lemon test, mentioned earlier) meant to clarify the yardstick it is using for allowing or denying protected status for speech. And like the Lemon Test, many of these tests, designed to eliminate ambiguity, introduced even more.

For instance, when regulating political speech, the clear and present danger test, first suggested in 1919, was meant to distinguish speech that was immediately harmful from that which posed only a remote threat. The test didn’t prove helpful in determining what “clear” and “present” meant, however, and it was eventually replaced with the imminent lawless action test, which protected speech unless it was linked with action.

Similarly, obscenity has been the subject of test-making efforts. Defining obscenity has given the justices considerable grief because of how seemingly subjective it can be: the late Justice Potter concluded in 1964, but “I know it when I see it.” Eventually the Court concluded that obscenity could be restricted so long as it met standards defined by the Miller test, which refers to local standards and asks whether the work lacks “serious literary, artistic, political, or scientific value.” Again, hard to define.

One thing the Supreme Court has been fairly steady on is its refusal to engage in previous or prior restraint—that is, censoring and refusing to allow the publication of something, even though it very well might fail one of the Court’s tests after publication. The Court has held that only a national emergency could justify such censorship, and it rejected President Richard Nixon’s effort to prevent the New York Times’s publication of a “top secret” document about the Vietnam War, ruling that national “security” is too vague a concept to excuse violating the First Amendment. To grant such power to the president, the Court ruled, would run the risk of destroying the liberty the government was trying to secure.

Life was simpler when the printing press was the only mechanism for disseminating information besides the human voice. Electronic communication makes it vastly more complicated. The Internet and the social media that

clear and present danger test: the rule used by the courts that allows language to be regulated only if it presents an immediate and urgent danger

imminent lawless action test: the rule used by the courts that restricts speech only if it is aimed at producing or is likely to produce imminent lawless action

Miller test: the rule used by the courts in which the definition of obscenity must be based on local standards

prior restraint: censorship of or punishment for the expression of ideas before the ideas are printed or spoken
An important issue related to the Internet is net neutrality. Net neutrality describes how the Internet works now—on the principle that service providers (Verizon, Comcast, AT&T, and the like) cannot speed up or slow down access for customers or make decisions about the content they see or the apps they download. The Federal Communications Commission (FCC) adopted net neutrality rules in 2015, but President Trump appointed a former Verizon employee as chair of the FCC in 2017 and he rolled back the protections. Supporters of net neutrality are urging Congress to reverse the policy.

The existence of the Internet has raised other issues that the authors of the First Amendment could not have anticipated. In 2016 it became apparent that a foreign country, Russia, had launched an attack on the American electoral system with the goal of damaging the chances of one of the candidates and destabilizing the political system as a whole. We were vulnerable to this attack because of our tendency to practice citizenship through various media channels. Among other methods (hacking into private email accounts and into voting systems themselves), the Russians manipulated social media with fake accounts destined to stir social unrest, boost the fortunes of Donald Trump, and damage the reputation of Hillary Clinton. In the wake of the election, Internet giants like Facebook and Twitter, which were used as instruments of the attack, have tried to regulate their own usage rules to avoid facing federal regulation of free speech on the Internet, which they may face anyway. At issue is whether protections of free speech also cover weaponized fake speech, particularly when the consumers of the speech are unaware of its source.

3.5 CIVIL LIBERTIES—UNDERSTANDING DUE PROCESS RIGHTS

Due process rights are the rights preserved in the Fourth through Eighth Amendments—the ones that give Americans some rights against being railroaded into jail by the police and the courts, especially for political purposes.

net neutrality: the principle that Internet service providers cannot speed up or slow down access for customers or make decisions about the content they see or the apps they download

due process rights: the guarantee that laws will be fair and reasonable and that citizens suspected of breaking the law will be treated fairly
A chief fear of the founders was a government so strong that its leaders could use its police power and the judicial system for political purposes. Rulers who can arrest, jail, torture, and imprison their opponents without cause can secure their own power much more easily than those who have to be accountable to citizens. English history was rife with examples of the denial of due process despite the 1215 Magna Carta, which limited the monarch’s powers somewhat, at least over the nobility. The founders were determined that their new republic would not have a president who could investigate or lock up his rivals.

The founders were so focused on these rights that some of them are even in the text of the Constitution itself. Article I provides that Congress cannot suspend the writ of *habeas corpus* (the right to be brought before a judge and informed of the charges and evidence against you) or pass a *bill of attainder* (a law directed at an individual or group that accuses and convicts them of a crime) or an *ex post facto law* (a law that makes something illegal after you have already done it).

If some liberties are so important that they belong in the First Amendment, how important must others be that the founders put them in the Constitution itself, and that the Anti-Federalists devoted half of the Bill of Rights to them?

The due process rights ensure that the police do not become a political weapon. That means Americans have the following protections:

* Their homes cannot be searched for evidence of a crime without probable cause (and if evidence is obtained illegally, the *exclusionary rule* prevents it from being used against them in a court of law).
* They have a right to be told why they are being arrested.
* They cannot be tried twice for the same crime (double jeopardy).

