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Civil Liberties and Civil Rights

AMERICAN GOVERNMENT

POWER AND PURPOSE

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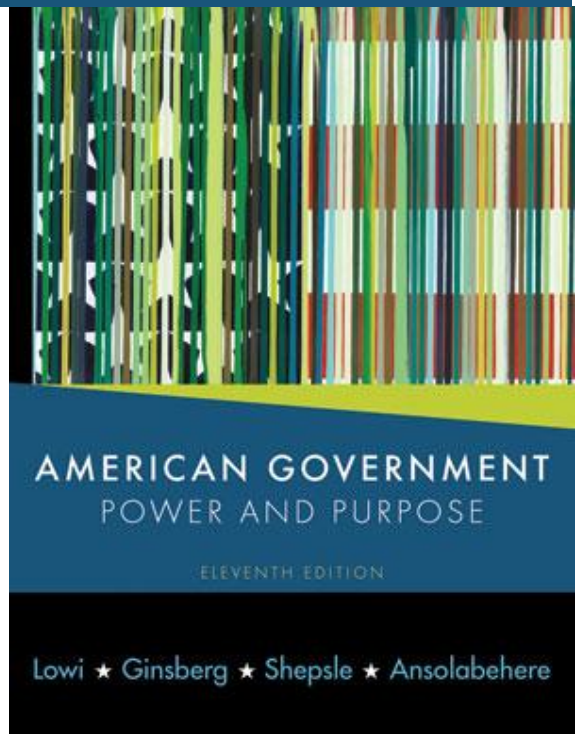
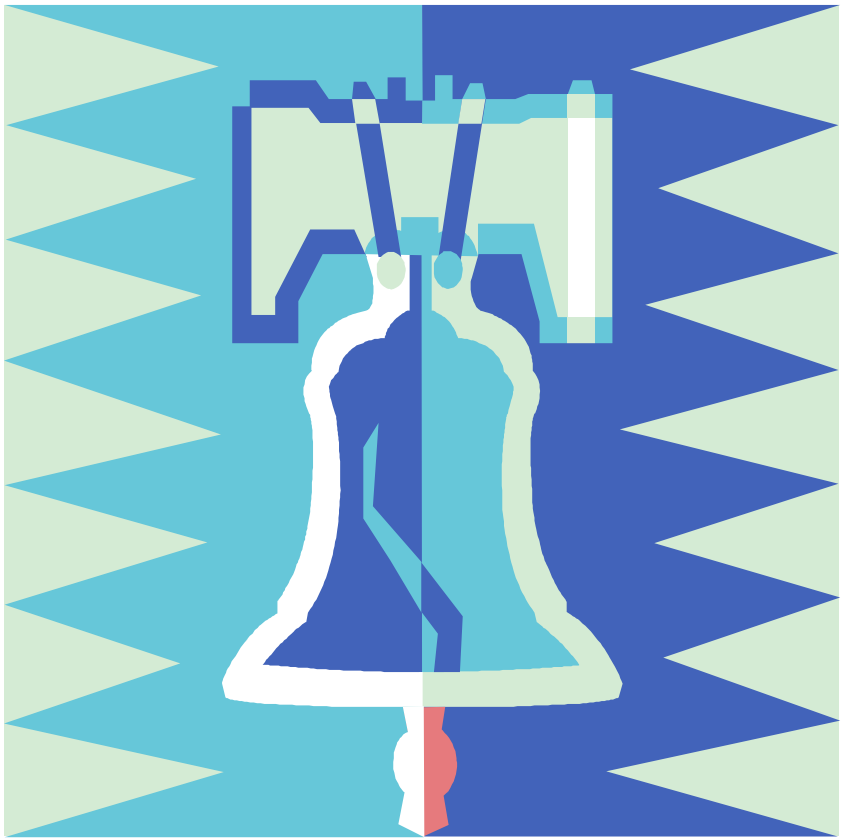


Civil Rights and Civil Liberties



Although we tend to use the terms interchangeably, a useful distinction can be made between

civil liberties
and
civil rights.

Civil liberties are protections of citizens from unwarranted government action.

Civil rights describe government's responsibility to protect citizens.

The History Principle:
How we got here matters.

The history of rights and liberties in America involves the changing nature of the federal relationship. The national government has increasingly protected citizens from other government agencies and private actors.

The Bill of Rights

The first ten amendments to the Constitution constitute the Bill of Rights.

- These amendments were designed to protect the basic freedoms of American citizens.
- The meanings and applications of these rights have changed over time as judicial interpretation of these freedoms has changed.

The freedoms included in the Bill of Rights include:

- the right to free speech;
- the right to the free exercise of religion;
- prohibitions against unreasonable searches and seizures;
- guarantees of the due process of law.

