Civil Rights and Liberties:
An OER Textbook for Undergraduate Students

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https://catalog.archives.gov/id/541997

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Getchell-Bastien, H. (2025). *Civil Rights and Liberties: An OER Textbook for Undergraduate Students.* https://www.professorbastien.org.

Because this resource addresses civil rights, civil liberties, and the law, it is a living document that will be updated regularly as legal developments occur. Please email me at hgetchellbastien@massbay.edu with any questions, comments, concerns, or suggested updates related to this resource.

Chapter One

Chapter One
Introduction and Overview

Chapter Outline

A. Why I Created This Resource

B. Scope and Focus

C. How to Use This OER

D. Before You Begin

E. Resources

F. About Professor Bastien

A. Why I Created This Resource

OERs (Open Educational Resources) are free educational materials that anyone can use, share, and adapt according to the permissions the author has selected through a Creative Commons license. I created this OER after more than twenty years of teaching civil rights and liberties because I was never able to find a textbook that met my students' needs. Although there are many excellent textbooks available that include the topics covered in my introductory civil rights course, most are either written for graduate students and assume an advanced academic background, or they are designed for high school students and do not provide enough detail for college-level analysis. Additionally, textbooks that pertain to civil rights are often expensive and become outdated very quickly because the law is constantly changing.

It is my hope that this OER will provide undergraduate students and their professors with a resource that is free, user-friendly, and comprehensive. Because it is available online, the text can be easily updated to reflect new cases, laws, and developments. Students who have never taken a course in civil rights should be able to understand the materials presented here, and if they find any constitutional law topics confusing, the resources listed below will be helpful. Conversely, students who have always loved learning about their rights should be able to discover new information that keeps them engaged.

Speaking of staying engaged, I realize that some students may be studying this topic only because it is a required course for their major, while others may feel

cautious about studying civil rights because of the constant, divisive coverage of politics in the media. Regardless, learning more about your rights and increasing your civic knowledge is empowering. As John Adams said in 1765, ***"Liberty cannot be preserved without a general knowledge among the people, who have a right...and a desire to know."***

B. Scope and Focus

This OER is designed for introductory-level undergraduate courses on civil rights and liberties. My goal is to provide a resource with more depth and context than the textbooks typically assigned in high school courses, while avoiding some of the overly technical concepts found in law school textbooks. Although this is an original resource, many OERs include "remix" material", which refers to adapting or combining existing openly licensed educational materials to create new resources. Readers and instructors are welcome to remix this resource to meet the needs of their own courses as long as appropriate attribution is provided to **Getchell-Bastien, H. (2025), *Civil Rights and Liberties: An OER Textbook for Undergraduate Students* (https://www.professorbastien.org).**

The text starts by providing a survey of civil rights and civil liberties in the United States, beginning with an examination of the Constitution and the role of the Supreme Court. It continues by looking at core doctrines of constitutional law, such as due process, the incorporation doctrine, and limits on judicial authority. After that, it analyzes First Amendment protections for religion, free speech, and related rights. Following this, it explores the Second Amendment, as well as the rights of the criminally accused. This OER also assesses civil rights as they relate to race, national origin, gender, sexual orientation, age, disability, and immigration status, as well as reproductive rights, privacy rights, and voting rights. This resource concludes by discussing emerging rights and future challenges to our democracy.

C. How to Use This OER

For Students: The Table of Contents on the home page lists all chapters in the OER, and the hyperlinks at the top of the page and within the Table of Contents let readers jump directly to any chapter. The topics are arranged in the order commonly used in civil rights courses, although some professors using this resource may choose to assign the chapters in a different order or focus only specific topics. Each chapter is written to stand on its own, allowing students to

understand the material without reading the chapters in sequence. Because this OER will be updated frequently to reflect changes in the law, and its digital format allows for direct links to external resources, I have not included a traditional glossary. Instead, key terms throughout the text are hyperlinked to reliable external sources that provide definitions. For any additional terms that are not directly linked, please refer to the list of resources below.

For Professors: Although this OER was written for undergraduate college students, it may also be useful for high school educators who teach government, civil rights, or history courses. Those of us who have experience teaching civil rights and liberties to high school and community college students know that supplementing reading assignments with class discussions exposes students to multiple perspectives and deepens their understanding of the assigned topics. **Before doing so, it is important to establish classroom norms**. Columbia University's Center for Teaching and Learning provides practical strategies in this article for building a high-trust, low-stress classroom environment with a specific focus on setting expectations and partnering with students to establish such norms, especially when dealing with controversial topics. (Columbia CTL, n.d.). I also recommend designing assessments that go beyond terminology review and memorization by asking students to apply course concepts to real-world situations, reflect on personal experiences, and demonstrate meaningful understanding of course concepts and how they apply to our world, rather than asking for simple recall. Nicole Messier of the University of Illinois Chicago has developed **a teaching resource t**hat helps educators design such assessments (Messier, n.d.).

D. Before You Begin

- **Students, get ready to read.** Understanding civil rights and liberties requires reading. Videos, podcasts, and other resources can be engaging, and they certainly complement reading cases. However, students must commit to spending time each week reading the assigned material in this OER and learning how the Constitution has been interpreted. These chapters are not terribly long, and participating in a weekly session of focused reading, free from outside distractions, is essential to truly grasp the foundational concepts. Additionally, the assigned cases in this OER are presented either in a concise narrative format or as 6–8 page excerpts, rather than full opinions. Supreme Court decisions often range from 30 to 70 pages, and some exceed 100 pages, so I have condensed the cases as much as possible My goal in writing this OER is

to provide the most relevant information for each topic without overwhelming or boring readers. However, a reasonable amount of reading is necessary.

- **Beware of chatbots.** Please note that AI summaries of cases are often unreliable because they can omit important nuances of cases and even invent details or fake cases. **Stanford University published a study that found leading AI-powered legal research tools from well-respected companies still "hallucinate" false or unsupported legal information in up to one-third of responses.** Dozens of lawyers have already been sanctioned for submitting briefs that cited entirely fictitious AI-generated cases (Stanford HAI, 2024).
- **Learn the basics of how to read a case.** Students need to be familiar with the basic components of a Supreme Court opinion and certain key terms before using this resource. Please read **How to Read a U.S. Supreme Court Opinion,** a helpful article by the American Bar Association. **Make sure to pay attention to these terms in the article: Affirm, Case Citation, Certiorari, Concurring Opinion, Disposition, Dissenting Opinion, Main Opinion/Majority Opinion, Remand, Reverse, Syllabus, Void, Vacate.** These twelve terms are used frequently in the rest of the chapters in this OER, so knowing what they mean *before* reading anything else is essential.
- **Bookmark helpful websites.** The website **Oyez.org** is very popular because it provides short case summaries for almost all Supreme Court cases. It is helpful for getting a quick overview of a case or clarifying things you might not understand, but it doesn't provide enough details for many questions professors might ask about cases. Think of it as a companion to reading the excerpts included in the chapters, not a replacement for reading them.
- **Know where to find full cases.** If you want to read an entire case that I summarized in this OER because you feel like the excerpt did not give you enough context, you can look up cases on the **Supreme Court's official website** or **Cornell Law School's site,** which provide the full text of many Supreme Court cases, as well as articles that help explain the law.

E. Additional Resources

Please note that the URLs listed below are presented as plain text rather than active hyperlinks in order to avoid triggering automated security filters.

1. **Constitution Center – Interactive Constitution** This interactive site explains each clause of the Constitution and posts essays by scholars from a variety of perspectives **https://constitutioncenter org/the-constitution**

2. **Cornell Wex Legal Dictionary/Encyclopedia**
   This is one of the most user-friendly legal dictionaries online. It explains legal terms in plain language and often links to related cases or laws, making it a great companion when you come across unfamiliar vocabulary.
   https://www.law.cornell.edu/wex

3. **First Amendment: Cases, Controversies, and Contexts (Open Casebook)**
   This free, open textbook dives deep into First Amendment law. It includes major cases, discussions of real controversies, and explanations that put everything into context.
   https://open.umn.edu/opentextbooks/textbooks/first-amendment-cases-controversies-and-contexts

4. **Georgetown Law Library – Case Law Research Tutorial** If you are looking for a practical guide for beginners on how to find and read cases, this is a great website. **https://guides.ll.georgetown.edu/cases**

5. **Justia US Supreme Court Center** This site provides the full-text of most opinions, plus it provides summaries and links to state cases and statutes.
   https://supreme.justia.com

6. **The Law Dictionary.** This is a free, online legal dictionary. You can use this to look up terms you don't understand that are not already hyperlinked to a definition. **https://thelawdictionary.org/**

7. **Legal Information Institute (LII) – Cornell Law School**
   One of the pioneers in free online legal information, Cornell's LII makes the law accessible to everyone. You'll find the U.S. Code, Supreme Court opinions, federal rules, and other resources. **https://www.law.cornell.edu/**

8. **MassBay Community College Library – LibGuides**
   This is MassBay's library guide hub (LibGuides), where you can find their Constitutional Law resources, research tools, and primary source links. All colleges and universities have similar guides on their library websites.
   https://massbay.libguides.com/

9. **SCOTUSblog** If you want to read commentary on Supreme Court cases that have just been decided, this is a great site to access. It also provides plain-language case previews and updates on pending decisions.
   https://www scotusblog com

10. **Supreme Court Oral Argument Audio** The Supreme Court posts oral argument audio recordings and transcripts on this site, which can help you to connect written opinions with live arguments. **https://www.supremecourt.gov/oral_arguments/argument_audio.aspx**

F. About Professor Bastien

As of July 2026, I serve as the Dean of Business and Professional Studies at Northern Essex Community College in Massachusetts. Prior to that, I taught at Massachusetts Bay Community College for eight years, where I was a tenured Professor of Legal Studies and Government and the college's Civic Engagement Coordinator. I still teach the course Civil Rights and Liberties at MassBay, and during the summer, I teach Employment Law for Framingham State University's Master of Human Resources program.

I was a first-generation college student, and I earned my Associate of Arts from Northern Essex Community College, a Bachelor of Arts in Political Science from Bradford College, and a Juris Doctor from Suffolk University Law School. In addition to holding a Title IX Coordinator certification from the National Association of College and University Attorneys, I earned a certificate in Inclusive Teaching Practices at Fitchburg State University.

For the first decade of my career, I was a practicing attorney and focused on criminal defense, employment law, and general practice cases. I also taught part-time in a variety of settings, including an alternative high school, a vocational program for future law enforcement professionals, an inner-city honors academy, three community colleges, and a correctional facility. Eventually, I transitioned to full-time teaching before assuming my current role. I still maintain an active law license and periodically volunteer with the Massachusetts Bar Association Pro Bono Panel.

When I am not working, I enjoy spending time with my husband and son, going on easy hikes with my two rescue dogs, attending live music shows, swimming in the Atlantic Ocean or New Hampshire lakes, and relaxing with my sister, extended family, and a small circle of friends I have known for over thirty years.

Click here to see my LinkedIn profile.





Sources

Please note that the URLs listed below are presented as plain text rather than active hyperlinks in order to avoid triggering automated security filters.

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Chapter Two

Chapter Two
The Constitution of the United States

Chapter Outline

A. Historical Context

B. Separation of Powers and Federalism

C. Checks and Balances

D. Beyond the Core Framework: Articles IV–VII

E. Bill of Rights

F. Other Amendments

A. Historical Context

Before examining the Constitution, it is crucial to remember the historical context that helped shape its drafting, as well as the intentions of its framers. The Declaration of Independence was adopted by the Continental Congress in 1776, and one of its most famous quotes is, "***We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.***" This quote reflected the principles that supported the revolution that was already underway. The British were defeated in 1781, and the thirteen colonies officially became the United States in 1783 with the signing of the Treaty of Paris (National Park Service, 2022).

The Articles of Confederation were the nation's first governing document. They were drafted in 1777 and ratified in 1781. During this time period, the Articles' framers sought to establish a sustainable form of government and safeguard civil liberties. Most historians conclude they fell short on both counts. Those who wrote the Articles of Confederation feared concentrated power that resembled the British monarchy, so they created a weak Congress with limited responsibilities. The national government lacked the authority to tax, regulate commerce, or enforce laws, leaving it unable to pay debts, resolve disputes between states, or maintain a strong military. The weaknesses of the Articles became obvious during Shays' Rebellion in Massachusetts, when farmers protested outside county courthouses to stop foreclosures and debt proceedings caused by the national government's inability to tax under the Articles. The federal government was

initially powerless to respond and had to rely on a privately funded state militia to eventually suppress the rebellion. This demonstrated the need for a stronger national government (National Park Service, 2022).

Additionally, the Articles focused solely on the liberties of men who owned property. They failed to address the rights of the poor, enslaved people, Native Americans, and women. There is an emerging trend to dismiss this observation as **Critical Race Theory.** However, most historians contend that this observation is simply an accurate acknowledgment of the historical record (Duignan, 2025).

Students of history and civil rights interested in the competing interpretations of the founders' motivations are encouraged to consult primary sources. One useful resource is the **Founders Online database,** which offers a searchable collection of over 184,000 documents, including correspondence, speeches, and public papers by George Washington, Benjamin Franklin, Thomas Jefferson, Alexander Hamilton, John Jay, James Madison, and John Adams (National Archives, n.d.). Another useful source is the ***Federalist Papers,*** a collection of essays written by key drafters of the Constitution that were published in newspapers and pamphlets to persuade the public to support the new Constitution. These papers clearly explained the benefits of the separation of powers as well as the advantages of checks and balances. They also emphasized that any new government must limit the influence of factions and promoted governance by socially and economically established elites, arguing that educated leadership, structural restraints on power, and a strong national government help prevent tyranny, maintain stability, and protect property (Federalist Nos. 10, 51, 35, 70, 78; Library of Congress, n.d.).

Regardless of their motivations, leaders Madison and Hamilton argued that the system established by the Articles was not sustainable and pushed for change. In May 1787, delegates from twelve states met in Philadelphia at the **Constitutional Convention** to create a stronger government. Big states wanted representation based on population. Small states wanted each state to have an equal voice. The states debated at length but finally reached a compromise by creating a **bicameral legislature**, which is a two-chamber lawmaking body. The House of Representatives would be based on population, and the Senate would have two members per state (Gilder Lehrman Institute of American History, n.d.).

Further debates revealed deep divisions over slavery. The Constitution did not use the word "slavery", but it was built into the structure of the new government. The **Three-Fifths Compromise** counted **enslaved persons** as three-fifths of a person for the purposes of representation and taxation, and the **Fugitive Slave Clause of**

Article IV required the return of people who escaped bondage. Abolitionists, women's rights advocates, Native Americans, and African Americans voiced their positions in various ways during this time period, often invoking the claim in the Declaration of Independence that all people possess natural rights. However, their arguments were not reflected in the Constitution (Gilder Lehrman Institute of American History, n.d.).

By the fall of 1787, the delegates had finished drafting the Constitution, and it was ratified the following year. It gave the federal government the power to tax, regulate trade, raise armies, and enforce laws as the supreme law of the land. The result was a stronger and more sustainable system. Ratification succeeded only after the framers promised to add a Bill of Rights to address concerns about civil liberties. These first ten amendments, ratified in 1791, provided safeguards regarding religion, speech, the right to bear arms, criminal procedure, and states' rights, but they did not protect any of the groups previously mentioned (Gilder Lehrman Institute of American History, n.d.).

This resulted in a government that was far more stable than before, but it also exposed deep contradictions between the nation's ideals of liberty and the rights of the majority of people who lived under it. **This OER will examine how the system that was created has evolved and whether it has truly succeeded in meeting the needs of all the people who live in the United States.**

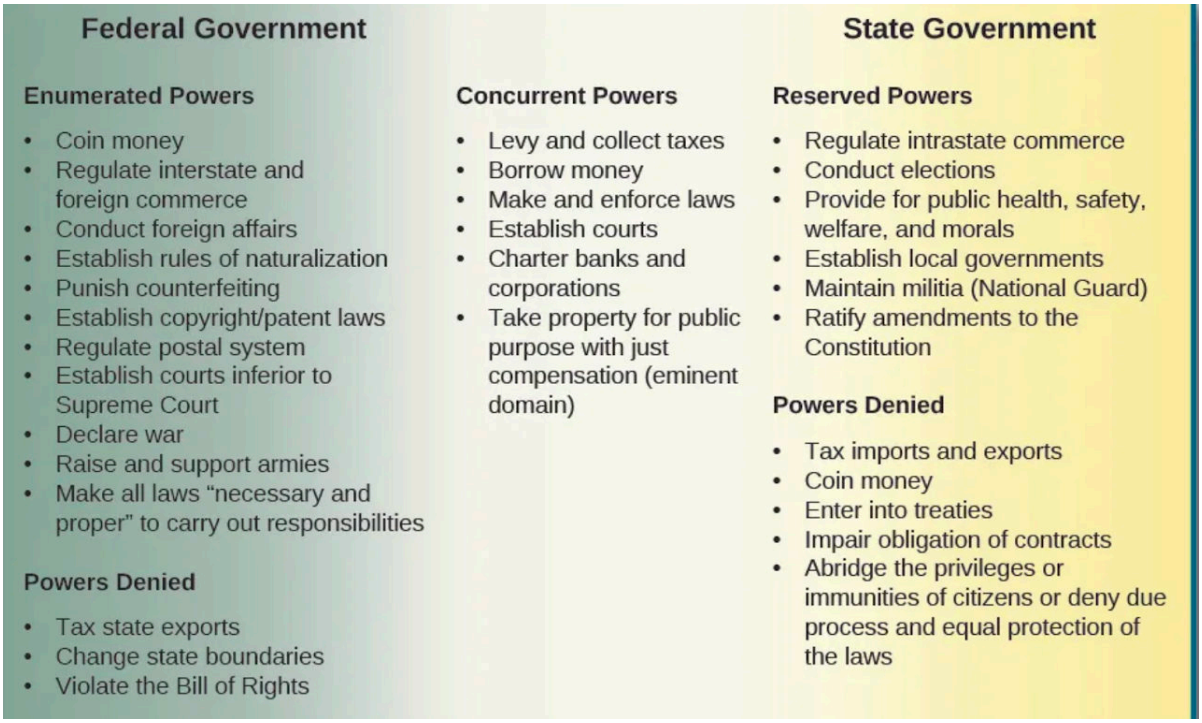
B. Separation of Powers and Federalism

Students of civil rights and liberties should do two things before examining the Separation of Powers:

- **The first is read the United States Constitution to become familiar with its structure and language.** It is under twenty pages long, and you can click here to read it in its entirety. You will notice that it is written in a somewhat archaic style, and its language can be confusing even for dedicated students. However, the context provided by doing so is helpful, and all parts of the Constitution will be explained further in this chapter and those that follow. Having the full text of the Constitution in mind will help students understand the principles that guide the American system of government. **It is difficult to succeed in a course on civil rights and liberties without reading the Constitution first.**
- **The second important step is to understand the significance of federalism.** Federalism refers to the division of power between the national government

and the state governments. Powers granted only to the federal government are called **enumerated** powers. Those held only by the states are **reserved powers.** And those shared by both are **concurrent** powers. The Constitution called for a strong federal government, but each state still had its own system of government and its own constitution. Additionally, federal supremacy was limited because all federal laws passed by Congress had to abide by the Constitution, and states retained reserved powers under the Tenth Amendment (Constitution Annotated, n.d.). **Please refer to Image 2.1 for more details.**

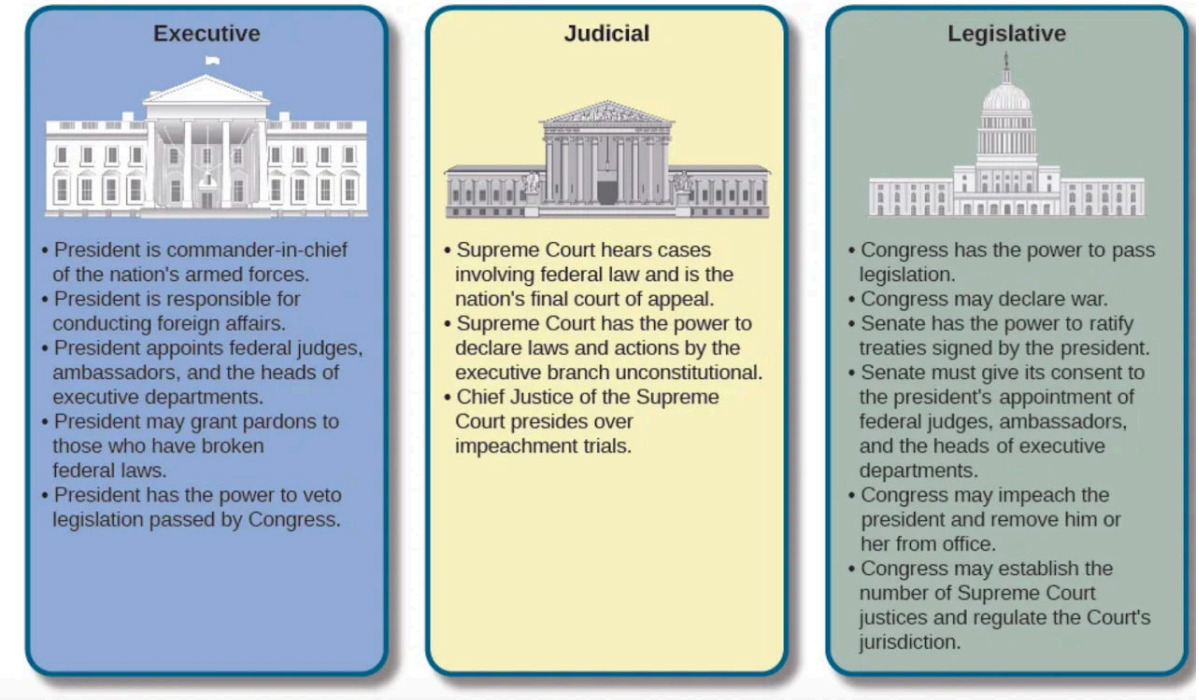
Federalism: Federal Powers vs. State Powers



Federal Powers vs. State Powers - Image 2.1
(OpenStax, 2021, Figure 3.3)

B. Separation of Powers and Federalism- continued

Just like federalism divides power between the federal government and state governments, the Constitution divides power into three different branches within the federal government itself, which is called the **Separation of Powers.** Image 2.2 below provides a brief overview about the powers each branch holds.