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**habeas corpus**: the right to be brought before a judge and informed of the charges and evidence against you  
**bill of attainder**: a law directed at an individual or group that accuses and convicts them of a crime  
**ex post facto law**: a law that makes something illegal after you have already done it  
**exclusionary rule**: the rule created by the Supreme Court that evidence seized illegally may not be used to obtain a conviction
They have rights to an attorney, to resist questioning, and not to incriminate themselves (and to be informed of these so-called **Miranda rights**, named for the case establishing that the police must inform suspects that they possess these rights).

They have a right to a fair and speedy jury trial with counsel.

They can't be subjected to cruel treatment in their imprisonment.

There are exceptions to all of these protections. Although police do need probable cause, they don't have to get a warrant to search someone's car, for instance (because that person will likely be gone by the time the warrant is obtained). Electronic surveillance raises many issues that the founders never had to face. The question of double jeopardy can run into federalism issues—for example, can you be tried for the same case in federal and then in state court? And many states have the death penalty, which some Americans consider cruel and unusual punishment.

Some courts—tax courts, for instance, or immigration courts—do not have to follow these rules of due process. The separation of families at the border in 2018 and the deportations of parents without their children took place without minimal due process, even though the Court ruled in *Zadvydas v. Davis* (2001) that noncitizens, including undocumented persons, are entitled to civil liberties. President Trump's call to have people deported without court proceedings was a clear violation of the law. The backlog of cases and difficulties in reunifying families torn apart has led to legal shortcuts, however.

These are only a few of the snags run into by the promise of due process, but at least on paper, Americans are protected, and if they are denied due process rights, a lawyer (to which they are entitled, remember, even if they cannot pay) can use that fact to try to secure them.

The Constitution and the Fourth through Eighth Amendments reflect the founders' concern that the police power would be used for political purposes, and they try to protect Americans from that. Although not its original intent, the Fourteenth Amendment has been interpreted to mean that the states must provide that same protection.

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**Miranda rights**: the rights that a person has to resist questioning and not to incriminate oneself; the police must inform suspects that they possess these rights.
In which amendment do we find the right to privacy? None of them, as it turns out. It’s not in the Constitution, either. One can argue that the founders created a limited government and never intended it to be powerful enough to infringe on the private lives of Americans, but none of them thought it a serious enough threat to put into the document itself.

The right to privacy is a judicial creation of the Supreme Court in the 1965 case of *Griswold v. Connecticut*. In that case the state of Connecticut had passed a law criminalizing the use of contraception. The law was challenged and appealed up to the Supreme Court on the grounds that the decision to use birth control was a private one.

The justices on the Court agreed, but the Constitution didn’t give them much to work with as a basis for their argument. Since there was no actual right to privacy in the document or any of the amendments, the justices “found” such a right to be implied in the First Amendment protection of one’s beliefs and speech, the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment protection against self-incrimination, and the Ninth Amendment promise that one’s rights weren’t limited to the ones enumerated in the document. Based on that reasoning, the Court declared the Connecticut law unconstitutional because it violated an implicit right to privacy.

On its face, there doesn’t seem to be a whole lot that’s controversial about the right to privacy. Most Americans would agree that the right to plan one’s family is a private decision the government should stay out of. Yet, the right to privacy has become one of the fiercest battlegrounds in American politics.

The disagreement arises because the precedent set in *Griswold* was the basis for the landmark 1973 decision *Roe v. Wade*, which held that a woman’s decision to terminate a pregnancy in the first trimester was a private one. And although contraception may not be all that controversial (unless we are talking about providing it as part of health care coverage), abortion definitely is.

**right to privacy**: the judicial creation from *Griswold v. Connecticut* (1965) that certain rights in the Bill of Rights protected intimate decisions like family planning from state interference
Underlying this controversy is an interesting constitutional issue: whether the Constitution should be read literally as the founders wrote it or whether it can be read flexibly in the light of contemporary circumstances. The first position, if you recall, is exactly the argument that Hamilton feared would be made if a bill of rights were to be attached to the Constitution—that only those rights that were explicitly written down would be protected. The right to privacy has become a target of those who argue that position.

Legal scholars who take the position Hamilton was wary of believe that the Constitution should be read just as it was written—that the task of the constitutional scholar is to discern the founders’ original intent and that their words are to be taken literally. These scholars and judges, known as originalists or strict constructionists because they read the Constitution strictly, believe that if Americans want a right to privacy, they need to amend the Constitution to include it.

Those who take the other approach to reading the Constitution, whose number includes seven of the nine justices who ruled in *Griswold*, are called judicial interpretivists. This view holds that the founders could not have anticipated all the changes that make the world today different from theirs and, therefore, judges should read the Constitution as the founders would write it in light of modern-day experience. That is, they should interpret what the founders would mean today.

Because how you read the Constitution has such clear policy implications, Supreme Court confirmation hearings have often become battlegrounds as well. Republicans want to appoint strict constructionists to the Court, hoping they will overturn *Roe* (by overturning *Griswold* and the right to privacy that interpretivists believe is implied). Democrats, seeking to protect women’s reproductive rights and the extension of rights generally, want to put interpretivists on the Court.