As restraints on government action, the guarantees provided in the Bill of Rights might better be understood as a *Bill of Liberties*.

Although it has been widely popular throughout most of American history, the Bill of Rights was controversial at the time of the Founding.

In *Federalist 84*, Alexander Hamilton (as Publius) objected to calls for a "Bill of Rights."

Hamilton argued:

1. The Constitution already contained sufficient protections of rights.

Hamilton further argued:

2. “Bills of rights” are appropriate in monarchies but are, at least, unnecessary in republics because, as he said, in a republic “the people surrender nothing” and “retain everything.”

Moreover, Hamilton argued:

3. By "enumerating" rights, the Bill of Rights would actually *restrict* the rights Americans enjoyed because

"They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"

In partial response to Hamilton's third criticism of the Bill of Rights, the Ninth Amendment was added to the Constitution.

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

Like Alexander Hamilton, James Madison too thought the main text of the Constitution, particularly the separation of powers and federalism, provided important protections of rights.

"In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

--James Madison, *Federalist 51*

Implicit in Madison's "***double security***" for "the rights of the people" is the idea that the central government will protect the people from the states and vice versa.

How well has the federal division of power provided this "security" to "the rights of the people"?

Dual Citizenship and the Nationalization of the Bill of Rights

Throughout American history, the Courts have wrestled with the question of whether the Bill of Rights restrains only the national government or whether its protections applicable to the states.

Barron v. Baltimore (1833)

Barron sued Baltimore for rendering his wharf useless on that grounds that the city had violated his Fifth Amendment rights by taking his property without “just compensation.”

The Supreme Court established “dual citizenship” by ruling that the Fifth Amendment and the Bill of Rights only protected citizens from the national government.

"The fifth amendment must be understood as restraining the power of the general government, not as applicable to the States."

—Chief Justice John Marshall, Majority Opinion, *Barron v. Baltimore* (1833)

As a precedent, *Barron v. Baltimore* established a long shadow on future interpretations of rights protection.

Although these subsequent cases reaffirmed the concept of “dual citizenship,” the adoption of the Fourteenth Amendment in 1868 seemed to challenge the concept of “dual citizenship.”

At first, the Fourteenth Amendment seemed to affirm the concept of dual citizenship.

"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."

The next line, however, seems to indicate that the national government might now provide Madison's double security and protect rights from state encroachment.

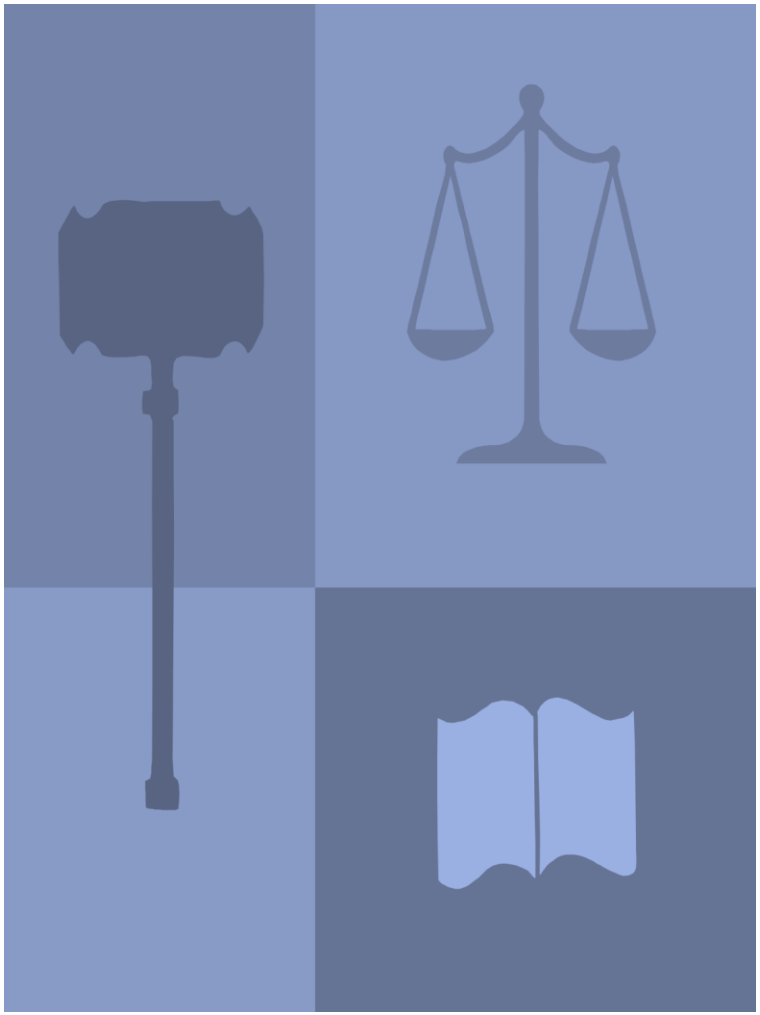
"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Despite this language in the Fourteenth Amendment, the U.S. Supreme Court reaffirmed the *Barron* precedent in the *Slaughterhouse* cases in 1873.