Separation of Powers - Image 2.2
(OpenStax, 2021, Figure 2.9)

Article I of the Constitution established the Legislative Branch, which consists of the House of Representatives and the Senate, collectively known as Congress. Congress holds the power to make laws, declare war, approve presidential appointments, ratify treaties, and conduct investigations (U.S. Congress, n.d.)

At the time of the nation's founding, the **House of Representatives** was composed of 65 members, apportioned among the states by population, but it has since grown to 435 members, plus non-voting delegates from Washington D.C. and U.S. territories. Members of the House serve two-year terms, must be at least 25 years old, and need to be U.S. citizens for at least seven years. Besides voting on legislation, the House of Representatives can also vote on whether to bring charges to remove federal officials, such as the President, from office. This first step of bringing charges is called **impeachment**.

The **Senate** consists of two members from each state. Senators were originally chosen by state legislatures until the 17th Amendment changed this practice to direct election by voters in each state. Senators serve staggered six-year terms, must be at least 30 years old, and must have been U.S. citizens for at least nine years. When voting on legislation, the Vice President casts tie-breaking votes.

In the past, senators who wanted to block a vote on a bill had to speak on the Senate floor for as long as they could, a practice known as a **talking filibuster or a traditional filibuster.** Today, under what is often called the **silent filibuster,** a senator can simply signal an objection, which prevents a vote from taking place, unless 60 senators agree to end debate under the Senate's **cloture rule.** In practice, this means most filibusters no longer require long speeches and instead operate as a procedural barrier to moving legislation forward. Most legislation can be blocked unless 60 senators vote to end debate, but other actions, such as routine motions and some nominations, can move forward with a simple majority.

In addition to voting on laws, senators confirm presidential appointments and ratify treaties. They also conduct presidential **impeachment** trials after the House of Representatives votes on articles of impeachment, with the Chief Justice of the Supreme Court presiding over the proceedings if the President is on trial. When the President is not involved, the Senate conducts impeachment trials under its own rules for removing federal officials, and the Vice President or a designated senator presides.

For a bill to become law, both chambers must pass the same version of a bill and send it to the President for signature. Congress can override a veto with a two-thirds vote in each chamber. Beyond lawmaking, Congress also holds the "power of the purse," giving it the power to levy taxes, approve spending, and authorize borrowing when necessary.

Article II of the Constitution established the Executive Branch, vesting power in the President of the United States, who serves as both head of state and head of government. As head of state, the President represents the nation in official ceremonies and in relations with other countries. As head of government, the President oversees the executive branch and federal agencies and serves as Commander-in-Chief of the armed forces. The President is also responsible for enforcing laws passed by Congress and for appointing federal judges, ambassadors, and senior officials, with Senate approval. The Constitution sets three qualifications for the presidency: the individual must be a natural-born citizen, at least 35 years old, and a resident of the United States for at least 14 years.

Additionally, the President signs or vetoes legislation, negotiates treaties, receives foreign diplomats, issues pardons, and delivers the State of the Union Address. The President can issue **executive orders,** which are formal directives to federal agencies that provide guidance for how laws should be carried out. Executive orders are not new laws; rather, they are meant to enforce or administer existing laws passed by Congress or powers already granted to the President by the Constitution.

Americans do not vote directly for the President. Instead, they vote for electors in their state, and those electors make up the **Electoral College,** which casts the official votes for President. The Electoral College is a group of representatives chosen by each state, based on the number of senators and representatives it has in Congress. These electors meet after the election to formally cast the votes that determine the President and Vice President.

Originally, the person with the second-highest number of electoral votes became Vice President. The **Twelfth Amendment** changed this process so that presidential candidates now choose their own running mates for **Vice President**, and voters cast a single ballot for the President and Vice President together. Although not mentioned in the Constitution, the **Cabinet** developed under President George Washington as an advisory body and today includes the heads of 15 executive departments, such as State, Defense, Treasury, and

Justice. The modern Executive Office of the President, created in 1939, along with numerous federal agencies, like the EPA and Department of Homeland Security, also support the President in administering and enforcing federal laws.

Article III of the Constitution established the Judicial Branch by creating the Supreme Court and giving Congress the power to establish the lower federal courts. It did not specify how many Supreme Court justices there should be or exactly how the federal court system should be structured. Article III only said that Congress should decide these issues. In 1869 Congress set the number of Supreme Court justices at nine, where it remains today. Over time, Congress shaped the federal court system by creating district courts and courts of appeals. Practices that now define the Court, such as how they decide which cases to take and the development of **judicial review,** were not spelled out in the original Constitution, but these practices emerged later. They are explained in Chapter 3.

Article III specified that federal judges would be nominated by the President, confirmed by the Senate, and serve for life unless removed through impeachment. The framers included life tenure and protection from elections to shield justices from political pressures, allowing them to base their decisions on the law rather than on popular opinion (U.S. Congress, n.d.).

C. Checks and Balances

Articles I, II, and III of the Constitution do more than spell out a framework of government. They also include language that establishes a system of **checks and balances** that is designed to keep any one branch of government from gaining excessive power. The framers intentionally included language in the Constitution to keep each branch in check (National Constitution Center, n.d.).

The **Legislative Branch** can override a presidential veto with a two-thirds vote, reject presidential appointments and treaties through the Senate, and remove a president from office through impeachment and conviction. Congress also checks the Judicial Branch by confirming or rejecting judicial appointments, impeaching and removing judges, and initiating the constitutional amendment process. Additionally, Congress can reorganize the lower federal courts.

The **President**, who leads the Executive Branch, also has checks on the other branches. The President can veto bills passed by Congress, call special sessions of Congress in extraordinary circumstances, and recommend legislation through

formal addresses and policy proposals. The President also influences the judiciary by nominating federal judges and Supreme Court justices and by granting pardons and reprieves to individuals convicted of federal crimes.

The **Judicial Branch**, headed by the Supreme Court, checks the other two branches through the power of judicial review. It can declare acts of Congress unconstitutional, invalidating laws that conflict with the Constitution. Likewise, it can strike down executive orders that exceed presidential authority and issue injunctive relief to stop the enforcement of unconstitutional actions (National Constitution Center, n.d.). **Image 2.3 below summarizes these checks and balances.**

	LEGISLATIVE	EXECUTIVE	JUDICIAL
LEGISLATIVE		THE LEGISLATURE CAN OVERRIDE A PRESIDENTIAL VETO, REJECT PRESIDENTIAL APPOINTMENTS, REJECT TREATIES, AND IMPEACH AND REMOVE THE PRESIDENT.	THE LEGISLATURE CAN REJECT JUDICIAL APPOINTMENTS, IMPEACH AND REMOVE JUDGES, INITIATE THE CONSTITUTIONAL AMENDMENT PROCESS, AND REORGANIZE LOWER COURT SYSTEMS.
EXECUTIVE	THE PRESIDENT CAN VETO BILLS, CALL SPECIAL SESSIONS OF CONGRESS, AND RECOMMEND LEGISLATION.		THE PRESIDENT NOMINATES FEDERAL JUDGES, GRANTS PARDONS, AND ISSUES REPRIEVES.
JUDICIAL	THE SUPREME COURT CAN DECLARE ACTS OF CONGRESS UNCONSTITUTIONAL.	THE SUPREME COURT CAN ALSO DECLARE EXECUTIVE ORDERS UNCONSTITUTIONAL AND ISSUE INJUNCTIVE RELIEF.	

Checks and Balances - Image 2.3
(Original Work, Getchell-Bastien)

D. Beyond the Core Framework: Articles IV–VII

Surveys show many Americans are not familiar with Articles IV through VII of the Constitution (Annenberg Public Policy Center, 2023). This section of the chapter explains these Articles and serves as a roadmap for the cases discussed in later chapters. Although the detailed discussion of these articles may seem technical, understanding these foundational principles is essential to analyzing civil rights and liberties. **The original constitutional text appears in bold below, followed by a plain-English explanation of its meaning.**

Article IV

- Article IV - Section 1 states, ***"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."*** This means that states have to recognize the laws, official documents, records, and court orders of other states and is known as the **Full Faith and Credit Clause.**
- For example, if someone was divorced in Massachusetts and moved to New Hampshire, then New Hampshire would have to recognize the divorce decree, even though the person was divorced in another state. If there was a court order that pertained to the divorce, like a child custody order, New Hampshire would have to recognize that too. There are some narrow exceptions to the Full Faith and Credit clause, which we will address later in this course (National Constitution Center, n.d.).

- Section 2 of Article IV states, ***"The Citizens of each State shall be entitled to all* Privileges and Immunities *of Citizens in the several States."*** Essentially, this means that if you are a citizen of one state, you should be able to travel to another state and enjoy the same rights as its residents. For instance, a state could not pass a law that says only people who got their driver's license in that state could drive on its roads. Likewise, a state cannot deny someone the ability to work in their state simply because they are from another state.

- Section 2 continues with, ***"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."*** Put simply, this means that if someone is accused of a crime in one state and flees to another, the governor of the state where the crime happened can request that the person be returned, and the second state must hand them over for trial. **This process is called extradition,** which is the legal procedure for returning someone accused or convicted of a crime from one state to another.
- The final part of Section 2 was known as the **Fugitive Slave Clause**, and it has been rendered unenforceable and **obsolete** by the Thirteenth Amendment, which banned slavery. It stated, "***No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."***

- Section 3 of Article IV starts with, ***"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."*** At first glance, this section seems to have only historical significance, but modern-day debates over granting statehood to Puerto Rico or Washington, D.C. show that this clause remains highly relevant today (National Constitution Center, n.d.).
- The next part of Section 3 states, "***The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."*** This clause gives Congress the power to manage U.S. territories and federal land, from places like Puerto Rico to Yellowstone National Park, and to make rules about how those lands are used or governed. This clause has special relevance today due to controversies surrounding several recent executive orders that have cut funding and resources to national parks and other federally owned

properties (New York Times, 2025).

- Section 4 of Article IV states that, ***"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."*** This means that the federal government promises to ensure that each and every state will stay a republic, and that the federal government will protect states from foreign attacks. It also means that the federal government can step in to help stop major internal unrest if a state requests it (National Constitution Center, n.d.).

During the summer of 2025, experts in constitutional law publicly questioned how President Trump could send National Guard troops into California over Governor Gavin Newsom's objections. Trump claimed authority to deploy the National Guard to Los Angeles under **10 U.S.C. §§ 251–254**, which is part of the **Insurrection Act** framework. However, Federal District Judge Charles Breyer of the Northern District of California ruled this was unlawful because the Guard was being used for domestic law enforcement activities, which the **Posse Comitatus Act** prohibits. (AP, 2025). This ruling only applies to California and to this scenario, but courts around the country will continue to define the parameters of executive authority under this clause .

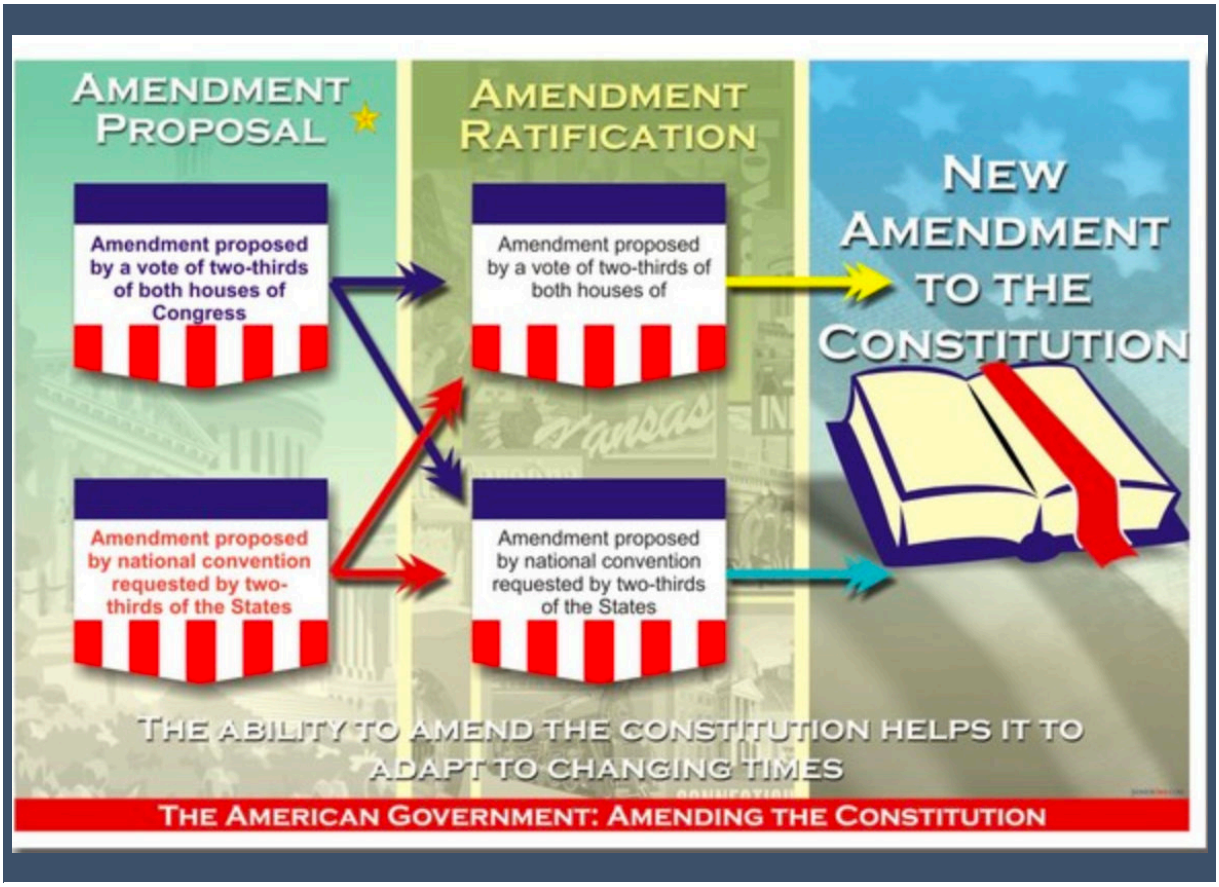
Article V

Article V states, ***"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."***

In simple terms, there are **four ways to amend the Constitution:**

1. Proposal by Congress with a two-thirds vote in both the House and Senate, then ratified by three-fourths of state legislatures.
2. Proposal by Congress with a two-thirds vote in both the House and Senate, then ratified by conventions in three-fourths of state conventions.
3. Proposal by a national convention called by two-thirds of the states, then ratified by three-fourths of state legislatures.
4. Proposal by a national convention called by two-thirds of the states, then ratified by conventions in three-fourths of the states.

For further clarification, please see Image 2.4 below.



Amending the Constitution - Image 2.4
(BillTrack50, 2014)

Article V - Continued

Amending the Constitution is no easy task. Ten amendments were added soon after its ratification in the form of the Bill of Rights, but only seventeen more have been adopted since the late 1700s. One example of a failed effort is the **Equal Rights Amendment (ERA)**, a proposed amendment to the United States Constitution that would guarantee equal rights under the law for all people, regardless of sex. The ERA was first proposed in 1923, but it did not gain real traction until 1972, when both chambers of Congress approved it by the required two-thirds vote and sent it to the state legislatures for ratification by three-fourths of the states. Congress had set a seven-year deadline for the necessary states to ratify, later extending that deadline to 1982, but the ERA ultimately fell short with only 35 state legislatures voting in favor of it (Associated Press, 2025, Timeline).

During this time period, Congress enacted laws such as Title IX (1972) and the Pregnancy Discrimination Act (1978), which some historians believe reduced pressure for a constitutional amendment. In recent years, Nevada (2017), Illinois (2018), and Virginia (2020) ratified the ERA in an attempt to push the total to 38, but because these ratifications occurred decades after the deadline, their validity is legally contested. **Efforts in Congress to remove or extend the ratification deadline have been introduced, and several lawsuits have been filed, yet none have succeeded**. Today, some argue that ratifying the ERA would be mostly symbolic because many protections already exist in federal law, while others believe it would provide stronger safeguards against laws that negatively affect women solely because of their sex (Associated Press, 2025, Timeline).

Article VI

Article VI begins with, ***"All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation"*** This meant that the U.S. government still had to pay all debts and keep all agreements it made before the Constitution was adopted. Switching to the new Constitution did not erase old obligations, and this clause has mainly historical significance.

The most well-known part of Article VI comes next . ***"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*** " The compelling words "supreme law of the land" have been brought up in countless Supreme Court cases, leading Article VI to be known as the **Supremacy Clause.** Essentially, this means that when federal and state law conflict, federal law prevails, although states may still act independently in some areas. For instance, a state can provide its citizens with greater civil rights and liberties than those guaranteed in the Bill of Rights. Massachusetts legalized same-sex marriage before any other state and twelve years before it was recognized nationwide (GLAD, n.d.). Native Americans also relied on this part of the Constitution when asserting land rights. Their treaties with the federal government were intended to be the "supreme law of the land," yet state governments and even the federal government often failed to honor them (Justia, n.d.).

Article VI ends with, "***The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."*** In essence, this means that government officials must promise to uphold the Constitution, but the government cannot require someone to follow a certain religion, or any religion at all, in order to serve in public office. Courts have struck down attempts by states to impose such requirements, as well as attempts to require lawmakers to put their hand on a Bible when swearing in and taking their oath of office (Freedom Forum, 2025).

Article VII

The last Article in the Constitution says, ***"The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."*** This language required at least nine states to ratify the Constitution , and it was met in just over six months. Delaware ratified first, followed by Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, and finally New Hampshire, which officially put the

Constitution into effect in June of 1788. Soon after, two of the most influential states ratified as well, Virginia in June 1788 and New York in July 1788. North Carolina and Rhode Island held out longer, with North Carolina ratifying in November 1789 and Rhode Island in May 1790, completing the union of all thirteen original states (National Archives).

E. Bill of Rights

The following chapters in this resource will examine most of the amendments in the Bill of Rights, the first ten amendments to the Constitution. This resource does not cover the Third Amendment, which holds primarily historical significance, nor the Seventh Amendment, which has limited impact on civil rights and liberties. **Image 2.5. below can serve as a roadmap for the amendments in the Bill of Rights that will be analyzed in this OER.**



Image 2.5
(National Constitution Center, n.d.)

F. Other Amendments

Other amendments will be discussed thematically, in keeping with the topics outlined in the table of contents, rather than in strict chronological order. Future chapters will analyze the Twelfth Amendment and the advantages and disadvantages of the **Electoral College**, including ongoing debates about whether the amendment should be repealed. The Thirteenth through Fifteenth Amendments, known as the **Reconstruction Amendments**, along with the Nineteenth Amendment and the struggle for women's suffrage, will be examined in chapters focused on civil rights. The Twenty-Fourth Amendment and its ban on poll taxes will also be analyzed in those chapters, including an exploration of why its ratification was so delayed. The Twentieth and Twenty-Second Amendments, which address presidential terms and term limits, will be considered in the broader context of voting rights and emerging controversies. The Twenty-Fifth Amendment, which governs presidential succession, will be evaluated in light of the advanced age of recent presidents and ongoing disputes over mental acuity. This OER will also review the Twenty-Seventh Amendment, which pertains to congressional pay.

This resource will not provide coverage of certain other amendments. The Eleventh Amendment is not analyzed because lawsuits against states have rarely affected individual civil liberties. The Sixteenth Amendment, which addresses taxation, is also excluded because it has not produced significant **case law** on individual rights. The Seventeenth Amendment, establishing direct election of senators, has definitely reshaped democratic processes, but it lies outside this OER's focus on civil liberties. The Eighteenth and Twenty-First Amendments, which created and repealed **Prohibition**, are historically important but not central to this field of study. The Twenty-Third Amendment, which granted presidential voting rights to Washington, D.C. residents, and the Twenty-Sixth Amendment, which lowered the voting age to eighteen, certainly expanded democratic participation, but these amendments have generated limited constitutional interpretation compared to other amendments covered here.

Image 2.6. below provides an overview of Amendments 11-27.



Image 2.6
(National Constitution Center, n.d.)