No, actually, they are not. Supporters of gay rights tried unsuccessfully to use the right to privacy to fight laws that criminalized homosexual behavior. As we will soon see, they ended up winning rights not as civil liberties but as civil rights under the constitutional principle of equal protection.

**strict constructionists:** supporters of a judicial approach holding that the Constitution should be read literally, with the framers’ intentions uppermost in mind

**judicial interpretivists:** supporters of a judicial approach holding that the Constitution is a living document and that judges should interpret it according to changing times and values
The right to refuse life-supporting treatment if one is terminally ill, and the right to have a doctor’s assistance in ending one’s life in the face of such terminal illness, have also been argued under right-to-privacy grounds. The Court has upheld advance directives determining one’s medical wishes and has also allowed states to permit physician-assisted suicide under certain circumstances. Currently six states allow that practice.

3.7 CIVIL RIGHTS—BATTLING POLITICAL INEQUALITY

So far in this chapter we have seen how the protection of our liberties restricts government action, leaving us free to act in various spheres. But sometimes exercising rights requires an active government to step in and create a protected sphere in which a group can exercise its rights.

Civil rights refers to the freedom of groups (defined by some particular characteristic—like race, gender, or sexual orientation—that is beyond their members’ control) to participate fully in the public life of a nation (for instance, voting, getting an education, traveling, and marrying). Rather than limiting government, the protection of civil rights often empowers government to act. Protections of civil rights are guaranteed by the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the Constitution.

The difficulty as we study the effort of excluded groups to possess the full array of citizenship rights is that we are studying the inherent problem of discrimination. All laws discriminate in some way. To discriminate is to treat differently—we treat murderers and nonmurderers differently, for instance, and people who speed on the highway differently from people who do not. The trick is to know what kinds of discrimination are okay and what kinds are not. When is it okay to treat people differently?

The Supreme Court has an answer to that question—similar to the “tests” we looked at earlier. It got there in a strange way.

discrimination: differential treatment
Obviously, the United States has a history of treating some people very differently from others, and the Supreme Court generally found a way to approve that differential treatment for people of color or women. But in 1942, the Court was forced to articulate a rule for when it was okay to discriminate and when it was not. During World War II, Franklin Roosevelt issued an executive order that people of Japanese descent, two thirds of whom were citizens, be put in internment camps, where they stayed until the order was suspended in 1944. His reasoning (which was not backed up with empirical evidence) was that, since the United States was fighting Japan, Japanese Americans might betray their own country because of secret loyalties to a country many had never even seen. Many of them lost their homes and their property while they were in the camps.

The order was challenged on equal protection grounds by a man named Fred Korematsu and reached the Supreme Court in 1944.

**The Fourteenth Amendment guarantees that citizens cannot be denied the equal protection of the laws, and that includes treating them differently because of race.**

**Korematsu v. United States (1944):**

- Laws that treat people differently because of race are highly suspicious, making race a suspect classification.
- That means the Court must subject them to a standard of review called strict scrutiny.
- Strict scrutiny means asking if there is a compelling state purpose to the discrimination.

In *Korematsu* the Court held there was a compelling state purpose in national security, but this legal standard of review would from then on be used to evaluate laws that discriminated on the basis of race.
A compelling state interest is a very hard standard to meet, although the justices in Korematsu shamefully decided the government had met it. Some good has come out of the compelling state interest test, however. It has been applied to strike down most laws that discriminate by race since the mid-1950s. It is part of a set of standards of review that the Court uses to decide when it is okay for the law to treat classes of people differently.

Through a number of cases the Court has arrived at the following scheme:

<table>
<thead>
<tr>
<th>If the law classifies people by</th>
<th>that classification is</th>
<th>which means the Court subjects the law to a</th>
<th>and asks if there is a</th>
<th>The usual outcome?</th>
</tr>
</thead>
<tbody>
<tr>
<td>race</td>
<td>suspect</td>
<td>strict scrutiny standard of review</td>
<td>compelling state purpose for this classification</td>
<td>The law is usually struck down.</td>
</tr>
<tr>
<td>gender</td>
<td>quasi-suspect</td>
<td>intermediate standard of review</td>
<td>important state purpose for this classification</td>
<td>The law may be struck down, or it may stand.</td>
</tr>
<tr>
<td>age, income</td>
<td>nonsuspect</td>
<td>minimum rationality standard of review</td>
<td>rational basis for this classification</td>
<td>The law usually stands.</td>
</tr>
</tbody>
</table>

**suspect classification**: a classification, such as race, for which any discriminatory law must be justified by a compelling state interest

**strict scrutiny**: a heightened standard of review used by the Supreme Court to assess the constitutionality of laws that limit some freedoms or that make a suspect classification

**compelling state purpose**: a fundamental state purpose, which must be shown before the law can limit some freedoms or treat some groups of people differently
Laws that discriminate according to gender do not get the same level of scrutiny that race does. However, had women's groups been able to pass the Equal Rights Amendment in the 1970s, gender may have very well become a suspect class.