Slaughterhouse's narrow interpretation of the Fourteenth Amendment set the stage for a process by which the Bill of Rights would be "selectively incorporated" into the Fourteenth Amendment.

Selective Incorporation

On a case-by-case basis, the Supreme Court began recognizing a role for the national government in protecting citizens from state governments.



Incorporation of The Bill of Rights into The Fourteenth Amendment

Selected Provisions and Amendments	Date "Incorporated"	Key Cases
Eminent domain (V)	1897	*Chicago, Burlington, and Quincy Railroad v. Chicago*
Freedom of speech (I)	1925	*Gitlow v. New York*
Freedom of the press (I)	1931	*Near v. Minnesota ex rel. Olson*
Free exercise of religion (I)	1934	*Hamilton v. Regents of the University of California*
Freedom of assembly (I)	1939	*Hague v. Committee for Industrial Organization*
Freedom from unnecessary search and seizure (IV)	1949	*Wolf v. Colorado*
Freedom from warrantless search and seizure ("exclusionary rule") (IV)	1961	*Mapp v. Ohio*
Freedom from cruel and unusual punishment (VIII)	1962	*Robinson v. California*
Right to counsel in any criminal trial (VI)	1963	*Gideon v. Wainwright*
Right against self-incrimination and forced confessions (V)	1964	*Mallory v. Hogan* *Escobedo v. Illinois*
Right to privacy (III, IV, and V)	1965	*Griswold v. Connecticut*
Right to remain silent (V)	1966	*Miranda v. Arizona*
Right against double jeopardy (V)	1969	*Benton v. Maryland*

A first “wave” of incorporation occurred in the 1920 and 1930s, applying key elements of the First Amendment to the states.

Palko v. Connecticut (1937) represents an important interlude wherein the Supreme Court refused to incorporate “double jeopardy” (Fifth Amendment) on the basis that it is not a right that is “*implicit in the concept of ordered liberty*.”

In the 1960s, a second wave of incorporation focused on applying and enforcing the rights of the criminally accused in the states.

Whereas at the beginning of the twentieth century, the Supreme Court had incorporated into the Fourteenth Amendment only the “eminent domain” clause of the Fifth Amendment, by 1965 and 1973 the Court had incorporated the “penumbral” (or implied) right to privacy into the Fourteenth Amendment in *Griswold v. Connecticut* and *Roe v. Wade*.

The Bill of Rights Today

The provisions of the Bill of Rights are subject to ongoing evolution and interpretation by the Courts, which give clearer meaning and precise application to the Constitution's various protections.

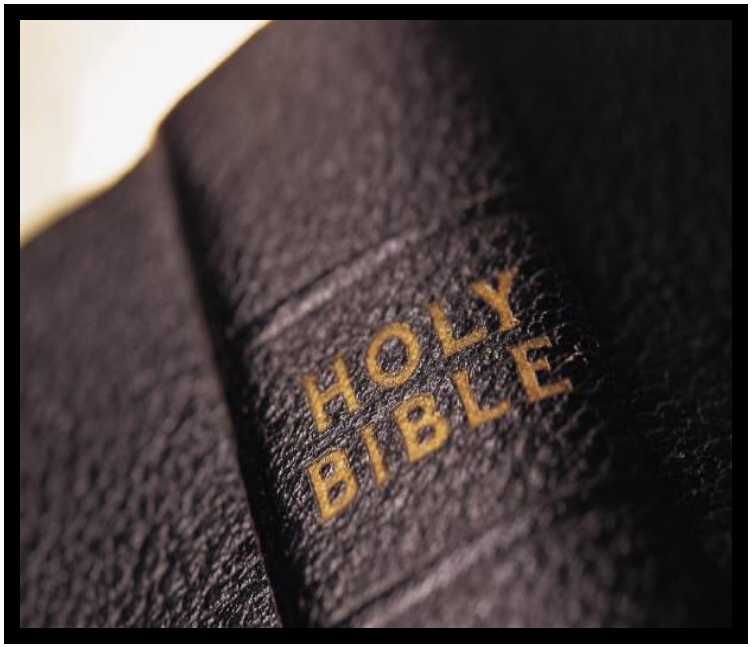
The First Amendment and Freedom of Religion

Elements of the First Amendment with respect to religion:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof";

- Separation of church and state
- Free exercise of religion

Although Thomas Jefferson believed in a “wall of separation” between the church and the state, Supreme Court interpretations of the First Amendment’s “establishment clause” have left room for some mingling of the government and religion.