Conclusion

Understanding the structure and content of the Constitution gives students the necessary foundation for further analysis of civil rights and liberties. After reading this chapter, students should be prepared to examine the principles, institutions, and amendments that shape constitutional law.

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Chapter Three

Chapter Three
The Supreme Court

Chapter Outline

A. History and Origins of the Court

B. Influential Justices and Eras

C. Structure of the United States Court System

D. Judicial Interpretation

E. How the Court Selects and Processes Cases

F. Criticisms and Controversies

A. History and Origins of the Court

The federal court system of the United States was established in the United States Constitution. Article III begins with, ***"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."*** The First Congress enacted the Judiciary Act of 1789, which created 13 federal district courts allocated among the states based on size and population. The Act also established 3 circuit courts and a Supreme Court made up of one Chief Justice and five Associate Justices.

In the early years, Supreme Court justices were required to **"ride the circuit,"** which meant traveling to preside over the regional circuit courts together in panels of two Supreme Court justices and one district judge. As a result, serving on the Supreme Court was not originally viewed as a highly prestigious role. Congress eventually replaced this system by creating dedicated circuit judge positions to manage those cases.

Over time, Congress expanded and reorganized the federal court system to meet the needs of the growing nation. The number of justices on the Supreme Court fluctuated in the 19th century, but since 1869 it has been set at nine. Congress also created more lower courts as new states entered the Union and the caseload grew. Today, the federal judiciary consists of 94 district courts (trial-level courts), 13 circuit courts of appeal (intermediate appellate courts), and the Supreme Court of the United States at the top (United States Senate Committee on the Judiciary, n.d.).

Timeline of the Federal Judiciary

- **1789 –** Judiciary Act of 1789 establishes 13 federal district courts, 3 circuit courts, and 6 Supreme Court Justices.
- **1801–1869 –** Number of Supreme Court Justices fluctuates between 5 and 10 during this time period.
- **1869 –** Judiciary Act of 1869 limits Supreme Court to 9 Justices.
- **1891 –** Evarts Act of 1891 creates United States Courts of Appeals.
- **1925 –** Judiciary Act of 1925 gives Supreme Court control over its docket.
- **Today –** 94 district courts - 13 Circuit Courts of Appeals - 9 Justices on the Supreme Court

Image 3.1

(United States Senate Committee on the Judiciary, n.d.)

Additionally, the Constitution explains how Supreme Court justices are appointed and how long they serve. Supreme Court Justices are not elected, and they do not serve fixed terms. Article II, Section 2, Clause 2 of the Constitution is known as the Appointments Clause. It says that, ***"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court."***

In practice, the President selects a nominee, and the Senate must then vote to confirm that choice. Today, confirmation requires only a simple majority. Until 2017, however, Senate rules permitted a **filibuster** of Supreme Court nominees, meaning 60 votes were often needed to end debate before a final vote. The shift to allow confirmation by simple majority is informally known as the "nuclear option," referring to the Senate's reinterpretation of Rule XXII, the cloture rule (Congressional Research Service, 2017).

Article III, Section 1 further states that ***"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."*** This language has long been understood to give Justices their appointments for life, a point of controversy discussed later in Section F of this chapter (Supreme Court Historical Society, n.d.).

B. Influential Justices and Eras

Students reading about constitutional law and civil rights will often see historians write about *"The Jay Court"* or *"The Warren Court"*. These historians are referring to the period of time when a particular Chief Justice presided over the Supreme Court. Additionally, the name of each "Court" reflects the composition of Justices serving at the same time, the kinds of cases the Court decided, and the historical context of the time period. For example, the Marshall Court (1801–1835) is remembered for establishing the Court's authority through ***Marbury v. Madison***, while the Warren Court (1953–1969) is known for landmark civil rights and liberties rulings like ***Brown v. Board of Education.*** The names of the Courts listed below in **Image 3.2** show the different eras (or "Courts") in Supreme Court history. This list is not comprehensive; it highlights only the most well-known eras (Supreme Court Historical Society, n.d.).

Judicial Eras In The United States

1. The Jay Court (1789–1795) – The nation's first Supreme Court, which helped establish the judiciary's basic operations but decided few major cases.
2. The Marshall Court (1801–1835) – Asserted the Supreme Court's power of judicial review (*Marbury v. Madison*) and strengthened federal authority over the states.
3. The Taney Court (1836–1864) – Known for the controversial *Dred Scott v. Sandford* decision, which denied citizenship to African Americans and deepened sectional divides.
4. The Chase Court (1864–1873) – Presided over the tumultuous Reconstruction era, addressing legal questions about civil rights and federal authority after the Civil War.
5. The Waite Court (1874–1888) – Often deferred to state authority, limiting the scope of the Reconstruction Amendments in cases involving civil rights protections.
6. The Hughes Court (1930–1941) – Initially resisted New Deal economic reforms, but shifted after 1937 to uphold broader federal regulatory power.
7. The Warren Court (1953–1969) – Famous for landmark rulings on civil rights, civil liberties, and criminal procedure, such as *Brown v. Board of Education.*
8. The Burger Court (1969–1986) – Issued significant decisions including *Roe v. Wade* but also began moving the Court in a more conservative direction.
9. The Rehnquist Court (1986–2005) – Strengthened states' rights and limited federal authority, while also issuing key rulings on equal protection and election law.
10. The Roberts Court (2005–present) – Marked by a strong conservative majority, with landmark rulings on campaign finance, voting rights, abortion, and administrative power.

Image 3.2

(Supreme Court Historical Society, n.d.)

B. Influential Justices And Eras - continued

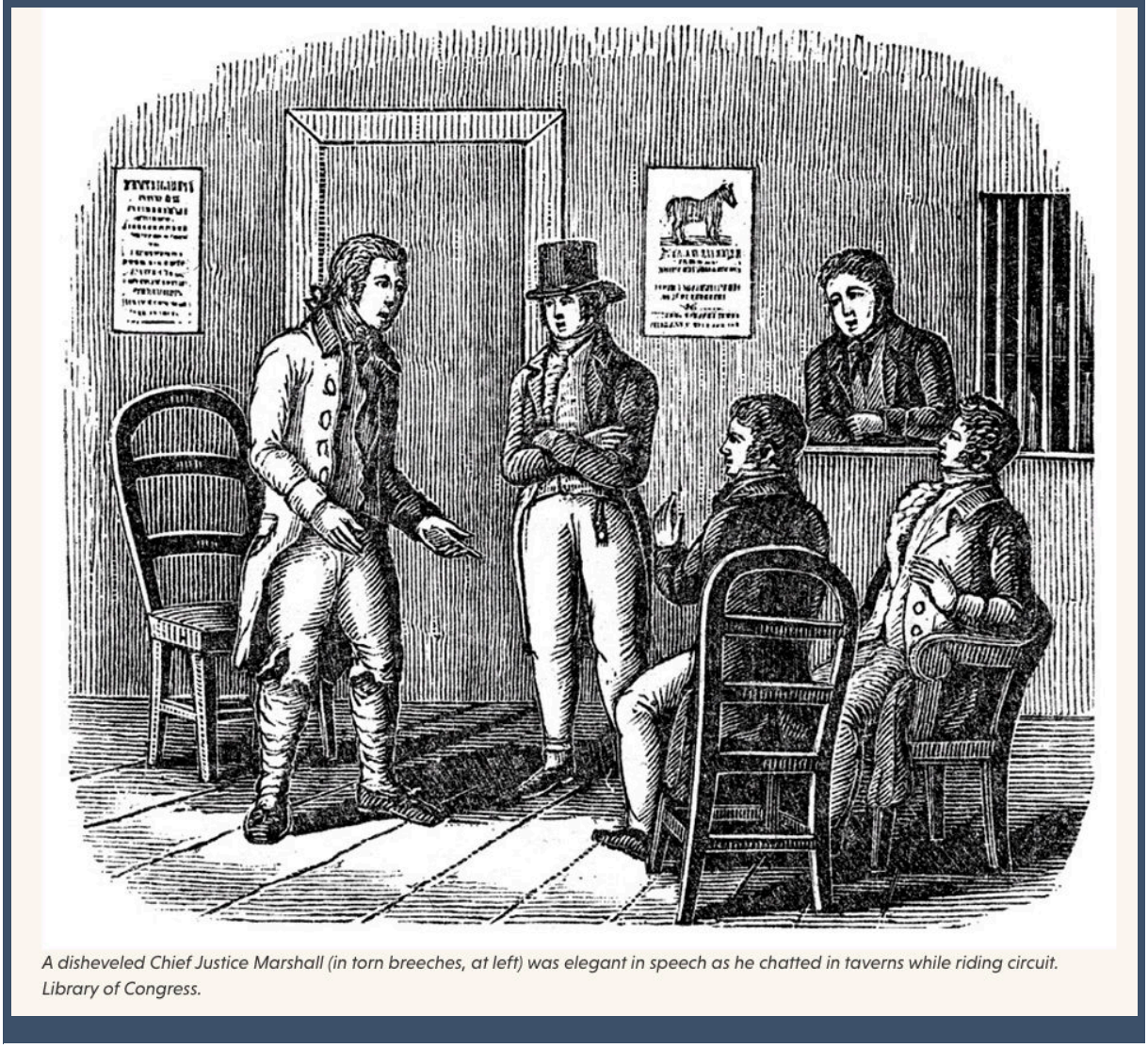
Court Era Spotlight:

The Marshall Court

The Marshall Court (1801–1835) was led by Chief Justice John Marshall. He turned the Supreme Court into a powerful and independent branch of government during a time of intense conflict between Federalists and Jeffersonian Republicans. The defining moment came in *Marbury v. Madison* (1803). In the final days of his presidency, John Adams signed last-minute judicial commissions, including one appointing William Marbury as a justice of the peace. When Thomas Jefferson took office, his Secretary of State, James Madison, refused to deliver Marbury's commission, effectively denying Marbury the job he was promised. Marbury then petitioned the Supreme Court to compel Madison to deliver the commission. Chief Justice Marshall agreed that Marbury was legally entitled to the commission; however, Marshall also stated the provision of the Judiciary Act of 1789 giving the Court jurisdiction to issue such an order contradicted the scope of jurisdiction spelled out in Article III of the United States Constitution. Marshall concluded that a portion of the Act was void. The ruling in this case resulted in the establishment of the principle of judicial review, which is the Supreme Court's power to strike down laws that violate the Constitution. This power is not explicitly stated in the text of the Constitution but was firmly established in Marbury v. Madison.

Image 3.3

(Supreme Court Historical Society, n.d.)



A disheveled Chief Justice Marshall (in torn breeches, at left) was elegant in speech as he chatted in taverns while riding circuit. Library of Congress.

Image 3.4
(Supreme Court Historical Society, n.d.)

The official Supreme Court photograph of the men who made up the Warren Court from 1962–1965 appears below as **Image 3.5.** The members of the Court in the photograph are, from left to right: **top row**, Byron R. White, William J. Brennan, Jr., Potter Stewart, and Arthur J. Goldberg; **bottom row**, Tom C. Clark, Hugo L. Black, Earl Warren, William O. Douglas, and John M. Harlan II. The Warren Court was known for several historic decisions advancing civil rights, most famously ***Brown v. Board of Education,*** which held that racial segregation was unconstitutional. The court also expanded the constitutional rights of the criminally accused in well-known cases like ***Miranda v. Arizona.*** The Warren Court spanned from 1953 to 1969 and included a number of justices over time, not all of whom are shown in the photograph below (Virginia Humanities, n.d.).



The Warren Court
Image 3.5
(Virginia Humanities, n.d.)

Most people know that *Miranda v. Arizona r*equires police officers to inform individuals in custody of their rights before interrogation, but not everyone is familiar with the details of the case. An excerpt of this famous Warren Court decision appears below.

Landmark Case Spotlight:
***Miranda v. Arizona* (1966)**
Case Excerpt (Not Full Case)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court. The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. Illinois,* 378 U.S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is

an application of principles long recognized and applied in other settings. We have undertaken a thorough reexamination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution -- that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel" -- rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And, in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens v. Virginia,* 6 Wheat. 264, 387 (1821).

Our holding will be spelled out with some specificity in the pages which follow, but, briefly stated, it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. **Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that**

he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it -- the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule, and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any

assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent, without more, "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as amicus curiae, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. Escobedo v. Illinois, 378 U.S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions, as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present, the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee

that the accused gives a fully accurate statement to the police, and that the statement is rightly reported by the prosecution at trial. See Crooker v. California, 357 U.S. 433, 443-448 (1958) (DOUGLAS, J., dissenting).

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount or circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us, as well as the vast majority of confession cases with which we have dealt in the past, involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on

appeal struck down in Gideon v. Wainwright, 372 U.S. 335 (1963), and Douglas v. California, 372 U.S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that, if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent -- the person most often subjected to interrogation -- the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that, if police propose to interrogate a person, they must make known to him that he is entitled to a lawyer and that, if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment

privilege so long as they do not question him during that time.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place, and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516 (1962), is applicable here: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects

the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were, in fact, truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation, and thus to prove guilt by implication.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today, or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. Illinois, 378 U.S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily

present.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today.

To summarize, we hold that, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of

interrogation can be used against him.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege. (Note: Only the facts of the Miranda case are included in this excerpt. The companion cases are not included.)

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession, and affirmed the conviction. 98 Ariz. 18, 401 P.2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically

request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings, the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. Haynes v. Washington, 373 U.S. 503, 512-513 (1963); Haley v. Ohio, 332 U.S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Therefore, in accordance with the foregoing, the judgments of the Supreme Court Of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761, are reversed.
It is so ordered.

After reading the excerpt of the ***Miranda v. Arizona*** case above, some readers might think that it seems very long and verbose. However, the excerpt included above is relatively short. It would be approximately seven pages long if it appeared in a printed textbook. **The full text of the actual case is over 100 pages long.** Typical Supreme Court opinions are anywhere from 20-100 pages. It is useful when beginning the study of civil rights to compare reading an excerpt of a case with other ways of reviewing a case, such as looking at the full text of the entire opinion or skimming a brief summary.

Landmark Case Spotlight: continued
***Miranda v. Arizona* (1966)**
To review the full text of the case, click here and then select "Opinions and & Dissents".

Please click on the link above to skim the full text of the actual *Miranda* case. While doing this, think about how different it looks compared to the excerpt. Not only is it over 100 pages long; it includes a lot more information about the judicial history of police interrogations. You will also notice that the full text of cases include the **majority opinion, concurring opinions, and dissenting opinions,** while the summary only includes the majority opinion, Factual nuances, procedural and lower-court history, footnotes, the names of the attorneys on both sides of the case, and argument dates are other features that do not typically appear in summaries. They also omit **dicta,** which is judicial commentary not essential to the **holding.** It is not practical for undergraduate students in a one-semester survey course to read the full text of every case, which is why carefully curated excerpts play an important role in this resource.

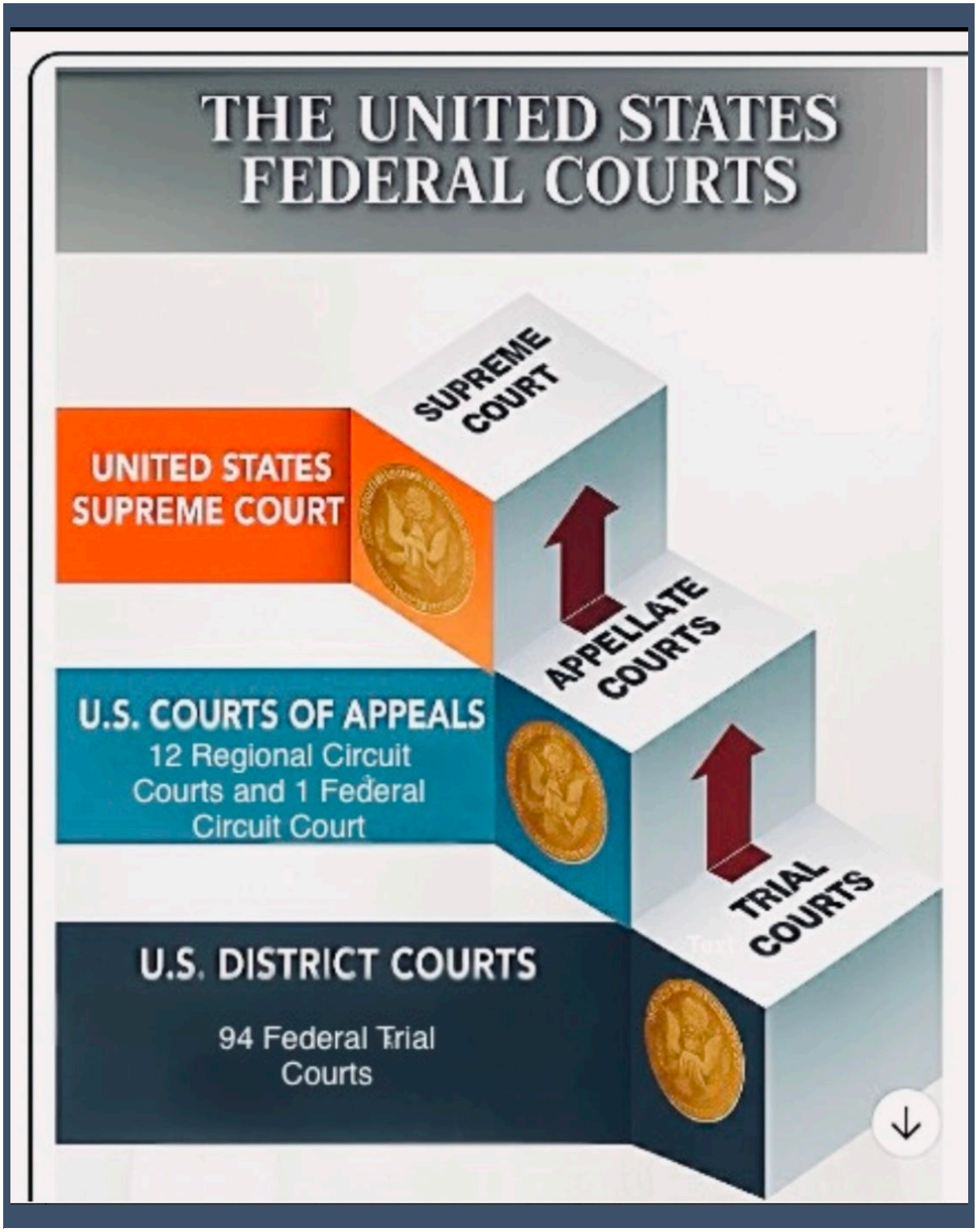
***Miranda v. Arizona* (1966)**
Click here for Oyez summary.

Please click on the blue link above to read the Oyez summary of the Miranda case. Oyez summaries are concise and straightforward, typically including a brief statement of the facts, the questions presented to the Court, and the case's disposition, which is whether the Court affirmed, reversed, vacated, or remanded. Like other types of case summaries available online, they omit many details, but they can be useful for readers seeking a very basic understanding of a case. **Oyez rarely provides enough information for a full analysis, but many times people find it helpful to skim a summary before reading the complete opinion.** While

some professors discourage students from relying on Oyez, most agree it can serve as a useful resource when used appropriately. In addition, the Oyez site offers audio recordings of the oral arguments presented to the Justices, and its summaries clearly indicate a visual representation of which Justices joined the majority and which ones issued separate opinions.

C. Structure of the United States Court System

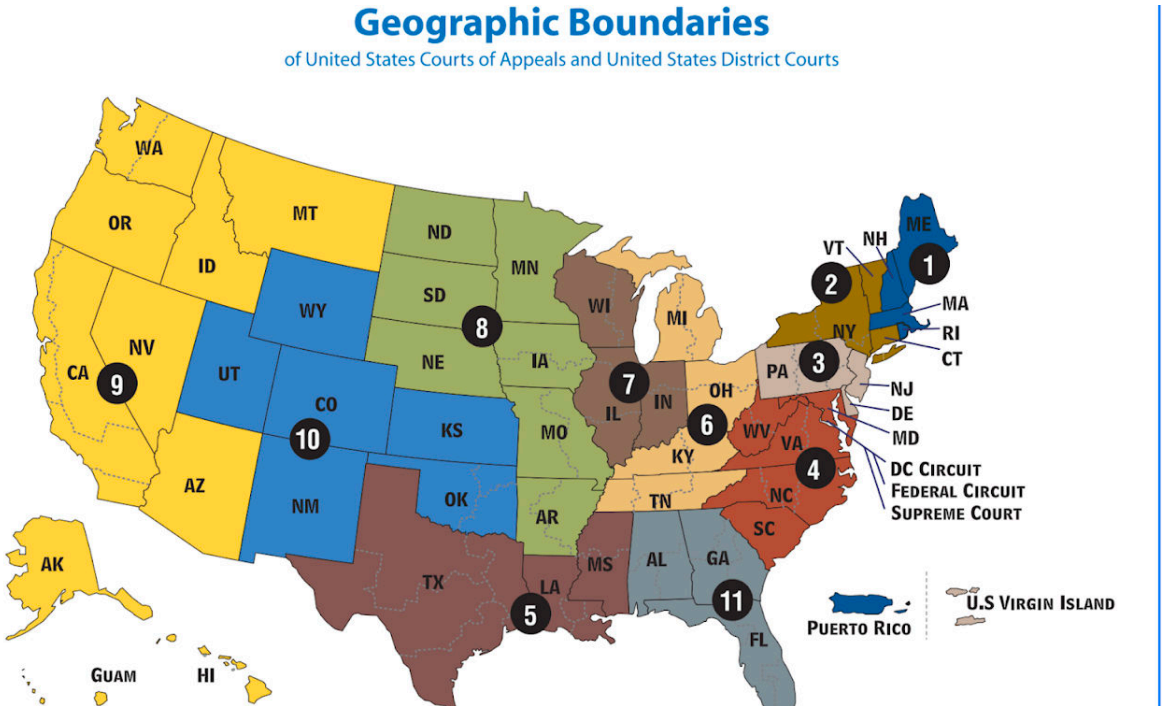
As stated in section A of this chapter, the current federal judiciary consists of 94 district courts (the trial-level courts), 13 circuit courts of appeals **(intermediate appellate courts),** and the Supreme Court of the United States at the top. **Image 3.6** below shows the current federal court structure. It is also beneficial to know the geographical boundaries of circuit and district courts, shown in **Image 3.7** below.