Becoming a suspect class sounds like a good thing since it means that laws that discriminate against your group get the strictest level of scrutiny. But it has proven to be a double-edged sword for racial groups because it tends to strike down not only laws that discriminate against you but also laws that discriminate in your favor. Thus, some affirmative action plans that try to create more racially diverse student bodies at American universities have been struck down. The practice that allows state legislatures to draw congressional districts to advantage racial minorities has been struck down as well.

One classification that is currently difficult to fit into this scheme is sexual orientation. Not long ago, sexual orientation was a nonsuspect class. It simply required a rational basis to treat members of the LGBTQ community differently. But the Court ruled in 2015 that the Fourteenth Amendment meant that states had to allow people of the same sex to marry. The standard they applied was stronger than the rational basis standard but not yet quite as strong as strict scrutiny. This is a classification that is in flux, and we will have to watch future Court cases to see how it is treated.

It may look cut-and-dried, but groups have had to put grueling effort into getting higher levels of scrutiny applied to the laws that treat them differently. We will look at some of these groups shortly.

Even when the battle is successful and the discriminatory laws are struck down, only one kind of discrimination is ended—de jure discrimination, or discrimination by laws. Another, more difficult kind of discrimination has nothing directly to do with laws. Called de facto discrimination, it is discrimination that results from life circumstances, habit, custom, or socioeconomic status. It can be just as devastating for a group to be the focus of this kind of discrimination, but it is harder to fix since there is no law to be subjected to scrutiny and changed.

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de jure discrimination: discrimination by laws
de facto discrimination: discrimination on the basis of life circumstances, habit, custom, or socioeconomic status
Many groups have had to wage mighty battles to be included as full citizens in American civil society. From their earliest days, American colonies excluded people from citizenship because of their religion, their lack of wealth, their gender, their status as slaves or Native Americans, or their ethnicity. In the next two sections we will look closely at the specific cases of African Americans and women as those groups struggled for equal rights.

### 3.8 CIVIL RIGHTS—THE CASE OF RACE

The story of America of course cannot be told without the institution of *slavery* and the narratives that white slave-owners told to justify owning and forcing the labor of fellow human beings. Adding insult to grievous injury, slaves were denied any rights in the Constitution, but southerners used them—through the Three-Fifths Compromise—to inflate the representation of southern states received in Congress. Those narratives created a story of an inferior race that required white mastery and established a set of stereotypes of African Americans—that they were less intelligent, less industrious, and less capable than their masters—that continue to haunt the nation. Slavery has been called the original sin of American politics. It was a tragedy for the human beings who were enslaved and demeaned by the narratives that supported it, and it twisted the minds and moral character of those who did the enslaving. Americans still live with the consequences today.

The American Civil War (1861–1865) was fought over slavery and the states’ rights to practice it, and even the conclusion of that bloody and tragic moment in our past did not put the issue to rest. Remember—rights equal power. It’s not human nature to give up power without a fight.

Immediately after the War and the passage of the *Thirteenth Amendment* banning slavery, white southerners tried to seize back the power they had lost by passing state and local laws called *black codes*. Black codes denied freed blacks the right to vote, to go to school, or to own property—they essentially re-created the conditions of slavery under another name.

---

**slavery:** the ownership, for forced labor, of one people by another

**Thirteenth Amendment:** the 1865 constitutional amendment banning slavery

**black codes:** a series of laws in the post–Civil War South designed to restrict the rights of former slaves before the passage of the Fourteenth and Fifteenth Amendments; denied freed blacks the right to vote, to go to school, or to own property, which re-created the conditions of slavery under another name
In an effort to shut down the black codes, the northern-dominated Congress passed the Fourteenth and Fifteenth Amendments (the Fourteenth extends full citizenship rights and equal protection to “all persons born or naturalized in the United States,” as we read earlier in the discussion of incorporation; the Fifteenth Amendment said the right to vote could not be denied on the basis of race). White southerners responded by ushering in the era of Jim Crow laws, again trying to re-create the power relations of slavery but this time attempting to do an end run around the amendments designed to give blacks citizenship rights. Jim Crow laws included various ways of stopping African Americans from exercising the vote and from using the same schools and other facilities as whites. They were forms of de jure discrimination that created a segregated society in the South.

When members of a group are as thoroughly barred from mainstream political life as African Americans were, it can be hard to gain access to a battleground on which they can fight for their rights. The arena of national legislative politics was closed to African Americans after the North turned to its own affairs following the passage of the Thirteenth through Fifteenth Amendments (known as the Civil War amendments). The presidency did not offer any recourse, nor did the state governments, which were the source of the discriminatory laws.

Before the Civil War, the precedent on black rights had been set in the 1857 Dred Scott v. Sanford case, in which the Court ruled that even a freed slave had no standing to bring a case to the courts. In 1896 the Supreme Court made segregation constitutional in Plessy v. Ferguson, ruling that separate facilities were legal if they were equal. Of course, separate but equal wasn’t equal at all, and the ruling signaled that the courts weren’t going to be a profitable arena for blacks to fight in either. All three branches of government—and government at all levels—seemed filled with obstacles.