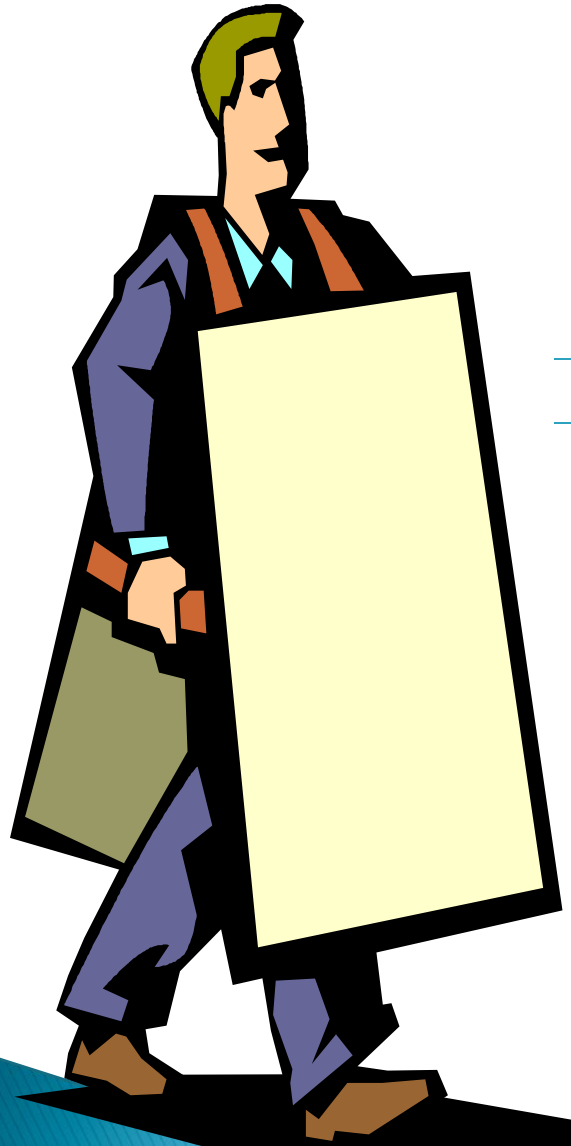
In *Lemon v. Kurtzman* (1971), the Supreme Court held that government aid to religious schools would be constitutional if they met three criteria, known as the Lemon test.

Lemon Test:

1. The government action must have a secular purpose;
2. Its effect should neither advance nor inhibit religion;
3. It must not lead to excessive entanglement with religion.

The First Amendment also guarantees citizens' rights to believe and practice whatever religion he or she chooses; this is the **free exercise clause**.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), further protecting citizens' free exercise of religion, though key elements were invalidated by the Supreme Court in the 1997 *City of Boerne v. Flores* case, wherein the Court reserved the institutional right to balance religious liberty claims against public policy.



First Amendment protections of **freedom of speech and of the press** enjoy some of the strongest constitutional protections.

Encroachments on these First Amendment rights often require that the government meet a **strict scrutiny** standard, which requires the government to show that its action is constitutional.

The Second Amendment

<u>Second Amendment:</u>

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Ambiguity and disagreement over the importance of the clause of the Second Amendment concerning a "well regulated Militia," has left Second Amendment protections problematic.

Advocates of Second Amendment rights generally adopt legislative strategies against gun control legislation rather than taking their cases to court.

One notable victory for gun control advocates was the 1994 Brady bill, passsed by a Democratic Congress and signed by President Clinton, which provided for background checks on handgun purchases and banned assault weapons.

Still, in 2004, a Republican Congress and President George W. Bush pleased advocates of Second Amendment rights by allowing the assault weapons ban to expire without renewal.

Rights of the Criminally Accused

Fourth Amendment:

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

Fifth Amendment:

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

Sixth Amendment:

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

Eighth Amendment:

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

How are the Fourth, Fifth, Sixth, and Eighth Amendments' protections upheld in practice?

Rules upholding Constitutional rights of the accused:

- The **exclusionary rule** excludes evidence obtained in violation of Fourth Amendment protections against warrantless searches and seizures.

- The **Miranda rule** ensures that arrested persons must be informed of their rights to “remain silent” and to have legal counsel.

The Right to Privacy

In *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), the Supreme Court held that American citizens enjoyed a "penumbral" (or implied) right to privacy.