The Federal Court System

Image 3.6

(United States District Court, Southern District of Florida, n.d.)



Geographical Boundaries
Image 3.7
(U.S. Courts, n.d.)

The Role of State Courts

At first glance, examining state courts doesn't seem like it should be a priority when studying the United States Constitution. After all, the Constitution does not contain many direct restrictions on, or references to, state governments. And when state governments are mentioned, the language seems very straightforward. The Supremacy Clause, the Full Faith and Credit Clause, and the Privileges and Immunities Clause, all of which were defined in the previous chapter, place clear limits on the authority of the states. Additionally, the provisions spelling out exclusive, concurrent, and reserved powers are explained in relatively simple terms.

Nevertheless, it is important to remember the role of state governments. **Each state has its own constitution and its own court system.** States also have their own executive branches, led by their governors, and their own versions of Congress, consisting of their state legislatures. It is important to understand the basic structure of state systems because complex or confusing issues can arise when federal and state authority overlap or conflict.

Please see **Image 3.8**, which illustrates how the federal and state judicial systems operate together in a dual court system. **Image 3.9** shows the typical structure of a state court system, using Massachusetts as an example, with the seven courts in green representing trial courts.

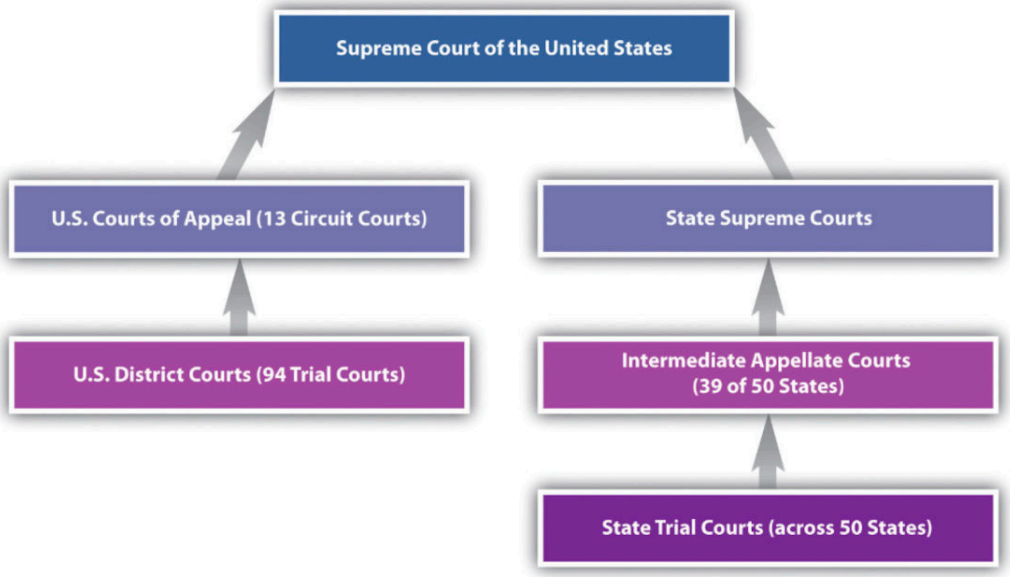


Image 3.8
Dual Court System
(Saylor Academy, n.d.)

The Massachusetts Court System

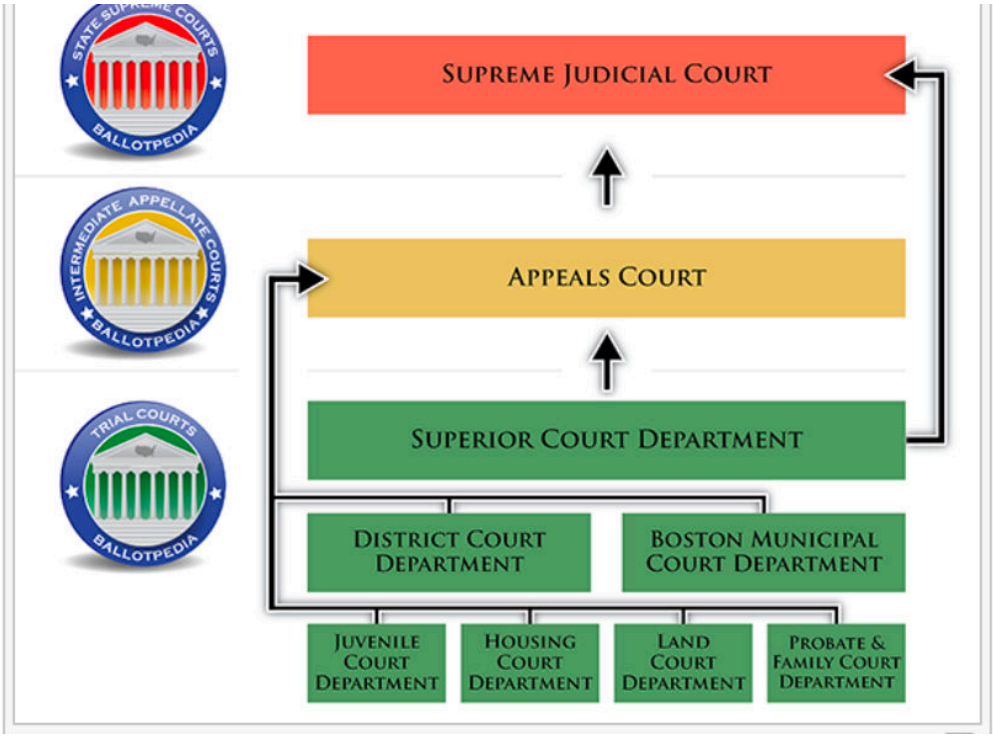


Image 3.9
Massachusetts Court System
(Ballotpedia, n.d.)

C. Structure of the United States Court System - continued

The Role of State Courts - continued

While most states have a court system that resembles that of Massachusetts, New Hampshire and ten other states have no **intermediate appellate courts.** In such states, cases that are appealed from the trial-level courts get appealed to their state supreme courts. Additionally, some states have different names for their courts. New Hampshire calls its trial courts "Circuit Courts" because in 2011 the state unified its District, Probate, and Family courts into one system organized by county-based circuits, streamlining administration under a single name (Ballotpedia, n.d.).

Other states, like New York, have a completely different naming system and call their main trial court the "Supreme Court". **Click here** to see a diagram of the unique New York system (New York State Unified Court System, n.d.). Even though most states use a three-tier court structure, it is important to be familiar with variations in other states. Otherwise, it can be confusing when reading Supreme Court cases that came from those courts.

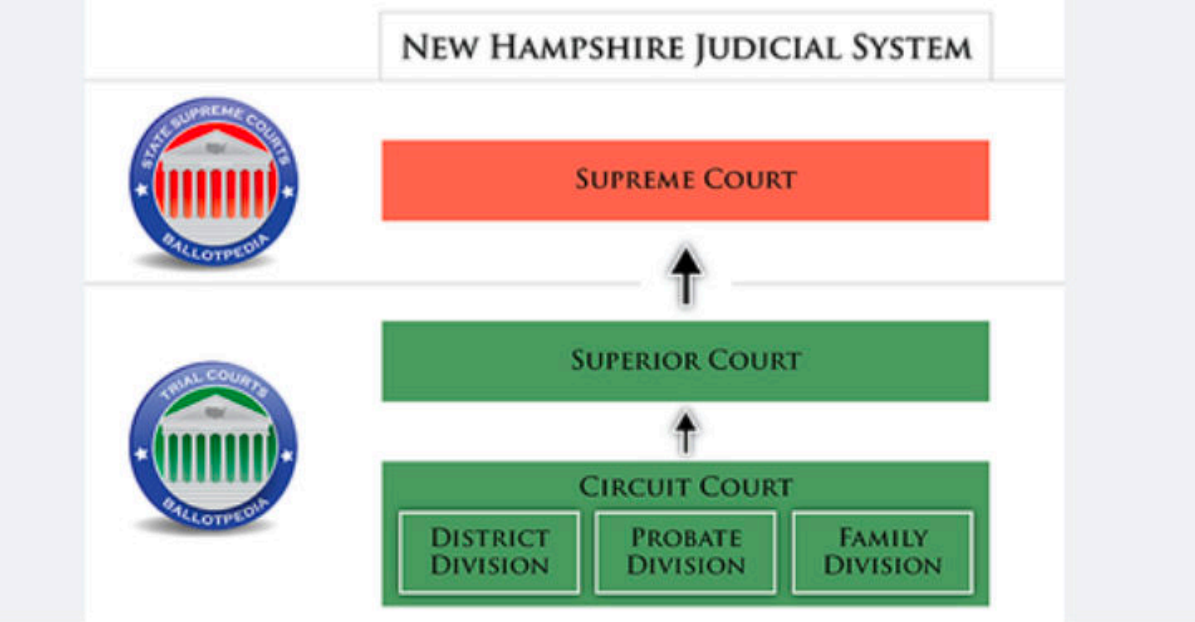


Image 3.10
New Hampshire Court System
(Ballotpedia, n.d.)

D. Judicial Interpretation

Judicial interpretation refers to the various ways judges apply and understand laws. Supreme Court Justices approach cases according to their own philosophies of how the Constitution should be understood. The best way to start examining this topic is to look at two commonly discussed approaches to decision making: **judicial restraint** and **judicial activism**. Although there are many ways to describe these approaches, a simple overview is provided here. Judges who practice **judicial restraint** have a philosophy that makes them likely to simply look at the plain meaning of a **statute** to determine whether or not it violates the Constitution. These judges tend to defer to precedent and other branches of government and are less likely to create new constitutional doctrines.

Judicial activists, on the other hand, are more likely to deeply explore and analyze the meaning of a statute along with the text of the Constitution in order to promote justice and address social wrongs. Historically, politically conservative Justices were often labeled as practicing judicial restraint, while liberal Justices were called judicial activists, but this distinction has faded in recent years because people have recognized these characterizations are often overly simplistic or simply inaccurate.

There are entire law school courses dedicated to the topic of judicial interpretation, but for the purpose of this OER, the main categories are listed below in Image 3.11 with very brief definitions. There is a considerable amount of overlap between these approaches due to the complex nature of judicial interpretation. Developing a basic familiarity with these terms is helpful before examining landmark cases so that students can appreciate the social commentary and legal criticism surrounding them from a more informed mindset (Congressional Research Service, 2021).

Numerous resources are available to study the philosophies and approaches of the Justices. Martin-Quinn Scores are a set of statistical measures developed by political scientists Andrew Martin and Kevin Quinn that estimate and measure the ideological leanings of U.S. Supreme Court Justices. These scores come from analyzing Justices' voting patterns to place them on a liberal–conservative spectrum, providing a widely used tool for tracking shifts in judicial philosophy and the Court's balance over time (Martin & Quinn, 2002). Many legal scholars criticize the Martin-Quinn system for outdated or for oversimplifying judicial

behavior by reducing it to a single liberal–conservative scale. The way scores are calculated treats all votes cast by the Justices as equal. Critics argue that this approach can distort scores by giving undue weight to less significant cases. As a result, routine or minor votes may be mistakenly calculated as meaningful ideological shifts, which results in the scores lacking contextual nuance (Farnsworth, 2007). Despite these limitations, Martin-Quinn scores remain a widely used tool for understanding the ideological trends of the Supreme Court.

In addition to Martin-Quinn scores, scholars study judicial philosophies through resources like the **Oyez Project,** the **Supreme Court Database,** and law school research guides, such as those from the **Georgetown University Law Library**. All of the resources track Justices' opinions, voting behavior, and interpretive approaches. LibGuides from law libraries, as well as specialized databases, also provide additional expertise on this topic.



Image 3.11

(Supreme Court of the United States, 2025)

Overview of Judicial Interpretation Approaches

1. Judicial Restraint A belief that the Justices should focus on the plain text of the law and the Constitution. Proponents of this view want elected legislatures to make policy decisions and will only strike down a law if it clearly violates the Constitution, even if an injustice could result by not doing so. **Example:** *Plessy v. Ferguson (1896),* opinion by Justice Henry Billings Brown.

2. Judicial Activism A philosophical approach in which judges interpret the Constitution and laws broadly, allowing for decisions that expand rights, address social issues, or adapt legal principles to changing circumstances. **Example:** *Brown v. Board of Education (1954),* opinion by Chief Justice Earl Warren.

3. Legalism An intellectual method, rather than a philosophical approach, that emphasizes applying legal rules strictly as written. It values consistency and predicability in legal decision-making, even when the result may seem unfair. Although this approach may seem identical to judicial restraint, legalism focuses only on how judges interpret and apply the text of the law and the Constitution, while judicial restraint centers more on the broader belief in limiting the Court's role and deferring to the decisions of elected branches whenever possible. **Example:** *Caminetti v. United States (1917),* opinion by Justice William Day.

4. Originalism The practice of interpreting the Constitution by giving its words the same meaning they had at the time they were adopted, focusing on the text's original public understanding, rather than modern views, evolving standards, or a focus on public policy. **Example:** *District of Columbia v. Heller (2008),* opinion by Justice Antonin Scalia.

5. Textualism An intellectual approach, often considered a subcategory of originalism, that interprets laws and the Constitution by focusing strictly on the ordinary meaning of specific words in the text at the time they were written, rather than relying on outside sources like legislative history or policy goals. **Example:** *Bostock v. Clayton County (2020),* opinion by Justice Neil Gorsuch.

6. Living Constitutionalism An approach that views the Constitution as a dynamic document whose meaning can evolve over time to reflect contemporary values, circumstances, and societal progress. Judges applying this method are less bound by historical understandings and more willing to interpret constitutional principles in light of modern realities. There is considerable overlap between this

approach and judicial activism. However, However, this approach focuses on constitutional meaning, while judicial activism generally refers to a judge's willingness to expand constitutional protections. **Example:** *Obergefell v. Hodges (2015),* opinion by Justice Anthony Kennedy.

7. Polling Jurisdictions The practice of researching and analyzing how other courts, either state or foreign, have decided similar issues. Although in most instances the decisions of these other jurisdictions only have persuasive authority and are not binding, they can inform Justices by providing insight into reasoning that has already been developed. **Example:** *Roper v. Simmons (2005),* opinion by Justice Anthony Kennedy.

8. Pragmatism This approach involves interpreting the Constitution from a practical standpoint, with attention to real-world outcomes and practical consequences. **Example:** *Missouri v. Holland (1920),* opinion by Oliver Wendell Holmes.

9. *Stare Decisis* The principle of following precedent to ensure stability and predictability in the law, which is the meaning of the Latin phrase that is used to label this approach. **Example:** *Planned Parenthood v. Casey (1992),* joint opinion by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter.

10. Structural Analysis Inferring constitutional meaning from the overall design of and relationships within the Constitution, such as separation of powers or federalism. **Example:** *McCulloch v. Maryland (1819),* opinion by Chief Justice John Marshall.

Image 3.12
(Congressional Research Service, 2018)

E. How the Court Selects and Processes Cases

The first place to look when examining how the Supreme Court selects and processes cases is to locate the relevant language itself in the Constitution. Section 2 of Article III reads, ***"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court sha*ll ***have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."***

The language in bold above explains the **jurisdiction** of the Supreme Court, which is its authority to hear certain types of cases. Sometimes the Court has **original jurisdiction,** which means it can hear a case first without it going through a lower court. Such cases involve disputes between two or more states, cases affecting ambassadors, cases affecting other public ministers and consuls, and cases in which a state is a party. Cases can also reach the Supreme Court through the **certification process,** which occurs when a federal court court of appeals formally asks the Supreme Court to resolve a legal question. **However, the certification process has not been used in decades and is considered functionally obsolete.** Original jurisdiction amounts to less than 5% of all cases the Court hears. Therefore, the remainder of this section will focus on the cases the Supreme Court hears via appeal (Administrative Office of the U.S. Courts, 2022).

Appellate jurisdiction involves reviewing decisions that have already been made in the lower federal courts and state courts. Most cases heard by the U.S. Supreme Court come from the federal system, with roughly 70–80% originating in the federal courts of appeals. Only 15–20% come from state supreme courts when a federal question is involved. When someone loses their case in a lower state or federal court and wants to appeal their case to the Supreme Court to hear the case they can petition the Court for a ***writ of certiorari*** This is a formal request

asking the Court to review the decision of a lower court. The Court receives thousands of these petitions each term but agrees to hear only a small fraction of them, less than 1% (Administrative Office of the U.S. Courts, 2022).

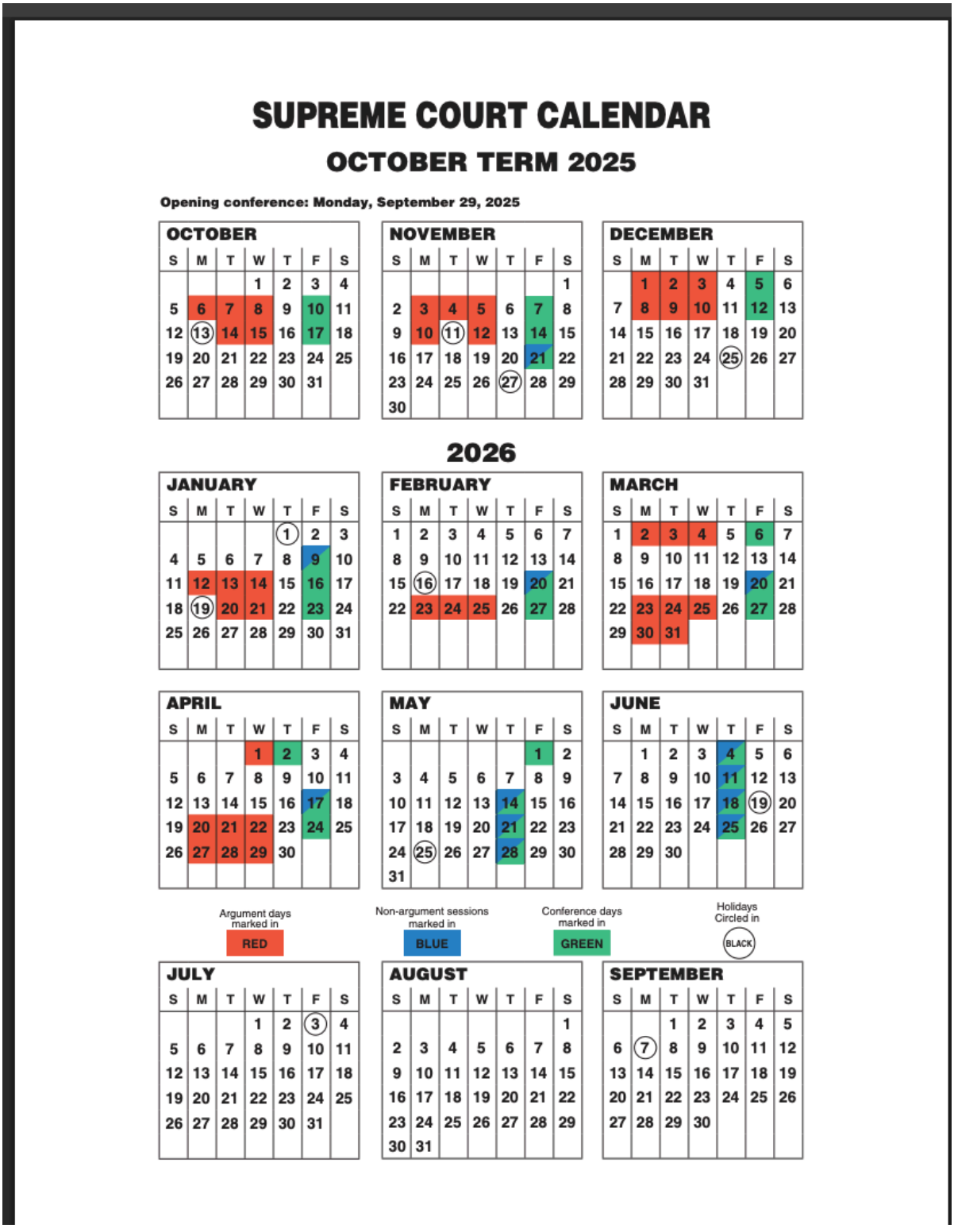
To decide which cases to take, the Justices follow what is called the **Rule of Four.** This means that if at least four of the nine Justices vote to grant ***certiorari,*** the case will be accepted for full review. This rule ensures that a minority of Justices can place a case on the docket, preventing the majority from controlling the Court's entire agenda. Most of the Court's cases arrive through this process, making the ***writ of certiorari*** and the **Rule of Four** central to how the Supreme Court manages its workload.