The courts nonetheless offered an important strategic avenue. In 1910, African Americans who refused to accept the second-class citizenship of Jim Crow organized the National Association for the Advancement of
Colored People. NAACP lawyers developed a legal strategy to gain access to the arena of the courts by first targeting legal education. Part of their calculation was that, to most Americans, law schools would be a less threatening area for desegregation than primary education, but one where the justices of the Supreme Court were particularly likely to find arguments against segregation to be persuasive. They ended with the political earthquake of *Brown v. Board of Education* in 1954. In *Brown*, the Court finally overruled the separate but equal doctrine that had prevailed in the legal community for more than half a century.

### 3.5: THE SKIMMABLE COURT WATCHER: FROM SEPARATE BUT EQUAL TO DESEGREGATION

<table>
<thead>
<tr>
<th>The legal basis for “separate but equal”</th>
<th>The arguments for nondiscrimination</th>
<th>Changes at the Court level</th>
<th>Problems implementing the <em>Brown</em> decision</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Dred Scott v. Sanford</em> (1857), the last Court case dealing with the rights of blacks, had established the precedent that even a freed slave had no rights in court.</td>
<td>The 14th Amendment said that all Americans were entitled to the equal protection of the laws.</td>
<td><em>Plessy v. Ferguson</em> (1896) agreed that if facilities were “equal,” it was okay for them to be separated, putting the seal of constitutional approval on segregation for almost 100 years.</td>
<td># Plessy became the basis for legalized Jim Crow throughout the South.</td>
</tr>
<tr>
<td>The Court struggled to reconcile the power relationships of segregation with the 14th Amendment and came up with the principle of separate but equal.</td>
<td>Requiring separate facilities was a violation of that right and thereby unconstitutional.</td>
<td><em>Brown v. Board of Education</em> (1954) reversed that ruling, holding that segregation itself was unequal.</td>
<td>It was not until the 1930s—when the NAACP began to use a law school–centered strategy [<em>Missouri ex rel Gaines</em> (1938), <em>Sweatt v. Painter</em> (1950)]—that <em>Plessy</em> was slowly undermined. The Court eventually overturned it in <em>Brown v. Board of Education</em> (1954) and set off a decades-long effort to desegregate schools.</td>
</tr>
</tbody>
</table>

*Brown v. Board of Education*: the 1954 Supreme Court case that rejected the idea that separate could be equal in education.
At the same time that Brown was being decided, African Americans found access to another arena that led to changes in discriminatory laws: economic activity. When Rosa Parks refused to vacate her bus seat for a white man in Montgomery, Alabama—launching the boycott of the bus system—African Americans realized that their purchasing power could be a considerable political weapon.

By the early 1960s, the new technology of television had brought the plight of African Americans out of isolation in the South to the whole country’s attention. The court of public opinion was not kind to southern whites.

Peaceful black protest marches met by snarling police dogs, and college-aged black students holding sit-ins at whites-only lunch counters being hauled off by police, made for gripping television viewing in northern states. Driving the point home was horrifying footage—including coverage of the murders of three young men, two white college students and one black, who were participating in the 1964 black voter registration drive called Freedom Summer.

In 1964 and 1965, civil rights legislation initiated by President John Kennedy and then pushed through Congress by President Lyndon Johnson after Kennedy’s assassination finally removed most of the legal barriers to integration.

Southern whites, most of whom still belonged to Johnson’s Democratic Party despite their social conservatism and racist views, (in large part because many still held a grudge against the party of Lincoln) didn’t take any more kindly to passage of the new civil rights laws than they had to the Civil War amendments 100 years earlier. Southern congressmen staged a filibuster to prevent a vote on the legislation in the Senate. When they lost, they began a slow process of defecting from the Democratic Party, a process sped up by President Richard Nixon’s so-called “southern strategy” of using racial issues to split them off from the Democratic Party.

**boycott:** the refusal to buy certain goods or services as a way to protest policy or to force political reform
The combination of these strategies has come to be known as the civil rights movement.

Unfortunately, no. One irony of the legislative change accomplished by Congress was that, although it ended the de jure discrimination in the South, it highlighted the shortcomings of legal change as a method to redress de facto segregation in the North. Northern cities didn’t have discriminatory laws to change. Instead, segregation in the North arose from long-term economic patterns and demographic changes that left African Americans in the city centers and succeeding waves of newly assimilated white immigrants in the suburbs. Schools and neighborhoods were segregated as a result, and there were no laws to change to reverse the process. Attempts at integration involving busing black kids out of the city to attend suburban white schools and white kids back in to attend urban black ones roused fury in white families that had fought their way up the economic ladder to move to places with better schools. De facto discrimination can’t be remedied by fixing laws. It requires an effort to fix the outcomes, which strikes many Americans as fundamentally unfair.

But the fact that opposition to busing was not solely race based did not mean that racism was vanquished or did not exist in the North as well as the South. Despite the hard-won changes in laws, demeaning racial narratives were still woven into the American story and still determined how African Americans were treated and how they were treated by rules and institutions founded on white privilege, that is, the learned tendency to see the world through the context of white culture and power.