In *Griswold*, Justice William O. Douglas argued that the Third, Fourth, and Fifth amendments suggested a "zone of privacy."

Although opponents of abortion and others skeptical of a "right to privacy" argue that the Court inappropriately created this right, Justice Arthur Goldberg, concurring with Douglas's opinion, cited the Ninth Amendment as additional justification for the right to privacy.

Ninth Amendment:

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

Inasmuch as the “privacy right” was forged in regard to birth control in the *Griswold* case, it has subsequently been applied not only to abortion cases but also to cases involving gay rights.

In *Lawrence v. Texas* (2003), the Supreme Court argued that gays are “entitled to respect for their private lives” out of reach of the state.

Civil Rights

Coinciding with the increased rights protection via selective incorporation, the Supreme Court and the national government also began to expand **civil rights** protection for African Americans.

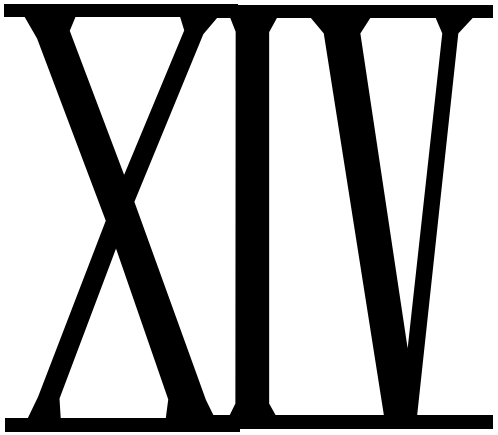
Civil Rights are legal or moral claims for protection that citizens are entitled to make upon the government.

Whereas **civil liberties** concern those things that governments cannot do *to* citizens, **civil rights** involve citizens appealing to the government to protect them from other citizens, social actors, or some aspect of the government itself.

The “Civil War amendments” to the Constitution are an important legal basis for civil rights protection in the United States.

- The Thirteenth Amendment abolished slavery.
- The Fifteenth Amendment guaranteed voting rights for black men.
- Most directly, the Fourteenth Amendment provides the basis for national government protection of rights.

Just as the Fourteenth Amendment was the basis for the selective incorporation of the Bill of Rights, interpretations of its **equal protection clause** similarly are the basis of many of the debates of civil rights.



Equal protection clause: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In its 1896 *Plessy v. Ferguson* ruling, the Supreme Court upheld the racial segregation system of Jim Crow, arguing that "separate but equal" train cars and other facilities did not violate the Fourteenth Amendment's "equal protection" clause.

"Laws permitting, and even requiring, their separation [by race] . . . do not necessarily imply the inferiority of either race to the other."

—Justice Henry Billings Brown
Plessy v. Ferguson (1896)

***The Policy Principle**:*

Political outcomes are the products of individual preferences and institutional procedures.

Although the *Plessy* decision was a setback for the civil rights movement, the "separate but equal" ruling became an important institutional rule that they could use to argue in court cases like, for example, *Sweatt v. Painter* (1950).

Plessy's "separate but equal" ruling held until it was overturned in *Brown v. Board of Education* in 1954 when the court found that, in the words of Chief Justice Earl Warren, *"in the field of public education the doctrine of 'separate but equal' has no place."*

In *Brown v. Board of Education*, the Supreme Court struck down the "separate but equal" doctrine and the practice of separation on the basis of race as "inherently unequal."