There are several factors that affect what might make the Court agree to hear a case. When deciding which cases to hear, the Supreme Court considers both official and unofficial factors. **Officially**, the Court looks for cases that raise important federal or constitutional questions, correct serious legal errors, or resolve conflicts among lower courts, known as circuit splits.

Unofficially, other dynamics play a role. The U.S. Solicitor General, a high-ranking attorney in the U.S. Department of Justice who represents the federal government, is often called the "Tenth Justice." This attorney enjoys a high success rate when filing petitions because the Justices trust the federal government's judgment. Likewise, a small group of elite lawyers with extensive Court experience also have higher odds of success when filing appeals. ***Amicus curiae*** briefs, or "friend-of-the-court" filings, are written arguments submitted by individuals or organizations that are not direct parties to the case but want to offer information, legal reasoning, or policy perspectives. These briefs can increase a case's visibility by showing the Court that the issues have national importance beyond those directly involved in the case. Finally, political and ideological considerations sometimes shape the justices' decisions because they may select cases strategically to advance or protect particular legal positions (Epstein & Walker, 2018).

Image 3.12 below shows how the Supreme Court's annual term runs from October through late June. The Justices hear oral arguments two weeks per month from October through April, usually on Mondays, Tuesdays, and Wednesdays, and these days are marked in red. On select Fridays, shown in green, they meet in private conferences to discuss petitions and cases. Blue days are non-argument sessions, when the Court issues orders or opinions without

hearing arguments. From May through June the Court focuses on releasing decisions, often on Mondays. July through September is a time for the Court to be in recess, although the Justices continue reviewing petitions and preparing for the next term during this time (Supreme Court of the United States, 2025).



Supreme Court Calendar

Image 3.13

(Supreme Court of the United States, 2025)

F. Criticisms and Controversies

There are many criticisms of the Supreme Court, both past and present. These critiques target both the institution as a whole and individual justices. Four major concerns are highlighted here: (a) the appointment process and terms of the Justices, (b) the Court's use of the **shadow docket**, (c) questions about the integrity of specific justices, and (d) a growing cynicism toward the Supreme Court as an institution.

The first critique is that justices are appointed rather than elected. As mentioned in the previous chapter, this design was meant to ensure that justices could make fair and principled decisions, rather than ones driven by popular opinion, but not everyone supports this approach. A related criticism is that justices serve lifetime terms, which some argue allows them to hold power for too long. Despite ongoing debate and attempts to limit the terms of the Justices, changing imposing a fixed term would require a constitutional amendment, and no efforts to make such a change have made significant progress (Georgetown Legal Ethics Journal, 2024).

The second controversy involves the shadow docket. This term refers to Supreme Court decisions made outside the docket and not based on the merits, frequently through brief, unsigned orders without the litigants submitting full briefs or oral arguments. While it was once used mainly for routine matters, it has increasingly been applied to high-stakes cases involving issues such as abortion, voting rights, immigration and vaccines. Between 2014 and 2024, the Supreme Court's use of the shadow docket expanded sharply, with the 2024–25 term alone including more than 110 emergency decisions, which is over 150% more than in the preceding decade's terms (Harvard Political Review, 2025).

Critics contend that this practice reduces transparency and creates an appearance that the Court is motivated by politics rather than the law because these rulings can significantly shape policy without the usual deliberative process. In response, legal scholars, members of Congress, and advocacy groups have called for reforms, including requiring fuller written opinions by the Justices, asking for clarification regarding the precedential value of shadow docket rulings, and urging the Court to limit the use of shadow docket decisions (Brennan Center for Justice, 2022).

Third, many Americans have wondered how to address the issue when certain Supreme Court Justices engage in behavior that some deem unethical. Article III

states, in part, that the Justices "**shall hold their Offices during good Behaviour**", but on occasion, the conduct of Justices has been problematic. Justice Abe Fortas resigned from the Supreme Court in 1969 after it was revealed he had accepted a $20,000 retainer from financier Louis Wolfson, who was under investigation for securities fraud. This financial tie raised serious concerns about conflicts of interest and pressured him to resign (Liptak, 2006). Justice Clarence Thomas has faced extensive criticism for failing to disclose numerous luxury trips, lucrative real estate deals, and complex financial ties with billionaire Harlan Crow, raising concerns about conflicts of interest and the adequacy of Supreme Court ethics rules (ProPublica, 2023).

Currently, the only way to remove a Supreme Court Justice is through impeachment in the House and conviction in the Senate under Article II, Section 4 of the Constitution. This process has only been attempted one time against Justice Samuel Chase in 1804, but the Senate declined to remove him. Several reforms have been proposed, but no laws have been passed to clarify what specific behavior should cause a Justice to be removed, leaving the Court governed only by its own recently adopted **Code of Conduct for Justices** (2023), a self-imposed document that requires justices to avoid impropriety, disqualify themselves in cases of conflict, and maintain integrity. These rules lack mechanisms of external enforcement.

The last type of criticism focuses on specific Courts, rather than individual Justices. For example, the Warren Court (1953–1969) was frequently criticized for "legislating from the bench" due to its landmark decisions expanding civil rights and liberties, which opponents described as examples of judicial activism. More recently, the **Roberts Court,** which has existed since 2005, has been scrutinized by political scholars. It consists of the current sitting Justices and is composed of six conservative-leaning members and three liberal-leaning members. Three of the conservative Justices were appointed by President Donald Trump. The Roberts Court has consistently handed down decisions that scholars deem conservative. Furthermore, even though conservatives on the Court have historically emphasized judicial restraint and a strong commitment to precedent, recent decisions have led many observers to argue that the Roberts Court is engaging in judicial activism instead. A prime example is *Dobbs v. Jackson Women's Health Organization* (2022), which overturned *Roe v. Wade* and nearly fifty years of precedent on abortion rights.

Prior to *Dobbs*, in *Janus v. AFSCME* (2018), the Roberts Court overturned *Abood v.*

Detroit Board of Education (1977), holding that public employees do not have to pay union agency fees because doing so violated the First Amendment, thereby overturning precedent. These rulings and others like them have fueled accusations that the Roberts Court is less anchored in precedent and more willing to reshape constitutional law to reflect the majority's political philosophy. This has contributed to debates about the Court's legitimacy and has sparked proposals by some progressives to expand the number of Supreme Court Justices to 13 members in order to align with the federal circuits.

Conclusion

Studying the Supreme Court's history, structure, case-selection process, interpretive methods, and ongoing controversies provides students of civil rights and liberties with a strong foundation for understanding the issues explored in remaining chapters of this OER.

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Chapter Four

Chapter Four

Core Doctrines of Constitutional Law

Chapter Outline

A. Overview

B. State Action

C. Hierarchy of Laws and Civil Rights Legislation

D. Limits on Judicial Power

E. The Incorporation Doctrine

F. Due Process and Equal Protection

G. Levels of Judicial Scrutiny

A. Overview

After reading chapters about the United States Constitution and the Supreme Court, most students are eager to dive into the study of the amendments and read about historical and current events that pertain to civil rights and liberties. However, students must first develop a solid understanding of certain foundational principles before they will be able to analyze cases that interpret the amendments. Although this chapter will examine the First Amendment, it will do so in order to explain the doctrine of **state action.** This chapter will also explain **the role of civil rights legislation, limits on judicial power, the incorporation doctrine, the right to due process, the guarantee of equal protection,** and **the levels of judicial scrutiny.** Understanding these core doctrines will provide students with the necessary context to start learning the intricacies of the amendments.

B. State Action

It is very common to see someone post on social media, "My First Amendment rights were violated because Facebook removed my post!" However, such a statement is inaccurate. A violation of a citizen's right to free speech under the First Amendment occurs if the *government* suppresses someone's speech. Since Meta, a private company, owns Facebook and Instagram, their decision to delete a post is not a free speech violation (Meta, n.d.). The result would be different if a public official in his or her official capacity ran a Facebook page on behalf of their elected office and deleted every negative comment

(*Davison v. Randall*, 2019; *Knight First Amendment Institute v. Trump*, 2019; *Lindke v. Freed,* 2024). **Such an act would qualify as state action, meaning an action carried out by or involving a federal, state, or municipal government.** In this example, social media was simply the forum through which the government restricted speech.

Recent events show that the line between government involvement and private decision-making can become blurred. In September 2025, ABC suspended *Jimmy Kimmel Live* after Kimmel's **monologue** included jokes about Donald Trump and his supporters in the aftermath of Charlie Kirk's murder, sparking outcry from conservative elected officials and social media commentators. The controversy got worse when FCC Chairman Brendan Carr condemned Kimmel's remarks and warned of possible regulatory consequences. At the same time, Nexstar, which owns dozens of ABC affiliates, pulled the show amid advertiser concerns and security threats. Disney, which owns the ABC network, chose to suspend the program indefinitely (Grynbaum, 2025).

These events sparked a heated national debate over free speech and political influence on the media. Some argued that the decision was purely corporate, based on advertising and market concerns. Others claimed that governmental pressure, such as the FCC chair's public threats to revoke broadcast licenses, combined with the financial vulnerability of affiliates seeking FCC approval for other deals, amounted to a First Amendment violation. After his suspension, Kimmel reportedly threatened to file a lawsuit against ABC, and there were social media reports about thousands of customers cancelling their Disney Plus subscriptions. Within a week of his suspension, Kimmel was back on the air (New York Times, 2025).

Because the issue has already been resolved, the Supreme Court will not review whether this situation constituted a First Amendment violation. Regardless, the Court has recognized that government pressure on private entities to restrict speech can amount to state action. In *NRA v. Vullo* (2024), the Court held that the coercion of private parties by state officials to punish a disfavored speaker may be unconstitutional. In *Murthy v. Missouri* (2024), the Court examined allegations that federal officials pressured social media companies to suppress posts about COVID-19 and election integrity. The Court noted that government "coerc[ion] or significant encourag[ement]" of private censorship could trigger First Amendment

scrutiny. The Court dismissed Murthy on procedural grounds, but it emphasized that the government may not coerce platforms through threats of punishment or regulatory action to remove protected speech.

This leads to an important clarification about how the term censorship is commonly used. Some people use the word **censorship** to refer to suppression or restriction of expression by a *private platform* rather than by the government. However, there is no clear agreement or consensus on this distinction, and many people use the word censorship to refer to government restrictions as well (Freedom Forum, n.d.).

Questions about when private conduct becomes state action go far beyond the First Amendment. They arise whenever private behavior is closely tied to government authority, triggering constitutional protections in areas such as criminal procedure, property rights, racial discrimination, and other areas of law. This concept is illustrated in landmark cases like ***Shelley v. Kraemer.***



The Shelley family in their home in St. Louis, Missouri
Image 4.1
(Hemphill, 2018)

Landmark Case Spotlight:
***Shelley v. Kraemer* (1948)**
Case Excerpt (Not Full Case)
Click here for full text.

Mr. Chief Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as **restrictive covenants**, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised. The first of these cases comes to this Court on *certiorari* to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition ....that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, ...it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found

that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase. On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that

enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part: "This property shall not be used or occupied by any person or persons except those of the Caucasian race. " "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded, and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated. By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property, and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. …….Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of

the excluded class, but, as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race." It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that, and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

Thus,§ 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866, which was enacted by Congress while the Fourteenth Amendment was also under consideration provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” This Court has given specific recognition to the same principle. Buchanan v.

Warley, 245 U. S. 60 (1917). It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley, supra, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

We conclude, therefore, that the restrictive agreements, standing alone, cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State, and the provisions of the Amendment have not been violated. ……But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action, or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the

constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

The short of the matter is that, from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States, and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure. We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers, and contracts of sale were accordingly consummated. It is clear that, but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the

States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in

all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners, they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." Strauder v. West Virginia, supra, at 100 U. S. 307.

Only recently, this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry was not a legitimate exercise of the state's police power, but violated the guaranty of the equal protection of the laws. Oyama v. California, 332 U. S. 633 (1948). Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power. [. 27] Cf. Buchanan v. Warley, supra. Respondents urge, however, that, since the state courts stand ready to enforce restrictive covenants excluding white persons from the

ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.

This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. **And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.** Cf. Marsh v. Alabama, 326 U. S. 501 (1946).

The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by

the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution, and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare.

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color..... **Upon full consideration, we have concluded that, in these cases, the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.**

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.
Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

Although the requirement of state action seems straightforward at first glance, analyzing recent First Amendment cases and the historic *Shelley v. Kraemer* decision shows that the lines can become blurred between private activity and government conduct. **In *Shelley v. Kraemer* (1948), for example, the Court held that while private parties could agree to racially restrictive housing covenants, judicial enforcement of those covenants constitutes state action and therefore violates the Equal Protection Clause.** When determining whether something constitutes state action and thereby triggers constitutional protections, it is helpful to first ask whether the activity in question regulates human conduct in some way. Then, consider whether the entity enforcing the rule is a government body, is closely entangled with government functions, or would require government assistance to ensure compliance.

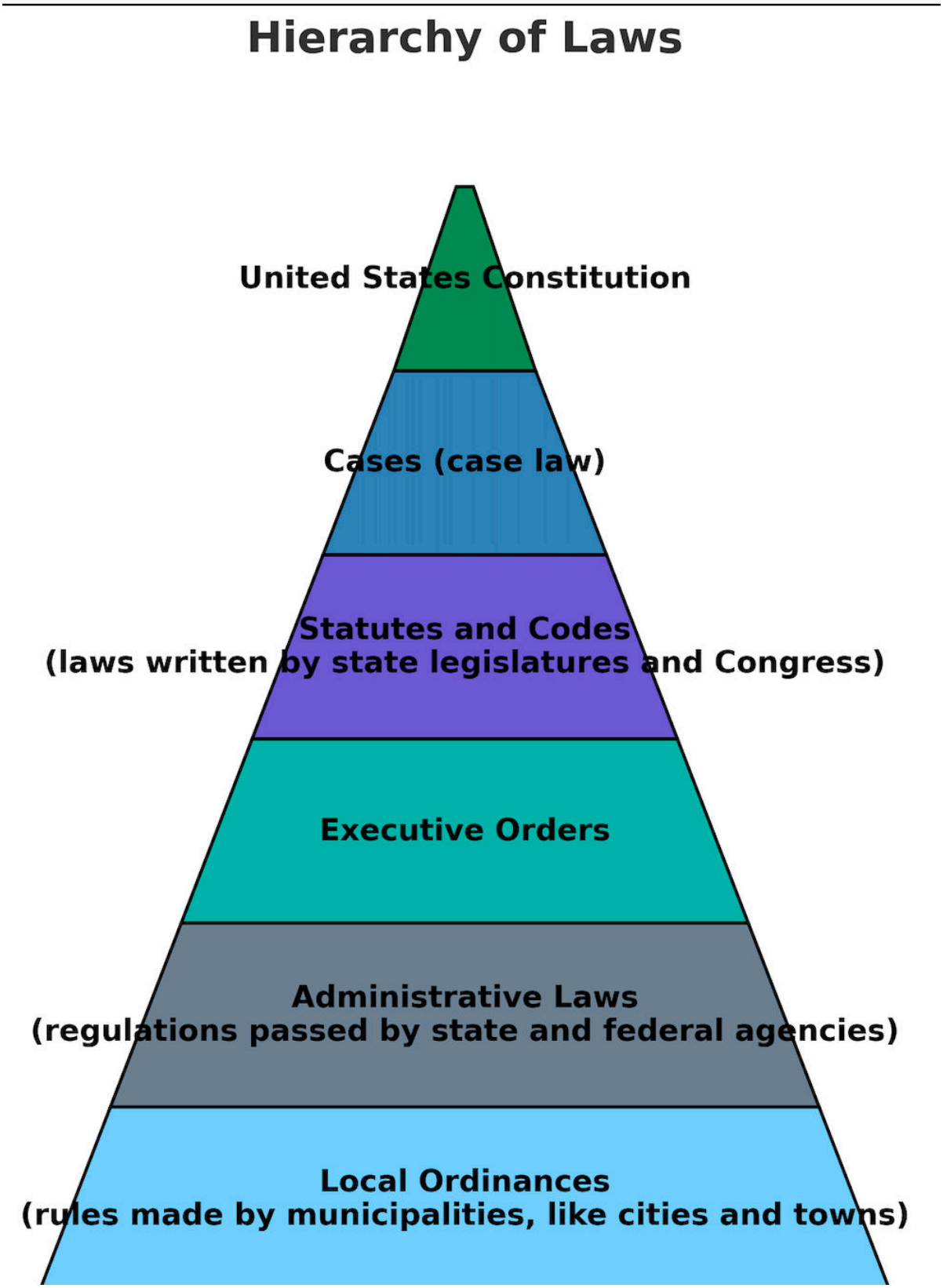


Image 4.2
(Original Work, Getchell-Bastien)

C. Hierarchy of Laws and Important Civil Rights Legislation

This OER focuses primarily on Supreme Court cases because most constitutional rights are recognized and defined through **case law**, the body of legal principles developed through court decisions that interpret the Constitution. Case law follows the doctrine of ***stare decisis***, which is the practice of courts adhering to **precedent.** However, case law is not the only kind of law. **Statutes** are enacted by state legislatures, **federal codes** are passed by Congress, **executive orders** are issued by the president, and **administrative regulations** are created by agencies such as the IRS or a state's Department of Motor Vehicles. Additionally, **common law** consists of general principles developed through legal tradition that courts look to when no statute, regulation, or precedent applies. It is important to understand where these various laws fit in the hierarchy of laws.

As you can see in the graphic above, these different sources of law are organized into a **hierarchy**, meaning they are ranked in order of authority. At the very top is the Constitution, which is the supreme law of the land and takes precedence over every other source of law. Just below the Constitution is case law because courts have the power to interpret the Constitution and other laws. Next are statutes and codes, which are written laws created by elected legislatures at the state and federal level. These laws cannot conflict with the Constitution or binding court decisions. Executive orders follow because they carry the force of law but are limited to the powers granted to presidents by the Constitution and Congress. Administrative regulations come after that because agencies like the IRS or a state's DMV only have the authority delegated to them by legislatures or those holding executive office. At the very bottom are local ordinances, which are rules made by municipalities like cities and towns. While they matter locally, they have the least authority because they must always comply with all other laws (Teas, Jefferies, Shomaker, Watson, & Gilmour, n.d.)

After reviewing where legislation fits into the hierarchy of laws, it is helpful to review major civil rights acts before reading further. These acts are referenced repeatedly throughout this OER. Only the most significant ones are included in blue below, and others will be introduced in later sections where they are most relevant.

Key Federal Legislation - Civil Rights and Civil Liberties

1. **Civil Rights Act of 1964 –** Landmark law banning discrimination in public accommodations (Title II), employment (Title VII), and federally funded programs (Title VI) on the basis of race, color, religion, sex, or national origin.
2. **Voting Rights Act of 1965 –** Prohibits racial discrimination in voting. Section 5 required pre-clearance for jurisdictions with a history of discrimination, but this requirement was later invalidated by *Shelby County v. Holder* (2013).
3. **Age Discrimination in Employment Act of 1967 (ADEA)** – Prohibits workplace discrimination against individuals over age 40.
4. **Education Amendments of 1972, Title IX** – Prohibited sex discrimination in federally funded education programs and activities.
5. **Pregnancy Discrimination Act of 1978** – Amended Title VII to prohibit discrimination based on pregnancy, childbirth, or related medical conditions.
6. **Americans with Disabilities Act (ADA) of 1990** – Prohibits discrimination based on disability in employment, public services, and public accommodations.
7. **Lilly Ledbetter Fair Pay Act of 2009** – Restored workers' ability to challenge ongoing pay discrimination by resetting the statute of limitations with each discriminatory paycheck.

The **Civil Rights Act of 1964** bans segregation in public places such as hotels, restaurants, and theaters. It also bars discrimination based on race, religion, sex, or national origin in federally funded programs and outlaws employment discrimination by most employers. When first reading about the Act, students might wonder how Congress had the power to regulate private businesses and order them to stop segregating their customers. After all, the **state action** requirement, described above, would seem to prevent such regulation.

The answer lies in the **Commerce Clause**, which is found in Article I, Section 8, Clause 3 of the Constitution. It says that Congress has the power to, *"regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."* Additionally, the **Necessary and Proper Clause**, which is found in Article I, Section 8, Clause 18, allows Congress to pass laws needed to carry out its constitutional powers, like regulating state commerce. In 1964, when the Heart of Atlanta Motel sued to challenge the Civil Rights Act, the Supreme Court upheld the Act and ruled that Congress had the authority under the Commerce Clause to prohibit racial discrimination in public accommodations (*Heart of Atlanta Motel v. United States*, 1964).