Yes. It would be tempting to believe that, almost a quarter of the way into the twenty-first century, the United States has finally left its race problems behind. We have certainly made strides that the early civil rights marchers

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civil rights movement: the group effort of African Americans to claim their civil rights through a variety of means—legal, political, economic, civil disobedience—in the 1950s and 1960s

integration: breaking down barriers (legal, cultural, economic) that keep races apart to allow the creation of a diverse community

racism: institutionalized power inequalities based on the perception of racial differences

white privilege: the learned tendency to see the world through the context of white culture and power
only dreamed of. But race endures as a defining issue in American politics, especially as demographic change forces whites to grapple with sharing minority status with other racial groups.

Systemic racism is built into the American system in a way that gives preference to whites and stacks the deck against people of color. We can see it in the education and income gaps that continue to reflect the different opportunities many African Americans face from birth. We can see it in the fear and prejudice that cause police officers to be quicker to shoot (and kill) unarmed black suspects than their white counterparts. We can see it in young Trayvon Martin’s 2012 murder by an armed vigilante who feared a young black kid in a hoodie making a candy run through his own neighborhood. We can see it in a Yale student who called the police in 2018 because she saw a black woman (a fellow student) asleep in a commons area and assumed she had no right to be there.

Groups like Black Lives Matter have picked up the mantle of the civil rights movement, marching in protest and able, for the first time, to use smartphones to capture on video the vitriolic responses and police abuses that black Americans still face, and to let those videos go viral. Like television carrying pictures of southern racism north, social media carries pictures of systemic racism everywhere.

Barack Obama’s ascent to the presidency was a huge symbol of the progress this nation has made on race, as well as a sign of the demographic changes occurring in the population. He was not the first president to win without a majority of the white vote—for more than fifty years a majority of white voters have typically supported Republicans. But he won a significant portion of the white vote, and his election night in 2008 was filled with the hopes of many that perhaps Americans had obliterated the stain of racism from the nation’s character.

In hindsight, we know that no such thing happened. Obama won the presidency in part on his promise to bring Americans together and to work with both halves of a Congress that had grown to be more polarized than at any time since the Civil War. Of course, that put the keys to his success in the hands of Republican legislators who were united in their effort to deny it to him.

And, of course, there was the election of Donald Trump in 2016 on a campaign that had clear racial and nativist overtones—not only was Trump the most famous of the birthers who denied President Obama’s legitimacy because of a bogus claim that he wasn’t a U.S. citizen, but he also made denigrating remarks about Hispanics, Muslims, women, Jews, and just
about any other group whose members he felt had crossed him in any way. A significant part of Trump’s support came from those reacting to Obama’s presidency and the coalition that had put him in office. The claim that we had to “take our country back” or “Make America Great Again” was an implicit rebuke to the president who many people felt had diminished America simply because of his skin color.

We all know the answer to this is “no.” People of color who have had to fight for equal treatment by the law include Native Americans, who were forced from their lands by European settlers to live on quasi-sovereign reservations; Latinos, who have regularly crossed the border from Mexico (across land they once owned) to do the cheap agricultural and domestic labor Americans often refuse to do; and Asians, who at various times in history have been refused entry or who have been admitted and then denied basic civil rights or worse, as the Korematsu case shows.

The United States is a nation of immigrants. Hardly any American, even direct descendants of the British settlers, can deny that their ancestors came from foreign lands. But immigrants from Europe—despite facing discrimination when they first arrive for talking funny or for eating strange foods or for living in a culture that seems odd to Americans already here—are eventually able to assimilate because they lose the accents, their food becomes Americanized, and they look like other white Americans.

But people whose skin color or other facial features continue to mark them as “the other,” or different, assimilate more slowly, if at all. The assimilation of European immigrants has traditionally been about their ability to fit in. The assimilation of people of color has depended on the willingness of the white population to give up racist narratives to accept them. As that white-majority status wanes, along with the privilege it has carried, the United States can expect more reaction from those whose numbers are declining, and less patience from those on the receiving end of the racist narratives.

3.9 CIVIL RIGHTS—THE CASE OF GENDER

Sexism, like racism, is pervasive, often unrecognized, and has deep cultural roots. Colonial white women had few rights, although those born into
wealthy families or married to men with good incomes lived materially comfortable lives. But even after national independence, they had no right to vote, to own property, to get an education, to have a job, to divorce their husbands, or even to keep their children if they were divorced by their husbands.

The fact that women went from holding their father’s last name to taking their husband’s (after being “given in marriage” by their fathers) is indicative of the legal and social status women had. In fact, in English common law, on which much of the American legal system is based, statutory rape was not a sex crime against the woman but a property violation against her father, because it reduced the dowry he could ask for her if she were no longer a virgin.

The women’s rights movement is commonly dated from the Seneca Falls (New York) Convention of 1848, when attendees issued a declaration of principles that read, “We hold these truths to be self-evident, that all men and women are created equal....” Even so, although there was general consensus at the convention that women needed more rights, not all attendees agreed that they should vote.