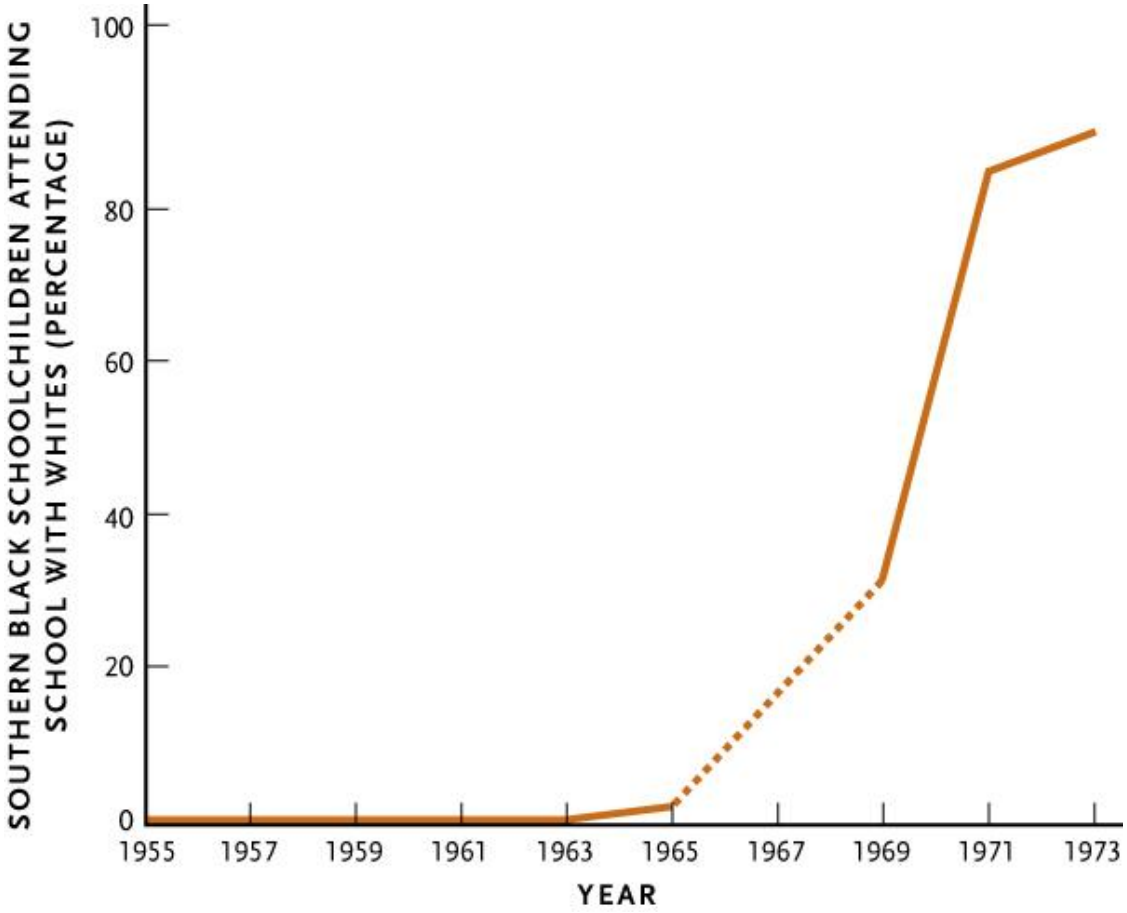
After *Brown*, states could no longer use race as a factor in discrimination in law and the court would apply its **strict scrutiny** standard to any case related to racial discrimination.

The Supreme Court's decision in *Brown* had important political consequences.

First, it began a **slow** process of school desegregation that was often met with resistance from state and local governments.

Insert Figure 4.1 here

The Percentage of Southern Black School Children Attending School with Whites, 1955–73



Moreover, it sparked greater resolve for a growing civil rights movement that would use social protest to press for political change, culminating in important congressional actions, particularly the 1964 Civil Rights Act and the 1965 Voting Rights Act.

Civil Rights after *Brown*

After winning in the Supreme Court, civil rights groups turn to Congress for further changes.

Important divisions in Congress's Democratic majority—between its progressive northern wing and its conservative southern wing (which included many members who favored segregation)—kept Congress from considering and passing important civil rights legislation.

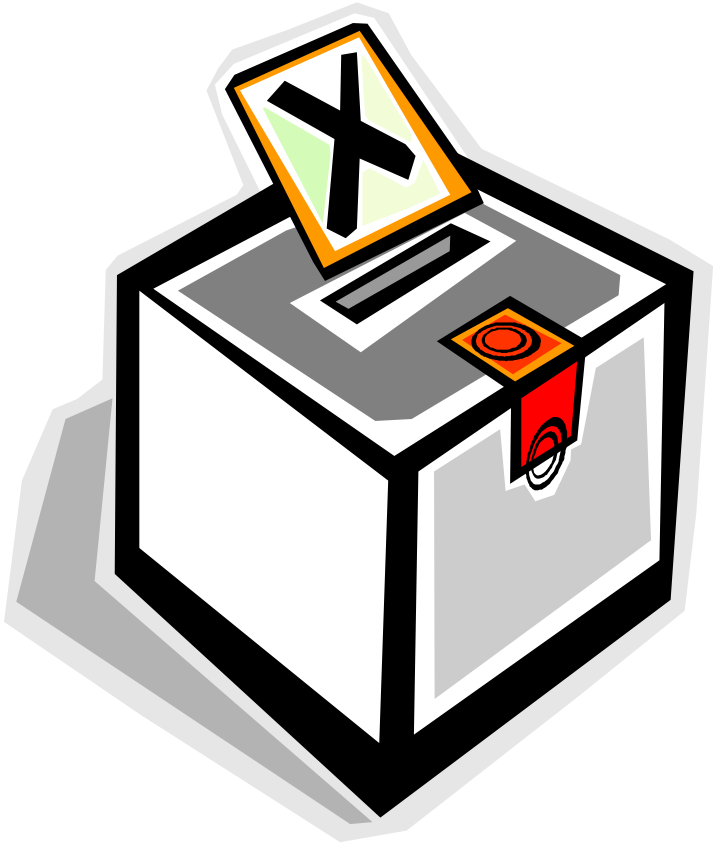
By 1964, three things had changed in Congress that facilitated consideration and passage of Civil Rights legislation.