D. Limits on Judicial Power

Students who are just beginning to study civil rights are often surprised to learn about the basic limits on the power of **appellate courts**. Unlike trial courts, appellate courts do not call witnesses, use juries, or decide which evidence gets admitted. Instead, they only review the official record from a lower court and decide whether the law was applied correctly. Additionally, not everyone who wants an appeal gets one. Most requests for appeals are denied. Appellate courts will only agree to hear a case when there are errors that could have changed the outcome of the case at trial or when fundamental flaws occurred in the proceedings below. Most appellate cases are decided by a panel of three judges, but in rare and important situations, the full court may rehear the case ***en banc,*** meaning all active judges on that appellate court participate in the decision.

Another important limit on judicial power is found in Article III, which restricts federal courts to hearing actual cases and controversies. The Constitution provides that "***The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution... [and] to Controversies***," meaning that courts can only decide real, concrete disputes. In constitutional law, this principle is known as **justiciability.** There are several aspects to **justiciability** defined in blue below. Please note that the Supreme Court sometimes makes exceptions to these rules, and there is considerable overlap between the terms below.

Justiciability - Limits on Federal Court Jurisdiction

1. **Advisory Opinions** – Federal courts cannot issue opinions that answer hypothetical questions or that only interpret the law in the abstract. Example: If a member of Congress asked the Supreme Court whether a bill would be constitutional while it is in the middle of being drafted, the Court must decline to hear the case because it cannot answer hypothetical questions.

2. **Collusive Cases** – A lawsuit must involve parties who actually have a conflict. If both sides want the same outcome and are only testing the law, the courts will not hear the case. Example: Two companies file a lawsuit against each other to try to get a law struck down in order to save money, and neither party has truly been harmed. The Court would not agree to hear the case.
3. **Standing** – To bring a case, a plaintiff must be the correct party. He or she must have a personal stake in the outcome or an actual injury that was caused by the defendant.

Example: A voter who is a citizen of and resides in California tries to sue the government of Texas over election procedures in Texas. Because the voter has not personally suffered an injury in Texas, they lack standing.

4. **Ripeness** – Courts require that a dispute be ready for review, not premature. Example: A business sues to challenge a regulation before the rule has even gone into effect. The Court would likely dismiss the case as unripe because no injustice has occurred yet.
5. **Mootness** – If a dispute has already been resolved or no longer presents a live controversy, the courts will not decide it. Example: A student sues a university over a suspension, but the suspension is lifted and the student graduates before the case is heard. The Court would dismiss it as moot because it was filed too late.
6. **Political Question Doctrine** – Courts avoid cases that the Constitution assigns to other elected branches or that are too politically charged for judicial resolution.
   Example: A state sues the President, claiming that a treaty he negotiated with another country is unconstitutional because it gives away too much power. The Court would likely dismiss the case as a political question because the Constitution grants treaty-making power to the President and the Senate. The Court has also treated disputes over the constitutional amendment process (Article V) as political questions best left to Congress
   (Justiciability, Wex, Cornell Law School).

E. The Incorporation Doctrine

When first studying civil rights and liberties, one might assume that the first ten amendments apply to both the federal government and state governments. This assumption is inaccurate. **The Bill of Rights was originally understood to apply only to the federal government.** The text of the Constitution restricted "Congress", not the states, and state constitutions were expected to protect individual rights (*Barron v. Baltimore*, 1833). Over time, this point of view changed. After the Civil War and the passage of the Fourteenth Amendment, litigants and legal scholars began arguing that the language of the Fourteenth Amendment made the protections of the Bill of Rights applicable to state governments.

Beginning in the early 20th century, the Supreme Court started using language in

the Constitution to apply individual protections from the Bill of Rights to the states. The **Due Process Clause** of the Fourteenth Amendment, Section 1, says in part: "*nor shall any **State** deprive any person of life, liberty, or property, without due process of law.*" In 1925, the Supreme Court decided *Gitlow v. New York* and held that the First Amendment's guarantees of speech and press applied to the states through the Fourteenth Amendment's Due Process Clause, laying the foundation for what became known as the **incorporation doctrine**. Instead of applying every right at once, the Supreme Court chose a system called **selective incorporation**, where it applied only certain rights that it viewed as essential. When reading Supreme Court cases, one will notice that nearly every decision includes a brief discussion of whether a particular amendment has been "incorporated" (Cornell Law School, Wex, "Incorporation Doctrine").

Full Incorporation (State governments must abide by all parts of the amendment.)	**Partial Incorporation** (State governments must abide by only certain parts of the amendment.)	**No Incorporation** (States don't have to abide by the amendment due to a court decision or the wording of the amendment itself).
First Amendment Second Amendment Fourth Amendment Eighth Amendment	Fifth Amendment (The right to indictment by a grand jury has not been incorporated, meaning states do not have to provide grand juries for state cases.) Sixth Amendment (The right to a jury selected from residents of crime location has not been incorporated for state cases.)	Third Amendment Seventh Amendment Ninth Amendment Tenth Amendment

Image 4.3
(Cornell Law School, Wex, "Incorporation Doctrine")

F. Due Process and Equal Protection

The Due Process Clause plays a critical role beyond its function in the incorporation doctrine. The phrases "due process" and "equal protection" appear in nearly all cases involving the rights of criminal defendants or challenges to laws that allegedly discriminate. The **Due Process Clause** first appeared in the Fifth Amendment, which states: *"No person shall... be deprived of life, liberty, or property, without due process of law."* The Fourteenth Amendment extended the same protection to the states, declaring: *"nor shall any State deprive any person of life, liberty, or property, without due process of law."* In simple terms, due process means that the government must act fairly and follow established procedures before taking away a person's life, freedom, or property. For example, a person accused of a crime must be informed of their Miranda rights, formally charged in court, provided a fair trial, given a fair sentence, and protected from cruel and unusual punishment. Some scholars make the distinction of calling this **procedural due process.**

The term **substantive due process** has emerged over the past century, and it refers to how many believe the Fourteenth Amendment guarantees fair legal procedures and protects certain fundamental rights from government interference, even if those rights are not specifically mentioned in the Constitution. Courts have used it to strike down laws that infringe on rights considered essential to liberty, such as the right to marry, the right to use contraception, parental rights, and other reproductive rights. This concept is controversial because it relies on judicial interpretation of what counts as "fundamental", and some consider it to be an example of **judicial activism.** Most cases mentioning due process focus on procedural protections, while substantive due process is reserved for rare but highly significant cases about fundamental rights.

The **Equal Protection Clause** also appears in the Fourteenth Amendment. It says *"nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."* Put simply, equal protection means the Court has to strike down any laws that do not treat people equally or single groups for different treatment. For example, a law cannot put limits on someone's right to vote based on race or gender.

These guarantees highlight the distinction between **civil rights** and **civil liberties,** two terms often used interchangeably by the general public. Civil liberties are basic freedoms found in the Bill of Rights that protect individuals from

government interference, such as freedom of speech, protection from unreasonable searches, and the right to due process in court. Civil rights involve the government's duty to ensure equal treatment under the law and enforce rights established in statutes that prohibit discrimination (FindLaw, "Civil Rights vs. Civil Liberties").

G. Levels of Judicial Scrutiny

The levels of judicial scrutiny determine how the Supreme Court applies different standards when reviewing laws that might be discriminatory or impact fundamental rights. At first, one might assume that all discriminatory laws would be struck down, but not all classifications are equally likely to be unfair or unconstitutional. For example, race-based distinctions in the law are virtually impossible to justify, while some gender-based distinctions can be upheld if connected to biological differences. When a law classifies individuals based on their membership in a particular group, the Court specifies the level of scrutiny applied. The chart below offers a helpful preview of these standards before analyzing civil rights cases (FindLaw, Challenging Laws: 3 Levels of Scrutiny Explained).

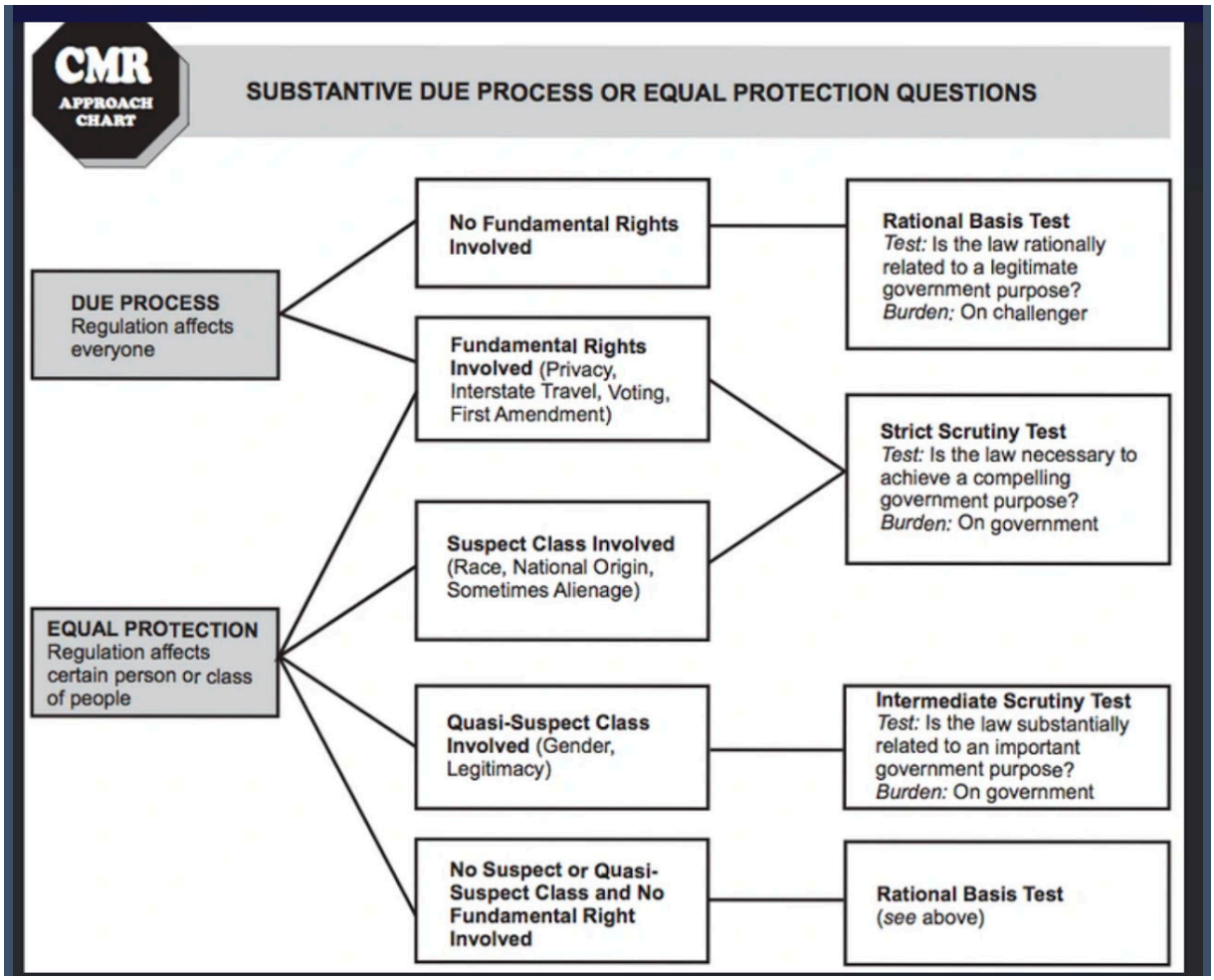


Image 4.4
(BARBRI, *Conviser Mini Review*, Constitutional Law Approach Chart)

Conclusion

Understanding the state action requirement, major civil rights legislation, the limits of judicial power, incorporation of the amendments, the levels of judicial scrutiny, and the significance of due process and equal protection provides essential background for studying civil rights and liberties.

Sources

- *Please note that the URLs listed below are presented as plain text rather than active hyperlinks in order to avoid triggering automated security filters.*

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Chapter Five

Chapter Five

The First Amendment Part One:

Religious Protections

Chapter Outline

A. Overview

B. The Establishment Clause

1. Historical Context and the Lemon Test
2. Government-Sponsored Prayer
3. Religious Displays on Government Property

C. The Free Exercise Clause

A. Overview

Since its founding in 1789, the U.S. Supreme Court has issued more than 30,000 decisions on the merits (Harvard Law Review, n.d.). The exact number of Supreme Court cases involving the First Amendment is unknown, but the Free Speech Center's database lists over 870 significant First Amendment rulings across federal and state courts. **Historians and constitutional law experts point to several reasons for the significant number of cases that have involved the First Amendment, but most agree that two reasons stand out more than others: (1) the amendment's legacy in protecting religion and speech, and (2) the complicated nature of the amendment due to its broad range of protections (Free Speech Center, n.d.).**

The framers of the Constitution were committed to protecting religious liberty because they understood the history and dangers of government-imposed religion. Queen Mary I of England (1553–1558) ordered hundreds of Protestants to be executed for their faith, and Queen Elizabeth I (1558–1603) instituted numerous restrictions on Catholics for refusing to conform to the Church of England, such as fines, loss of political rights, and other penalties (Library of Congress, n.d.).

These patterns of persecution continued in the American colonies. Puritan leaders in Massachusetts whipped, banished, and even executed Quakers and other religious dissenters. Catholics in colonies such as Maryland faced restrictions on worship and their right to own property. From the 1800s through the present, the

American tradition of fiercely protecting speech and religion has been litigated in the courts, debated in legislatures, and analyzed in the media. As a result, the protection of religious freedom has become a core part of our nation's identity, constitutional heritage, and civic culture (Library of Congress, n.d.).

In addition to its historical legacy, the text of the First Amendment contains numerous guarantees that have also contributed to the considerable litigation surrounding it. The text of the First Amendment says, ***"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."***

When analyzed provision by provision, it becomes easier to understand both the scope of the First Amendment's protections and why the amendment has sparked so many legal disputes. **The amendment contains the following guarantees:**

1. **Establishment Clause** - The government cannot create an official religion, give preference to one religion over another, or promote religion in general.
2. **Free Exercise of Religion** - The government cannot ban religious practices; however, there are exceptions to this general rule if the religious practice can cause harm to others.
3. **Free Speech** - The government cannot restrict free speech, generally speaking, and this includes speech that is symbolic in nature, as well as advertising. There are exceptions to this general rule for issues regarding public safety, obscenity, fraud, defamation, and other activities. Laws affecting communications using the Internet and other forms of technology are analyzed under the free speech clause.
4. **Freedom of the Press** — The clause refers to the right of journalists and the media to publish information and opinions without government interference. Like all amendments, there are narrow exceptions to this right.
5. **Freedom to Assemble and Petition the Government** — U.S. citizens have the right to gather peacefully, demonstrate, and ask the government to address their concerns. The government can establish reasonable time, place, and manner restrictions on these activities.
6. **Freedom of Association** — This right is inferred from the First Amendment, rather than explicitly stated, and protects the ability to join, form, or leave groups and organizations without government restriction.

Only the clauses in blue above will be discussed here in Chapter Five. The rest

will be covered in Chapter Six.

B. The Establishment Clause

1. Historical Context and the Lemon Test

In 1802, the Danbury Baptist Association, a network of Connecticut Baptist churches, wrote to President Jefferson because the state's official Congregational Church required religious dissenters like Baptists to pay taxes for its support. This resulted in Baptists being compelled to finance another church and left their religious liberty dependent on lawmakers. Jefferson famously wrote back to the Baptists stating, **"I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State"** (Thomas Jefferson, *Letter to the Danbury Baptist Association*).

A modern translation of Jefferson's famous statement could be expressed as follows, *"Congress cannot create a national religion or interfere with people's right to practice their faith, and this principle establishes a clear wall separating church and state."* More than a century later, the Supreme Court addressed how this principle applies to the states. In 1947, the Supreme Court made clear that the Establishment Clause is incorporated through the Fourteenth Amendment (*Everson v. Board of Education*). This means that state and local governments, not just the federal government, must also comply with the Establishment Clause and refrain from actions that promote or endorse religion.

Once the Establishment Clause was applied to the states, the Court was required to develop standards for evaluating when government involvement with religion goes too far. In *Lemon v. Kurtzman* (1971), the Supreme Court struck down certain Pennsylvania and Rhode Island programs that provided public funding to supplement teacher salaries and instructional materials in religious schools. From this decision, the Court established the well-known **Lemon Test**, a framework for evaluating Establishment Clause cases. **Please read the case excerpt below and see if you can identify the three-prong test.**

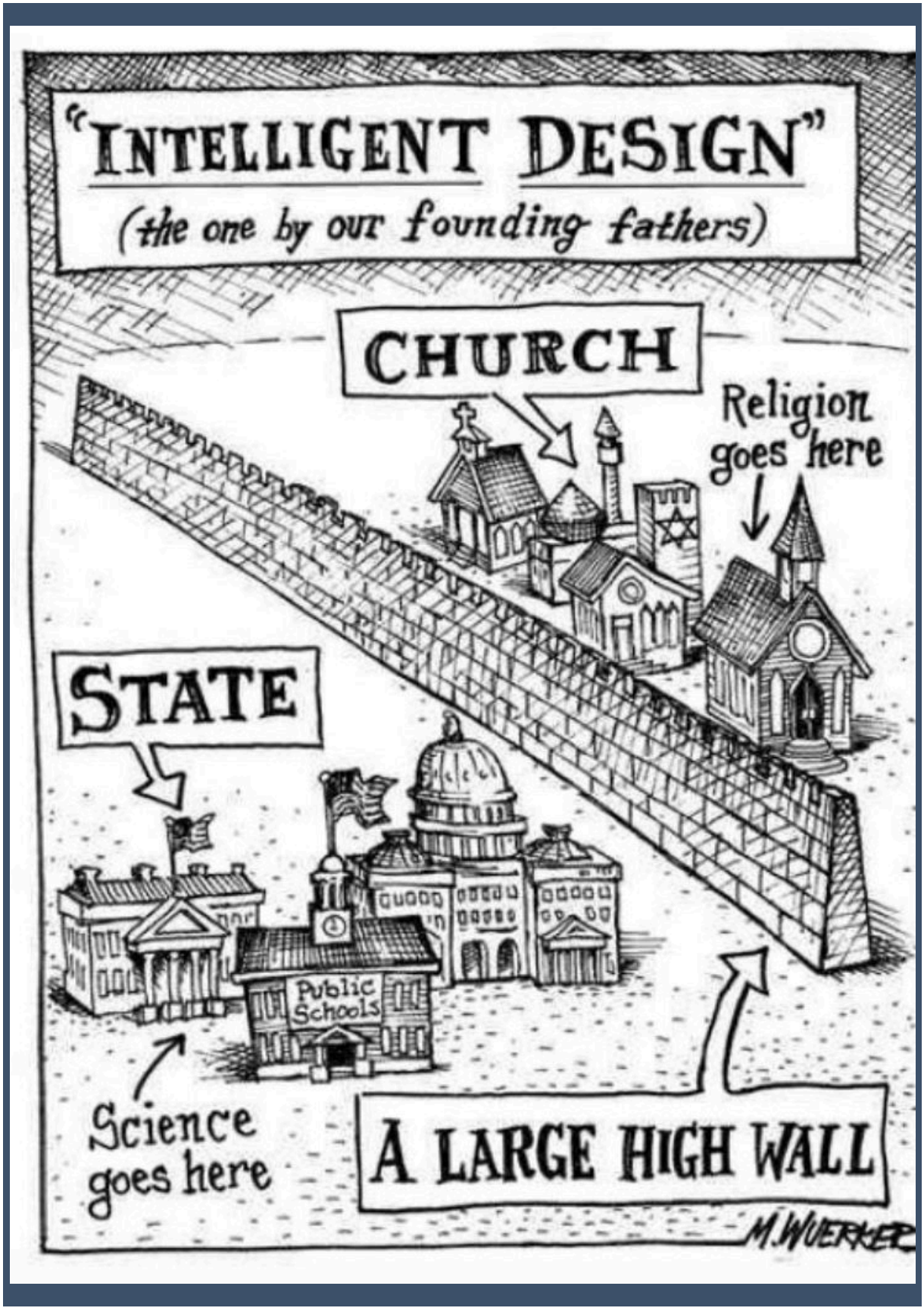

"INTELLIGENT DESIGN"
(the one by our founding fathers)
CHURCH
Religion goes here
STATE
Public Schools
Science goes here
A LARGE HIGH WALL
M. WUERKER

Image 5.1
(Wuerker, 2021.)

Landmark Case Spotlight:
***Lemon v. Kurtzman* (1971)**
Case Excerpt (Not Full Case)
Click here for full text.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I *The Rhode Island Statute* The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools,

and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition, two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." We affirm.

The Pennsylvania Statute Pennsylvania has adopted a program that has some, but not all, of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education. . . ."

The organizational plaintiffs appellants are associations of

persons resident in Pennsylvania declaring belief in the separation of church and state; individual plaintiffs appellants are citizens and taxpayers of Pennsylvania. Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track, and thus had paid the specific tax that supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants appellees.

A three-judge federal court was convened. The District Court held that the individual plaintiffs appellants had standing to challenge the Act, 310 F. Supp. 42. The organizational plaintiffs appellants were denied standing under *Flast v. Cohen,* . The court granted appellees' motion to dismiss the complaint for failure to state a claim for relief. It held that the Act violated neither the Establishment nor the Free Exercise Clause, Chief Judge Hastie dissenting. We reverse.