The widely accepted narrative that kept wealthy white women out of public life was that they were too good and pure for the rough-and-tumble corruption of public life. Their territory was the home and their job was to be a “home-maker,” creating comfort for their husbands and a respite from the stressful and ugly outside world.

This was a hard story to combat because it required women to deny their own purity, which not everyone, especially comfortable middle-class women, were willing to do. It was also difficult to find an arena to fight in. The U.S. executive branch was no help, nor was the Congress. (One senator declared on the floor, “If women are allowed to vote, every man’s life will become hell on earth.”) The courts were not willing to hold that the Fourteenth Amendment applied to women.

Women found an unexpected arena in state politics. Not in the settled eastern states, where well-to-do women could argue they had a good life without civil rights, but in the scrambling, dangerous life in states on the western frontier, where women worked side by side with men to carve a life out of the wilderness. The territory of Wyoming allowed women to vote, and when it applied for statehood it refused to yield to the congressional demand that it disenfranchise women. Wyoming was admitted to the union in 1890 as the first state where women could vote.
Although women’s rights activists had been pursuing a national strategy without much luck, the state-level effort promised more, but slow, success. Remember that rights equal power! Strong industrial and liquor interests, who bought into the narrative that women were pure and good, feared that saloons would be shut down and women would prevent profitable but exploitative labor practices if they had political power. They waged a fierce battle against women’s suffrage, but the state-level effort slowly yielded real results. By 1912, women could vote in states that accounted for fifty-five electoral votes for the presidency.

The Nineteenth Amendment, granting women the right to vote, was finally ratified in 1920, the result of

- The state strategies combined with the national movement
- The fact that women took on more powerful positions and in some cases largely ran the country while men fought World War I in Europe
- A growing international sense that the United States was a leading democracy (that still did not allow half its white population to vote)

To give you an idea of the length of the process, only one child who had been brought by her parents to the Seneca Falls Convention was still alive to vote when the national right was guaranteed.

No. The new amendment said only that no state could refuse them the right to vote. More equal rights, including a guarantee of equal treatment by the laws that would have raised gender to the level of a suspect class, would have required the passage of the Equal Rights Amendment. Although the ERA made it through Congress in 1972, it had to be ratified by the states, and campaigners never managed to get enough support for it. That is partly because Roe v. Wade was decided in 1973, giving women reproductive autonomy, which was one of the things they sought. The Supreme Court, too, began to apply Fourteenth Amendment protections to women, which also took some of the energy out of the movement to pass the ERA. Finally, many people feared the change the ERA would bring. They recognized,

SO THE NINETEENTH AMENDMENT MEANT WOMEN WON EQUAL RIGHTS?

Nineteenth Amendment: the 1920 constitutional amendment granting women the right to vote

Equal Rights Amendment: a constitutional amendment passed by Congress but never ratified that would have banned discrimination on the basis of gender
rightly, that strict scrutiny meant that laws that benefited women would be subject to the same scrutiny as those that disadvantaged them. Opponents of the amendment argued, for instance, that women could be drafted and sent to war if the ERA passed. At a time when few women served actively in the military, that seemed like a frightening prospect.

Even though the ERA was not ratified, women’s legal status has improved to a large extent. The Lilly Ledbetter Act, signed by President Obama in 2009, requires equal pay for equal work, although a wage gap between men and women remains. There also continues to be a glass ceiling that women have not succeeded in breaking, making the majority of the population a minority in boardrooms across the United States, in Congress, on the Supreme Court, and in the other places where power is wielded.

And, of course, one big glass ceiling that women have not yet managed to fracture is the one giving them access to the Oval Office. Regardless of one’s views of her politics, Hillary Clinton’s two runs for the presidency revealed a good deal of latent sexism in the media and American politics generally. She was criticized for having a shrill voice; for being weak and sickly; and for her choice in clothing, makeup, and hairstyles—none of which had anything to do with her political experience or readiness to be president.

More insidiously, the gendered coverage in the media held Clinton to a different standard than it did her opponents. American ideas of what constitutes leadership are very much based on models provided by the first forty-five presidents of the United States and, therefore, are inescapably based on male role models. When women embrace those characteristics, they are seen as unfeminine, unlikable, and inauthentic, and when they try to define the role differently, they are not seen as leaders.

Cultural attitudes toward woman are undoubtedly changing. Reactions to the openly misogynistic statements made by the current president and the scandals that the #MeToo movement have revealed have signaled a fundamental shift in the kinds of behaviors considered acceptable on the part of powerful men. The #MeToo movement has displaced men of enormous clout in the political, entertainment, news, and sports industries and, maybe more important, empowered women at the individual level to run for office.
and try to change the basic rules of the game. The 2016 midterm elections brought over 100 women into the House of Representatives, and rallied record numbers of women to vote for them.

This chapter’s GenGap box examines generational attitudes toward racial, ethnic, and gender issues.