1. Larger Democratic majorities in Congress;
2. Cooperation of key northern Republicans;
3. The skilled legislative leadership of President Lyndon Johnson.

In 1964, Congress passed the Civil Rights Act, which extended the national government's role in rights protection.

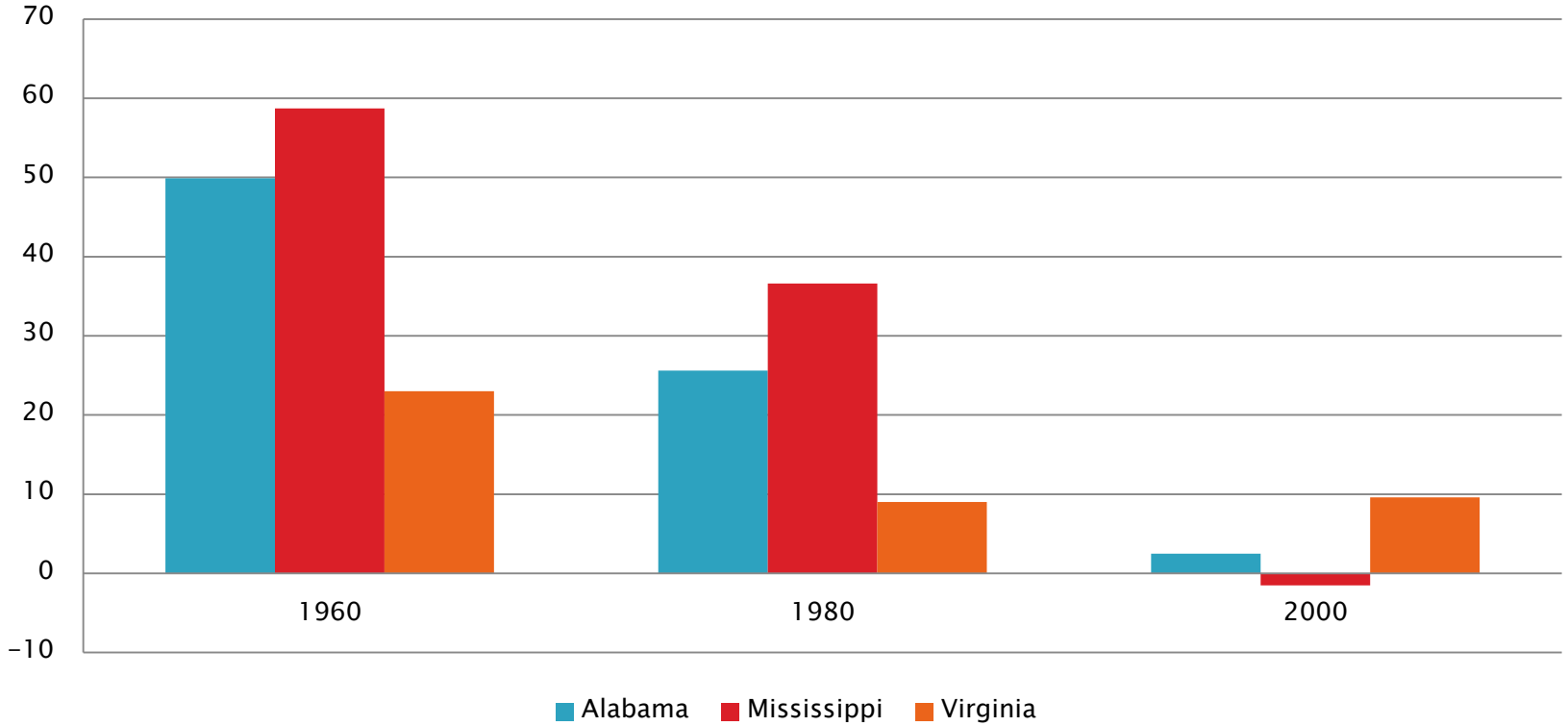
The 1964 Civil Rights Act:

- Protected voting rights;
- Protected access to public accommodations;
- Ensured the desegregation of public schools;
- Outlawed discrimination in employment on the basis of race, religion, and gender.



In 1965, Congress passed the Voting Rights Act, which protected African Americans' right to vote, particularly in those southern states that had a history of obstructing the African American vote.