II In *Everson v. Board of Education,* 330 U. S. 1 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There, MR. JUSTICE BLACK, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses.Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is, at best, opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state

religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion, but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U. S. 664, 397 U. S. 668 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U. S. 236, 392 U. S. 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion.

III In *Walz v. Tax Commission, supra*, the Court upheld state

tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine, rather than enlarge, the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Here we find that both statutes foster an impermissible degree of entanglement.

(a) Rhode Island program The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act. The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises, since instruction

in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities.

Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools, rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings, the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of

these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious

organization is fraught with the sort of entanglement that the Constitution forbids.

(b) Pennsylvania program The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular, as distinguished from the religious, instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards "

IV A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare, and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been

developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

V The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that, in constitutional adjudication, some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. A certain momentum develops in constitutional theory, and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational

institutions by religious organizations, largely by the gifts of faithful adherents. The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

B. The Establishment Clause - continued

In the years following *Lemon v. Kurtzman* (1971), the Supreme Court frequently applied the Lemon Test in cases involving government aid to religious schools. In *Committee for Public Education v. Nyquist* (1973), the Court struck down tuition reimbursements and tax benefits for parents of students attending religious schools, concluding that the program failed Lemon's requirements. Later, in *Aguilar v. Felton* (1985), the Court invalidated a program that sent public school teachers into religious schools to provide remedial instruction, emphasizing that ongoing government oversight created excessive entanglement between church and state. Together, these cases illustrate the Court's early reluctance to permit public funding arrangements that closely involved religious institutions.

The Court later moved away from the strict application of the Lemon Test when addressing issues of public funding and religion. In *Zelman v. Simmons-Harris* (2002), the Court upheld an Ohio school voucher program that allowed parents to use public funds at private religious schools. Rather than strictly applying the Lemon Test, the Court focused on whether the program was neutral toward religion and provided genuine private choice. It concluded that any benefit to religious schools resulted from the independent decisions of parents rather than direct government advancement or endorsement of religion. This reasoning was echoed in *Carson v. Makin* (2022), where the Court held that when a state provides public funding for private schools, it may not exclude religious schools solely due to their religious character because doing so would violate the Free Exercise Clause.

In late 2024, another Establishment Clause funding issue arose in Oklahoma when Ryan Walters, the State Superintendent of Public Instruction, allocated $3 million in state funds for the purchase of Bibles. He announced an initial order of 500 Bibles for Advanced Placement Government classrooms, and schools in the state were reported to have begun distributing the "Trump-endorsed" *God Bless the U.S.A.* King James Bibles. They included not only the biblical text but also the Declaration of Independence, the Pledge of Allegiance, the Constitution, and the Bill of Rights. Although the Oklahoma Supreme Court temporarily blocked the use of public funds for these purchases three months later, the controversy led to numerous lawsuits and broader public debate. In late 2025, the Oklahoma Supreme Court dismissed a lawsuit challenging the Bible-in-schools mandate

after state education officials announced they would no longer enforce the original policy involving the funding and distribution of the Bibles, effectively ending the dispute (*Oklahoma Supreme Court dismisses Bible mandate lawsuit*, 2025).

A related funding controversy emerged in June 2025, when an Ohio trial court ruled that the state's universal voucher program, known as EdChoice, violated the Ohio Constitution by diverting public funds away from the stat's constitutionally required system of "common schools" and by channeling taxpayer money to religious institutions. The ruling rested on independent state constitutional grounds, including concerns about the financial impact on traditional public schools, and the case has not reached the U.S. Supreme Court (PFPS, 2025). As of early 2026, the EdChoice program remains in effect while the state appeals the decision within Ohio's court system, leaving the ultimate outcome unresolved.

The Lemon Test served as a helpful guide for understanding how courts analyze government funding involving religion, particularly whether such arrangements resulted in excessive entanglement between church and state. Over time, the Supreme Court has shifted toward more context-specific approaches, emphasizing factors such as neutrality, private choice, and historical practice. Cases involving school prayer and religious displays on government property raise different constitutional concerns. In most instances, school prayer cases are evaluated using the **coercion test**, while cases involving religious displays are analyzed using the **endorsement test**, although this is not always the case. The following sections explore how these standards are applied in practice.

2. Government-Sponsored Prayer

Considering Jefferson's famous quote about the metaphorical wall separating church and state, it may surprise some Americans to learn that Congress begins each session with a prayer, a tradition dating back to 1789. In *Marsh v. Chambers* (1983), the Court upheld prayer in the Nebraska state legislature and emphasized that the long tradition of prayer in Congress supported the constitutionality of the tradition. Similarly, in *Town of Greece v. Galloway* (2014), the Court extended this reasoning to permit prayers before local government meetings. In doing so, the Court emphasized what is known as the **coercion test**, first articulated in *Lee v. Weisman* (1992), which has frequently been used when analyzing government-sponsored prayer. This test asks whether individuals are pressured, directly or indirectly, to

participate in a religious exercise. Because attendance at such meetings is voluntary and no penalties are imposed for non-participation, the Court found no unconstitutional coercion (Legal Information Institute, n.d.).

The Supreme Court has taken a different approach when analyzing prayer in public schools, where attendance is not voluntary and students are more susceptible to influence. **In *Engel v. Vitale* (1962), the Court struck down a policy of the New York Board of Regents that authorized teachers to recite a state-composed prayer during the school day.** The Court held that government-sponsored prayer in public schools violates the Establishment Clause. This decision sparked significant backlash, with many Americans accusing the Court of hostility toward religion for rejecting even voluntary, non-denominational school prayer. In response, some members of Congress introduced proposed constitutional amendments to restore prayer in public schools, although none have been ratified (Library of Congress, n.d.).

Before the controversy over the *Engel* case had a chance to die down, the Court decided *Abington School District v. Schempp* (1963). This case required the Justices to consider whether reading the Bible in public schools violated the Establishment Clause. **The Court ruled that state-sponsored Bible readings and recitation of the Lord's Prayer in public schools were unconstitutional.** This decision provoked even greater controversy than *Engel* because daily Bible readings and recitation of the Lord's Prayer were long-standing practices in many public schools. The backlash fueled claims that the Court was removing God from public life and led to a wave of proposed constitutional amendments to restore school prayer and Bible reading. None have been successful.

In the 1980s, the Court again addressed cases involving prayer in public schools. In *Wallace v. Jaffree* (1985), it struck down an Alabama law that authorized a daily moment of silence for meditation or voluntary prayer, finding that its purpose was clearly religious and therefore unconstitutional. A few years later, in *Lee v. Weisman* (1992), the Court established the **coercion test,** noted earlier in this chapter, to strike down clergy-led prayers at public school graduations, reasoning that the state's involvement and the inadvertent social pressure on students to participate amounted to unconstitutional government coercion.

In *Santa Fe Independent School District v. Doe* (2000), the Supreme Court struck down a school policy that allowed student-led prayers to be delivered over the

school's public-address sound system at home football games. Although the prayers did not occur during the regular school day, they were broadcast at school-sponsored events using official school equipment, which led the Court to conclude that the practice amounted to government endorsement of religion and created coercive pressure on students required to attend or participate in the events.

Given the Court's earlier approach from the 1960s through the 2000s, many were surprised by the 2022 *Kennedy v. Bremerton School District* decision, where the Court ruled in favor of a high school football coach who prayed on the field after games. The Justices emphasized that the prayers occurred outside the classroom, after instructional time, and without students being required to participate. As a result, the Court concluded that the coach's actions constituted private religious expression protected by the Free Exercise and Free Speech Clauses, rather than a government endorsement of religion, underscoring that context and tradition play a critical role in Establishment Clause analysis.

3. Religious Displays on Government Property

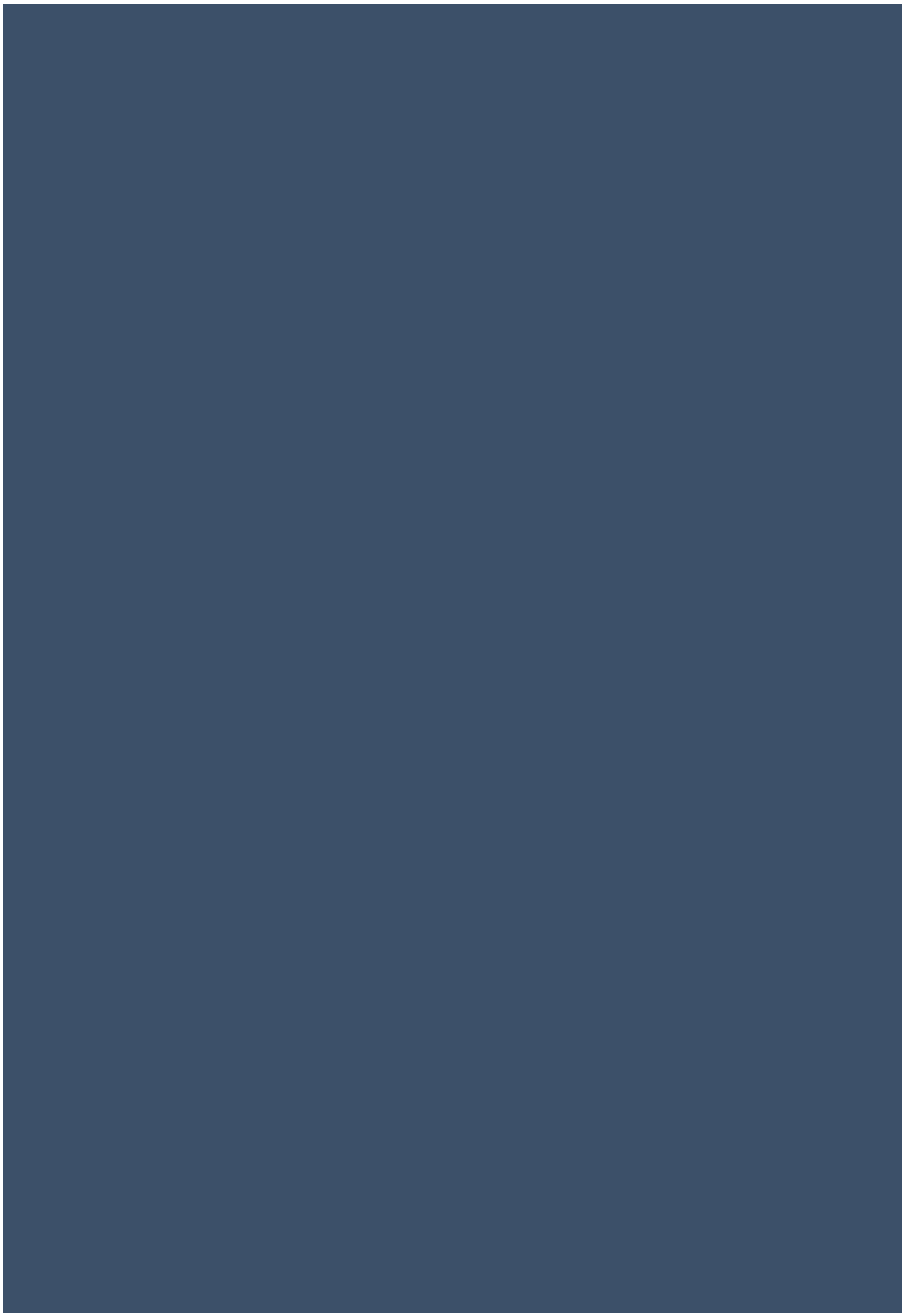
In *Lynch v. Donnelly* (1984), the city of Pawtucket, Rhode Island, included a nativity scene as part of its annual holiday display in a downtown shopping district, alongside secular symbols such as Santa Claus, reindeer, and Christmas trees. The Court upheld the display, reasoning that it recognized the cultural and historical aspects of the holiday season and did not primarily advance or endorse religion. In a concurring opinion, Justice O'Connor introduced what became known as the **endorsement test**, which asks whether a government action would be perceived by a reasonable observer as endorsing or disapproving of religion.

In *County of Allegheny v. ACLU* (1989), the Court applied the endorsement test more strictly than it had in *Lynch* by evaluating two different holiday displays. The Court held that a nativity scene displayed alone inside the Allegheny County Courthouse violated the Establishment Clause because it conveyed government endorsement of Christianity. By contrast, the Justices upheld a menorah displayed outside the City-County Building alongside a Christmas tree and other holiday decorations, reasoning that, in that broader context, the display reflected cultural pluralism rather than promoting a single faith. The *Allegheny* decision emphasized that context matters when evaluating whether a specific government action appears to endorse religion.

While cases like *County of Allegheny* focused on whether government actions appeared to endorse religion, growing concern soon emerged that religious practices were being restricted too aggressively. In response to these concerns, Congress passed the Religious **Freedom Restoration Act (RFRA)** in 1993 to strengthen protections for religious exercise. RFRA required the government to demonstrate a compelling interest and to use the least restrictive means whenever it substantially burdened a religious practice. However, in *City of Boerne v. Flores* (1997), the Supreme Court limited RFRA's scope. That case arose when a Catholic church in Texas was denied a permit to expand under a local historic preservation ordinance. The Court ruled that Congress had exceeded its constitutional authority by applying RFRA to the states and held that RFRA applies only to the federal government.

As the Court continued to refine how context shapes Establishment Clause analysis, it confronted the constitutionality of longstanding religious monuments on public property. Later, in *Van Orden v. Perry* (2005), the Court upheld a Ten Commandments monument on the Texas State Capitol grounds, stating that it carried historical and secular significance rather than endorsing religion, because it stood among several other monuments and historical markers in the same area. The decision has generated significant debate among scholars and commentators, some of whom argue that the Ten Commandments are inherently religious and question whether their display on government property can truly be understood as primarily historical or secular in nature.

More recent disputes have involved efforts to place religious texts directly in public school classrooms, where courts have applied stricter constitutional scrutiny. Similar measures arose in Texas, where a law passed in June 2025 required the Ten Commandments to be displayed in classrooms. In August 2025, a federal judge temporarily blocked the law and granted a preliminary injunction after families and faith leaders argued that the mandate violated the Establishment Clause. The judge emphasized that such displays could pressure students into religious observance and noted that there is no longstanding tradition of permanently posting the Ten Commandments in public school classrooms (Texas Tribune, 2025). Similar laws in Louisiana and Arkansas have also been halted by courts, suggesting that legal battles over these measures are ongoing and may ultimately reach the U.S. Supreme Court (The Guardian, 2025).





In Van Orden v. Perry, 545 U.S. 677 (2005), the Supreme Court ruled 5-4 that a monument depicting the Ten Commandments in an Austin, Texas, public park did not violate the establishment clause of the First Amendment. In this photo, Darrell E. Way, a visitor to the Capitol, walks past a stone bearing the Ten Commandments on Friday, Sept. 4, 2002, in Austin, Texas. A federal judge has ruled that the stone slab with the Biblical passage near the state Capitol building

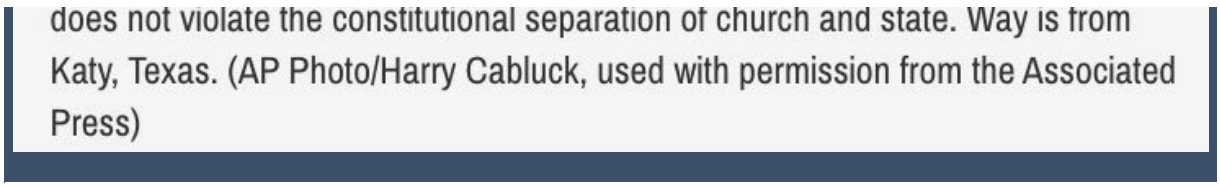


Image 5.2
(Ravitch, 2023)

C. The Free Exercise Clause

While the Establishment Clause limits the government's role in promoting religion, **the Free Exercise Clause focuses on protecting people's right to practice their faith.** Over the years, the Supreme Court has faced questions about what happens when certain religious practices conflict with general laws or negatively affect public safety. The following cases show how the Court's approach has evolved from early rulings on polygamy to modern debates over nondiscrimination and religious liberty.

The Supreme Court first addressed whether the free exercise of religion could be limited in *Reynolds v. United States* (1879), which challenged the constitutionality of a federal law that banned **polygamy,** the practice of having more than one spouse at the same time. The Court upheld the law, ruling that while religious belief is absolutely protected, religiously motivated conduct may be regulated, establishing the important "belief–action" distinction.

The next major Free Exercise case did not arise until six decades later, when the Court decided *Cantwell v. Connecticut* (1940). In that case, Jehovah's Witnesses were arrested for soliciting without a permit under a Connecticut law that let officials decide who could solicit for religious or charitable purposes. The Supreme Court struck down the law, holding that the Free Exercise Clause applies to the states through the Fourteenth Amendment and that giving officials discretion over whether or not to allow religious solicitation risked censorship. The Court reaffirmed that religious belief is fully protected, while religiously motivated conduct may be regulated under generally applicable laws.

After *Cantwell v. Connecticut* established that the Free Exercise Clause applied to the states, the Court was soon asked to decide how far those protections extended. In *Sherbert v. Verner* (1963), a Seventh-day Adventist was denied unemployment benefits after refusing to work on Saturdays, her day of worship. The Court ruled in her favor, holding that when the government substantially burdens a person's religious practice, it must demonstrate a compelling interest and use the least restrictive means available. This **"Sherbert Test"** became the standard for evaluating free exercise claims for nearly three decades.

Less than a decade later, in *Wisconsin v. Yoder* (1972), the Supreme Court considered whether Amish parents could be compelled to comply with state compulsory education laws or whether they could continue their religious

practice of educating their children only through the eighth grade. To explore this case further, **click here** to watch a video about it or **click here** to read the case. **Did the Court rule in favor of the Amish families or the state? What reasoning did the Justices provide for their decision?**

While *Yoder* demonstrated the Court's willingness to grant religious exemptions when state laws imposed a substantial burden on religious practice, the balance shifted two decades later. In *Employment Division v. Smith* (1990), two members of the Native American Church were fired from their jobs after admitting to using peyote as part of a religious ceremony, conduct that violated Oregon's criminal drug laws. When the state subsequently denied them unemployment benefits, the claimants argued that this denial violated their Free Exercise rights. Unlike in *Sherbert* or *Yoder*, the Court ruled against the claimants, holding that the Free Exercise Clause does not excuse individuals from complying with neutral, generally applicable laws, even when those laws incidentally burden religious practices. This decision marked a major turning point and sparked significant debate over the limits of free exercise protections.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), the Supreme Court examined a conflict between the free exercise of religion and anti-discrimination protections. Jack Phillips, a baker and devout Christian, declined to create a custom wedding cake for a same-sex couple, explaining that designing such a cake would force him to express a message contrary to his sincerely held religious beliefs. Phillips emphasized that he was not refusing service altogether and was willing to sell the couple any of the ready-made products available in the store. The couple filed a complaint under Colorado's anti-discrimination law, and the state's Civil Rights Commission ruled against him. When the case reached the Supreme Court, the justices issued a narrow decision in Phillips's favor. The Court found that the Colorado Civil Rights Commission had displayed hostility toward Phillips's religious beliefs during the proceedings, pointing to disparaging comments about religion and a failure to treat his faith-based objections with neutrality, as required under the Free Exercise Clause. The Court did not recognize a broad constitutional right to refuse service but instead focused on the Commission's lack of neutrality, which violated the government's obligation under the Free Exercise Clause.

After the Supreme Court's decision in *Masterpiece Cakeshop*, Phillips became the subject of another lawsuit when a transgender woman, Autumn Scardina, asked him to make a cake celebrating a gender transition. Phillips again refused, citing

his religious beliefs, and Scardina filed a complaint under Colorado's anti-discrimination law. This second case, *Scardina v. Masterpiece Cakeshop*, differed from the earlier lawsuit in an important way. The request was not for a custom wedding cake, but for a relatively simple cake with specific colors of frosting and filling, rather than a unique or expressive design. Unlike the prior case, the Colorado courts found no evidence that state officials had shown hostility toward Phillips's religious beliefs. In 2023, the Colorado Court of Appeals upheld the ruling against him, concluding that his refusal violated the state's anti-discrimination law. Phillips sought review by the U.S. Supreme Court, but the Court declined to grant certiorari, allowing the Colorado ruling to stand and leaving Scardina with a legal victory.

Conclusion

The Establishment Clause and the Free Exercise Clause work together to protect religious freedom, making sure the government does not promote religion while also protecting people's right to practice their faith. The Supreme Court has created different tests and rules in these cases, and sometimes the outcomes may seem to conflict with each other. That is why courts evaluate each case individually, using precedent and the specific context before them to balance these rights in a fair and consistent manner.

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- *Please note that the URLs listed below are presented as plain text rather than active hyperlinks in order to avoid triggering automated security filters.*

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Chapter Six

Chapter Six

The First Amendment Part Two:
Free Speech and Other Protections

Chapter Outline

- A. Overview
- B. Free Speech
  1. Threats
  2. Incitement
  3. Fighting Words & Disorderly Conduct
  4. Hate Speech
  5. Defamation
  6. Fraud & Advertising
  7. Obscenity
  8. Symbolic Speech
- C. Freedom of the Press
- D. Freedom to Assemble and Petition the Government
- E. Freedom of Association

A. Overview

Chapter Five introduced the First Amendment, placed it in historical context, and examined cases that protect religion through the Establishment Clause and the Free Exercise Clause. This chapter continues examining the First Amendment and starts with another look at the amendment's actual words.