3.10 THE PERSISTENCE OF INEQUALITY IN AMERICA

America is still, in real ways, a nation with pervasive racism and systemic gender bias that most citizens often do not recognize, especially in their own selves. Indeed, given the nation’s history, it would be amazing if most Americans did not hold racialized and gendered views of each other—that is, if they did not act on the basis of unconscious stereotypes or assumptions about other Americans based on their race, ethnicity, gender, or sexual orientation. Some social scientists call the tendency for fleeting thoughts that confirm existing stereotypes to pass through our minds implicit bias—those thoughts don’t mean that we are racist or sexist, but they do mean that we are subject to social conditioning that helps sort the world into patterns. When those thoughts become the basis for actions, we have crossed a line.

The United States is at a moment of profound demographic change. By 2050, most of you reading this book will be well into middle age, and the working population you will be part of will be predominantly nonwhite. That means, for the first time in American history, whites will no longer be the majority but rather will be one minority group among other minority groups and will be outnumbered by people of color. Gender patterns are in flux too. Women already outnumber men, and if current trends continue, women will be at least as likely as men (if not more likely than them) to have a college or advanced degree.

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gender bias: systemic ways of treating women differently to their detriment
stereotypes: assumptions about other people based on their race, ethnicity, gender, or sexual orientation
implicit bias: the tendency for passing thoughts to confirm existing stereotypes in our minds, even if we quickly catch them

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Maybe a natural consequence of the fact that younger generations are more diverse and are exposed more frequently to people whose experiences differ from their own is that they are also more likely than older generations to think that discrimination, rather than personal failings, is the major barrier to blacks’ progress. Over half of Millennials hold that view; just over a quarter of the Silent Generation do.

Perhaps it is not surprising that younger generations are also more open to immigration, with nearly 80 percent of Millennials feeling it strengthens the nation. With the Republican Party taking such a hard line against immigration, it is easy to see connections between these data and those that show younger people tend to be more liberal.

A survey that asked only female Millennials and Baby Boomers about their perceived gains against gender discrimination showed a positive change, but still little support for the notion that women and men are treated the same in the workplace. At best just over a quarter of Millennials think things have changed for the better in the past ten years.
3.3: PERCENT WHO AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS (“STRONGLY AGREE”)

![Bar chart showing the percent who agree or disagree with the following statements among Millennial Women and Boomer Women.]

- **I believe I am paid fairly for the work I do**
  - Millennial Women: 20
  - Boomer Women: 10

- **Over the past 10 years, the position/treatment of women has improved in my country**
  - Millennial Women: 27
  - Boomer Women: 16

- **Men and women are treated equally in society**
  - Millennial Women: 21
  - Boomer Women: 10


**TAKEAWAYS**

- **Changes in social attitudes are generally slow, and race and gender are prime examples.** Although public opinions on some issues, like marriage equality, have turned remarkably fast, those that deal with who is perceived as having power in society and who is seen to be losing it can be tightly held and slower to change.

- **Almost all generations, especially younger ones, say immigration strengthens the nation.** How will these people deal at the ballot box with those who are trying to cut off or limit immigration?

- **Millennial women really do fare better in the marketplace than their moms did.** And yet, large majorities still perceive bias. How might the frustration behind this perception have helped fuel the Women’s Marches, the #MeToo movement, and the number of women candidates running in 2018?
Remember that rights equal power. That means these demographic changes and the rights claims associated with them are likely to cause some social upheaval.

Many of the signs of that upheaval are already evident as groups jockey to hang on to or acquire more rights and privilege. We see it in Barack Obama’s election to the presidency and the subsequent challenges to his citizenship and some people’s hostility to his presidency. And we see it in the racialized tone of Donald Trump’s campaign rallies, in white supremacist marches in response to the removal of Confederate monuments and the growth of the alt-right, in attempts to crack down on immigration from various countries and religious groups, in refusals to support women’s reproductive rights or LGBTQ rights in the name of religious freedom, and in the criticism directed at athletes who protest police violence against blacks by kneeling during the national anthem at sports events.

All of these events say something about the turbulence of the times and the inevitable power shifts in a changing society. It is impossible to say right now how those power relationships will end up, but it is useful to look back and see how they have evolved over time.

Big Think

➡️ Is it possible to keep the divisions that separate religious groups out of politics in a democracy?
➡️ Will Congress try to regulate social media platforms? And is regulation of tech companies even possible given the degree to which social media are automated?
➡️ How do your own implicit biases affect your political and social judgments?
➡️ Can you imagine a nation without systemic power biases? What would it look like?

Key Terms

CONCEPTS

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### IMPORTANT WORKS AND EVENTS

- Bill of Rights (p. 75)
- *Brown v. Board of Education* (p. 96)
- Equal Rights Amendment (p. 102)
- Thirteenth Amendment (p. 94)
- Fourteenth Amendment (p. 77)
- Fifteenth Amendment (p. 95)
- Nineteenth Amendment (p. 102)

### KEY INDIVIDUALS AND GROUPS

- accommodationists (p. 80)  
- judicial interpretivists (p. 89)  
- strict constructionists (p. 89)  
- civil rights movement (p. 98)  
- separationists (p. 80)