Voter Registration in Selected Southern States: Differences between Percentage of White and Nonwhite Voting Age Populations Registered to Vote, 1960–2000



Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments,* 3rd edition (Washington, DC: CQ Press, 2003), p. 759. Figures represent the percentage of the white voting-age population registered to vote minus the percentage of nonwhite voting-age population registered to vote.

***The Policy Principle**:*

Political outcomes are the products of individual preferences and institutional procedures.

The adoption of the 1964 Civil Rights Act and the 1965 Voting Rights Act established institutional procedures that expanded African American political power in ways that would allow for African Americans' preferences, providing a greater voice in all manner of political decisions, including the selection of African American officeholders.

Additional Art for Chapter 4

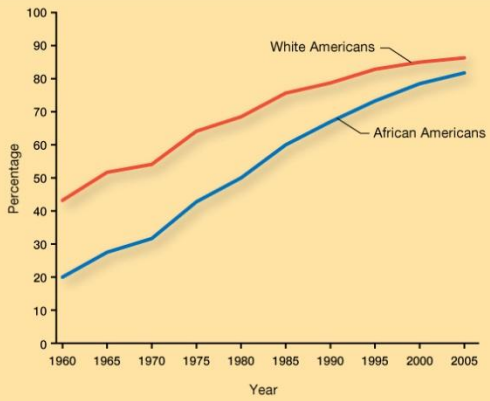
ANALYZING THE EVIDENCE

Racial Equality

As we discuss in this chapter, civil rights is a major political issue in the United States. Especially since the 1960s, most forms of racial discrimination have been prohibited by law, and a large number of government programs have been designed to promote greater political, social, and economic equality between black and white Americans. Despite these efforts, progress in the direction of racial equality has been uneven. As we can see in the following figures and tables, some data suggest that the United States has made great strides toward the color-blind society envisioned by the early leaders of the civil rights movement. Other data, though, indicate that we have a long way to go. The fact that America's president is black does not mean that complete racial equality has been achieved in the U.S.

In assessing racial equality in the United States, we could also consider numerous other statistics and other racial and ethnic groups. Depending upon which evidence is selected, one might argue that racial equality in the United States has increased substantially in recent years or that it has not.

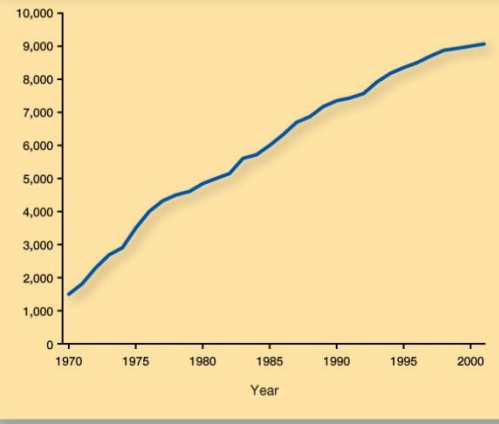
HIGH-SCHOOL GRADUATION RATES



One encouraging statistic is the change in black versus white levels of educational attainment over the past 45 years. In 1960, black Americans were less than half as likely to finish high school or graduate from college as whites. Today, the percentage of blacks graduating from high school is nearly identical to the percentage of whites who earn diplomas.

Source: U.S. Census Bureau, www.census.gov (accessed 6/22/09).

AFRICAN AMERICANS ELECTED TO OFFICE



Progress has also been made in the political arena. As recently as 1970, only 1,469 African Americans held elected office in the United States—out of approximately half a million federal, state, and local offices. By 2001, the last year for which the government collected data, there were more than 9,000 black elected officials, an increase of more than 600 percent.

Source: Joint Center for Political and Economical Studies, "Black Elected Officials," jointcenter.org/BD/detail/BEO.htm (accessed 6/22/09).

In the economic realm the gap between blacks and whites has decreased more slowly. In 2007, the *mean* income of black men was only 66 percent of the mean income for white men. This represented only slight progress for black men since 1980. Although black women's mean income was close to that of white women in 2007, it was even closer in 1980—so black women have lost ground relative to white women during this period. The table below shows *median* incomes, which also reflect the gap between blacks and whites, especially among men.

MEDIAN INCOME (2005 Dollars)

	Men				Women			
	1980	1990	2000	2007	1980	1990	2000	2007
White	31,931	32,557	35,877	35,141	11,852	15,866	19,360	21,069
Black	19,188	19,789	25,698	25,822	10,973	12,807	19,121	19,752

Source: U.S. Census Bureau, www.census.gov (accessed 6/22/09).

This concludes the presentation slides for Chapter 4: Civil Liberties and Civil Rights

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