"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."

As in the prior chapter, examining the First Amendment one provision at a time and outlining the protections associated with each helps clarify the principles involved. This chapter will examine:

1. **Free Speech** - The government cannot restrict free speech, generally speaking, and this includes speech that is symbolic in nature, as well as advertising. There are exceptions to this general rule for issues regarding public safety, obscenity, fraud, defamation, and other activities. Laws affecting communications using the Internet and other forms of technology are analyzed under the free speech clause.
2. **Freedom of the Press** — The clause refers to the right of journalists and the media to publish information and opinions without government interference. Like all amendments, there are narrow exceptions to this right.
3. **Freedom to Assemble and Petition the Government** — U.S. citizens have the right to gather peacefully, demonstrate, and ask the government to address their concerns. The government can establish reasonable time, place, and manner restrictions on these activities.
4. **Freedom of Association** — This right is inferred from the First Amendment, rather than explicitly stated, and protects the ability to join, form, or leave groups and organizations without government restriction.

B. Free Speech

The First Amendment states, ***"Congress shall make no law … abridging the freedom of speech…"*.** This language safeguards the right of individuals to express their ideas, opinions, and beliefs without government interference. However, this right is not absolute. **Courts have long recognized that some forms of expression cross into unlawful territory, such as threats, incitement, fighting words, disorderly conduct, hate speech, defamation, fraud, obscenity, and some forms of advertising. The Supreme Court has also extended protection to symbolic speech, which consists of nonverbal acts that convey a message, like wearing an armband or burning a flag.** Understanding the boundaries of free speech helps clarify how the Constitution balances individual liberty with the protection of others and maintaining public order.

1. **Threats**

The First Amendment does not protect statements that meet the criteria for criminal threats. For example, under Massachusetts Laws Chapter 275 § 2, someone can be found guilty of criminal threats if the prosecutor proves that the defendant (1) expressed an intent to harm someone or their property; (2) meant for that threat to be communicated to a specific person; (3) threatened an act that would be a crime if carried out; and (4) did so in a way that would reasonably cause the victim to fear the threat could actually be carried out. This criteria is very similar to other state laws that exclude criminal threats from First Amendment protection. At the federal level, several statutes criminalize threats, including interstate threats, threats against the President and other federal officials, and bomb threats (18 U.S.C. §§ 875(c), 871, 115, 844(e)).

In *Virginia v. Black* (2003), the U.S. Supreme Court ruled that states may prohibit "**true threats.**" The Court defined a true threat as a statement or symbolic act that communicates a serious intent to commit unlawful violence against a specific person or group. The case involved three defendants convicted under a Virginia law that made it a crime to burn a cross "with the intent to intimidate" and presumed that any cross burning *automatically* showed such intent. The Supreme Court held that a state may prohibit cross burning when it is intended to intimidate, but the Virginia statute was unconstitutional because it treated all cross burnings as *automatic proof* of intimidation. The Court explained that cross burning at a private Klan rally, while deeply offensive, may be considered protected symbolic speech if it expresses ideology rather than a direct threat, but it becomes a true threat when it is directed at individuals with the purpose of causing fear or intimidation.

Over the next decade, as online communication increased, courts were confronted with cases involving alleged threats made on social media, raising new questions about intent and context. In *Elonis v. United States* (2015), the Supreme Court considered whether a person could be convicted of making threats on social media without proof of intent to threaten. The case involved a defendant who posted a series of violent messages on Facebook about his ex-wife, co-workers, and law enforcement, often framing the messages as rap lyrics. He was convicted under a federal law that prohibited transmitting threats across state lines (18 U.S.C. § 875(c)). The Supreme Court overturned his conviction, ruling that the prosecution failed to prove the defendant had the required mental state to be convicted. The Court explained that it is not enough for a reasonable person to view the words as threatening. **There must be evidence that the speaker subjectively intended, or at least knew, their words would be perceived as a threat.**

The *Elonis* decision laid the groundwork for *Counterman v. Colorado* (2023), which involved a man who sent hundreds of unwanted and disturbing Facebook messages to a local musician over several years, causing her to fear for her safety. He was convicted under a Colorado law that did not require proof of intent to threaten. **The Supreme Court overturned his conviction, holding that the critical issue is whether the prosecution can prove that the speaker's mental state involved a conscious disregard of the risk that the statement would be perceived as a threat.** This ruling clarified the current constitutional standard for regulating threatening speech, including speech conveyed through social media.

Courts have consistently found true threats where a speaker sends repeated, targeted messages that include specific threats of violence, references to weapons, or information showing knowledge of the victim's location. In these cases, the speech goes beyond offensive or disturbing expression and is no longer protected by the Constitution because it is intended to place the target in fear of imminent harm. For example, in October of 2025, the Associated Press reported that a man in Alabama was federally charged with making threatening phone calls and text messages to rabbis and other religious leaders across several states, including statements such as, "I want you to die." Authorities seized firearms and found evidence that he possessed personal information about the individuals he targeted. This case illustrates the type of conduct that prosecutors and courts have treated as a true threat, rather than protected speech (Chandler, 2025).

Even if a criminal conviction for threatening speech is not viable, a person targeted by the threats may still pursue relief in civil court. Victims can file lawsuits for intentional or negligent **infliction of emotional distress** or other suitable claims. These civil actions provide a way to seek monetary damages and accountability, even when the speech does not meet the high evidentiary threshold for criminal prosecution.

2. Incitement

Courts are also concerned about **incitement**, which refers to speech that encourages or provokes others to engage in illegal acts or violence. Before the modern doctrine of incitement was firmly established, the Supreme Court addressed dangerous speech in *Schenck v. United States* (1919). In that case, the Court upheld the conviction of Charles Schenck, a socialist who distributed leaflets urging men to resist the military draft during World War I. He was prosecuted under the Espionage Act of 1917, which made it a crime to obstruct military recruitment or interfere with the war effort. Writing for the Court, Justice Oliver Wendell Holmes Jr. explained that freedom of speech does not protect expressions that create a **"clear and present danger"** of causing significant harm to the nation, such as undermining its ability to defend itself. Justice Holmes illustrated this principle with his famous statement that *"[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater and causing a panic."* This decision laid the foundation for later cases by recognizing that speech posing an immediate and serious threat to public safety or national security may fall outside First Amendment protection.

In *Brandenburg v. Ohio* (1969), the Supreme Court established the modern test for incitement, which greatly expanded free speech protections. The case involved Clarence Brandenburg, a Ku Klux Klan leader in Ohio, who was convicted under a state law after a TV crew filmed him making racist remarks and vague threats of "revengeance [sic]" against the government. The Court overturned his conviction and replaced the older, broader "clear and present danger" test from *Schenck* with a new, narrower standard: **Speech can be punished only if it is directed to inciting or producing imminent lawless action and is likely to produce such action.** This modern standard is called the **imminent lawless action test**, which ensures that offensive or inflammatory expression remains protected, unless it is both intended and likely to cause immediate unlawful behavior.

3. Fighting Words & Disorderly Conduct

Laws addressing disorderly conduct exist in all fifty states, though they may be labeled as breach of the peace or disturbing the peace in some jurisdictions. Generally, these laws prohibit conduct that disrupts public order or tranquility, such as fighting, threats, or behavior likely to provoke violence (Black's Law Dictionary, 12th ed., 2024). They are not designed to criminalize speech that is merely offensive or unpopular. At times, legislatures and law enforcement face challenges when trying to balance the need to maintain public order with the protection of individual rights.

In *Chaplinsky v. New Hampshire* (1942), the U.S. Supreme Court established the **fighting words doctrine**, one of the earliest recognized limits on free speech aimed at preventing public disorder. The case arose when Walter Chaplinsky, a Jehovah's Witness, was distributing religious pamphlets on a public street in Rochester, New Hampshire. After angry exchanges with people who were passing by, a crowd started to gather, and a city marshal warned Chaplinsky to stop causing a disturbance. In response, the defendant shouted insults, calling the marshal a "damned fascist" and a "racketeer." Chaplinsky was arrested and convicted under a state law prohibiting offensive, derisive, or annoying words in public. **The Supreme Court upheld his conviction, ruling that certain narrowly defined types of speech, such as fighting words, which are "likely to provoke the average person to retaliation and cause a breach of the peace," are not protected by the First Amendment because they contribute nothing to public discourse and cause immediate violence.**

A few years later, in *Terminiello v. Chicago* (1949), the Supreme Court began to narrow its application of the fighting words doctrine. Father Arthur Terminiello, a suspended Catholic priest, delivered a fiery speech in Chicago that sharply criticized various racial, political, and religious groups, provoking hostility among listeners inside and outside the auditorium. As tensions escalated and violence broke out, police arrested him under a city ordinance that punished speech likely to cause a breach of the peace. The Supreme Court overturned his conviction, holding that the ordinance was unconstitutional because it punished speech merely for provoking anger or unrest, rather than for creating a clear and present danger. The Court emphasized that the function of free speech is often to "invite dispute" and "stir people to anger," and that the proper response to a hostile audience is crowd control, not silencing the speaker. **This decision clarified that the fighting words doctrine recognized in *Chaplinsky* does not permit a "heckler's veto," and that speech may not be punished simply because it provokes hostility or unrest.**

The Court leaned more decisively toward protecting speech and protest rights in *Edwards v. South Carolina* (1963), a case involving nearly 200 African American students who peacefully marched to the South Carolina State House to protest racial segregation. Police ordered them to disperse when onlookers began expressing hostility, and when the students refused, they were arrested and convicted of breach of the peace and disorderly conduct**.** The Supreme Court unanimously overturned their convictions, ruling that the arrests violated the students' First Amendment rights to free speech, peaceful assembly, and petitioning the government for redress of grievances. **The Court held that the state cannot criminalize peaceful protest merely because it provokes hostility among bystanders.** As Justice Potter Stewart wrote, "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." This ruling solidified the principle that peaceful public demonstrations are fully protected under the First Amendment.

Finally, in *Gooding v. Wilson* (1972), the Supreme Court further narrowed the fighting words doctrine. A Vietnam War protester had been convicted under a Georgia law for shouting insults at police officers, but the Court struck down the statute as too broad because it punished speech beyond true fighting words. **The justices explained that laws restricting speech must be precisely written to cover only direct, personal insults likely to provoke immediate violence.** As politics become more divided and technology keeps advancing, this area of the law will keep changing.

4. Hate Speech

Hate speech generally refers to expression that attacks, demeans, or incites hatred against individuals or groups based on characteristics like race, religion, ethnicity, gender, sexual orientation, or disability (American Bar Association, *Hate Speech and the First Amendment*, 2021). Although such speech is deeply offensive, the U.S. Supreme Court has consistently ruled there is no general hate speech exception to the First Amendment. **Speech cannot be punished simply because it expresses hatred or prejudice**, unless it

falls into a recognized unprotected category such as true threats, incitement to imminent violence, fighting words, or other exceptions mentioned in this chapter. The guiding principle is that the government cannot restrict expression based on its content or viewpoint. As reaffirmed in *Virginia v. Black* (2003), even hateful or bigoted ideas are protected so long as they do not cross the line into direct threats or incitement.

5. Defamation

Speech that damages someone's reputation raises difficult First Amendment issues. The Supreme Court has struggled to balance free expression with the right to protect one's good name. **Defamation** refers to false statements that injure someone's reputation by exposing them to public hatred, ridicule, or contempt. When such statements are written or published, it is called **libel,** and when they are spoken, it is known as **slander** (*Restatement [Seconds] of Torts* § 558). Although defamation lawsuits allow individuals to seek monetary compensation for harm to one's reputation, the First Amendment limits how far these laws can go in order to prevent the suppression of open debate.

The modern constitutional standard for defamation began with *New York Times Co. v. Sullivan* (1964). The case arose after an Alabama public official sued *The New York Times* over a civil rights fundraising advertisement that criticized the treatment of civil rights protesters by local police and contained minor factual inaccuracies. The official won the case at trial, and the verdict was upheld by the Alabama Supreme Court. **Upon further appeal, the United States Supreme Court unanimously overturned the libel judgment, holding that a public official cannot prevail in a defamation case unless they prove the statement was made with "actual malice," meaning it was published with knowledge of its falsity or with reckless disregard for the truth.** The Court reasoned that open debate about public issues must be "uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." This decision gave the press broad protection to report on matters of public concern without fear of being punished for honest mistakes.

Three years later, in *Curtis Publishing Co. v. Butts* (1967), decided alongside *Associated Press v. Walker*, the Court extended the "actual malice" standard established in *New York Times Co. v. Sullivan* beyond public officials to include public figures, such as prominent coaches, celebrities, and others who command substantial public attention. The case involved a *Saturday Evening Post* article accusing University of Georgia football coach Wally Butts of conspiring to fix a football game. The Court ruled that because Butts was a well-known public figure with significant access to the media to defend himself, he was also required to prove **actual malice** to recover damages. **This ruling established that public figures, like government officials, are subject to greater public scrutiny and therefore face a higher burden when bringing defamation claims.**

This brings us to a different kind of challenge: what happens when the target of offensive speech is a public figure, and the words may have been intended to hurt, but they were clearly meant as a joke or parody? The Supreme Court addressed this question in *Hustler Magazine v. Falwell* (1988), a case involving a controversial satire that pushed the limits of free expression. Please read the excerpt from the decision below to see how the Court balanced freedom of speech with claims of defamation and emotional harm. **Please be advised that the case involved graphic descriptions of sexual activity.**


Jerry Falwell talks
about his first time.*



Image 6.1

(Famous Trials, *Parody Ad*)

Landmark Case Spotlight:
***Hustler Magazine, Inc. v. Falwell* (1988)**
Case Excerpt (Not Full Case)
Click here for full text.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. *(Editor note: Hustler Magazine was a nationally distributed adult entertainment magazine known for its sexually explicit content and provocative political satire. It was published by Larry Flynt, who often used the magazine to challenge social norms and push the boundaries of free speech. Jerry Falwell was a well-known evangelical televangelist at the time these events took place. Falwell and Flynt often traded insults in the press.)*

Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November, 1983, issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times."

Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite

who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody -- not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated."

The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners. Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan*, must be met before respondent can recover for emotional distress. The court agreed that, because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel."

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress

is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large" . Justice Frankfurter put it succinctly in *Baumgartner v. United States*, when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra,* at 376 U. S. 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary."

Of course, this does not mean that any speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan*(1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

Respondent argues, however, that a different standard should apply in this case because, here, the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. In respondent's view, and in the view of the Court of Appeals, so

long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking, the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most, if not all, jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, we held that, even when a speaker or writer is motivated by hatred or ill-will, his expression was protected by the First Amendment: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures. Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events -- an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

"The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is

usually as welcome as a bee sting, and is always controversial in some quarters."

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them. Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons.

There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their

dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation* that speech that is "*vulgar,' `offensive,' and `shocking'" is "not entitled to absolute constitutional protection under all circumstances."*

In Chaplinsky v. New Hampshire, 315 U. S. 568 (1942), we held that a State could lawfully punish an individual for the use of insulting "`fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 315 U. S. 571-572. But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing, in addition, that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times*. It reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment. **Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law. The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and, in accordance with our custom, we**

accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. **But, for reasons heretofore stated, this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly *Reversed.***

5. Defamation - continued

The defamation cases discussed in this chapter show that offensive or emotionally harmful speech about government officials and public figures is frequently protected, particularly when it involves satire or parody. In contrast, the First Amendment offers far less protection to speech that intentionally deceives others for financial gain.

6. Fraud & Advertising

Fraud occurs when someone deliberately lies or makes a reckless misrepresentation of an important fact to persuade another person to act in a way that causes harm. In legal terms, it involves intentional deception and is not protected under the First Amendment because it is considered conduct, not expression. The law protects free debate in charitable fundraising and business advertising, but not deceit (*Restatement [Second] of Torts* § 525).

In *Village of Schaumburg v. Citizens for a Better Environment* (1980), the Supreme Court struck down a local ordinance that required charitable organizations to obtain a permit before soliciting donations in public and denied permits to groups that could not show that at least 75 percent of their receipts were used for charitable purposes. Citizens for a Better Environment, a nonprofit environmental group, was barred from soliciting under this rule. The village argued that the ordinance prevented fraud and protected donors from wasteful fundraising, but the Court held that charitable solicitation is protected speech because it combines fundraising with the communication of social and political ideas. While the government may regulate fraud or misrepresentation, it may not condition the right to solicit charitable contributions on rigid percentage-based requirements that restrict legitimate advocacy.

This standard was further refined in *Riley v. National Federation of the Blind* (1988), where the Court analyzed a North Carolina law requiring professional fundraisers to disclose the percentage of contributions actually going to the charitable cause at the time the donation request is made. The Court struck down the law under strict scrutiny, reasoning that this type of compelled disclosure altered the fundraiser's message and burdened protected speech by discouraging charitable giving. While recognizing that the government can regulate and punish actual fraud when it comes to charitable solicitation, the Court held that it may not compel speech or impose rigid disclosure requirements that interfere with how organizations communicate their message. Instead, the court ruled that truthfulness in fundraising must be enforced through narrowly tailored anti-fraud measures.

Just as courts allow some leeway in charitable solicitation, they also permit some flexibility in commercial advertising. Courts have allowed **puffery**, which consists of exaggerated claims that no reasonable consumer would take literally, such as "the best cup of coffee in town." However, businesses may not make false or misleading factual statements. For example, claiming a product is "clinically proven" to work when there is no reliable evidence to substantiate the claim is unlawful. Federal law provides two key tools to address such deception. Under **Section 5 of the Federal Trade Commission (FTC) Act**, the FTC may stop unfair or deceptive business practices and require substantiation for advertising claims. Additionally, **Section 43(a) of the Lanham Act** allows competitors to sue for false or misleading advertisements that are likely to deceive consumers and affect purchasing decisions. Together, these laws ensure that commercial speech remains truthful and that fraud, whether in sales or advertising, remains outside the protection of the First Amendment.

The Court applied this reasoning in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), a case that reshaped how the First Amendment applies to business communication. The case began when a Virginia law prohibited pharmacists from advertising the prices of prescription drugs, arguing that

such ads would make the profession seem less "dignified." The Supreme Court disagreed and struck down the law, ruling that consumers have a right to receive truthful information about prices and that commercial speech can serve an important public interest. Although the Court acknowledged that advertising is not as highly protected as political or artistic speech, it emphasized that truthful commercial information helps people make informed choices and supports transparency in the marketplace.

In *Central Hudson Gas & Electric Corp. v. Public Service Commissio**n*** (1980), the Supreme Court created the well-known **Central Hudson Test** for evaluating restrictions on commercial speech. Under this standard, the Court held that the government may regulate commercial speech only if (1) it concerns lawful activity and is not misleading, (2) the government has a substantial interest, (3) the regulation directly advances that interest, and (4) the restriction is no broader than necessary. False or misleading advertising, however, receives no First Amendment protection at all, because it distorts rather than contributes to the marketplace of ideas.

Taken together, these cases show that the Supreme Court distinguishes between persuasion and deception. Although some professions, such as attorneys, are subject to ethical rules that place limits on advertising, this type of regulation is the exception rather than the norm (ABA Model Rules of Professional Conduct 7.1–7.5). In general, charitable appeals, fundraising efforts, and advertisements receive constitutional protection when they honestly convey ideas and information. Once a message crosses the line into deliberate falsehoods or material misrepresentations, however, it loses that protection.

7. Obscenity

Obscenity, as defined by *Merriam-Webster*, refers to material that is "offensive to accepted standards of decency or modesty." In constitutional law, obscenity occupies one of the few categories of expression entirely excluded from First Amendment protection. The Supreme Court clarified this definition in *Miller v. California* (1973), when it upheld the conviction of a man who mailed unsolicited adult brochures. In doing so, the Court established a three-part test for determining whether material is obscene: **(1) whether the average person, applying contemporary local community standards, would find that the work appeals to a prurient interest (meaning a morbid or shameful interest in sex); (2) whether the work depicts sexual conduct in a patently offensive way as defined by state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.** This test is also known as the SLAPS test after the criteria in part three of the test, and it remains the controlling framework for obscenity cases.

Nearly thirty years later, the Court revisited the limits of this doctrine in *Ashcroft v. Free Speech Coalition* (2002), when it struck down portions of the Child Pornography Prevention Act of 1996, a federal law that banned "virtual" child pornography. The Court concluded that the law was written so broadly that it prohibited a wide range of images that did not involve the exploitation of real children. **Accordingly, the Court held that depictions such as computer-generated images or youthful-looking adult actors cannot be criminalized merely for resembling illegal material because no real children were involved in their creation.**

Recently, modern technology has created new challenges that blur the line between fantasy and exploitation. In response, Congress enacted the **TAKE IT DOWN Act** in May 2025, which makes it a federal crime to post or threaten to post nonconsensual intimate imagery online, including AI-generated or **"deepfake" pornography** (TAKE IT DOWN Act, Pub. L. No. 118-214 [2025]). The law also requires social media companies to remove such content within a specified timeframe after a report and to implement prevention systems within a year. Several states, including Tennessee, Iowa, and New Jersey, have passed similar laws criminalizing synthetic child sexual abuse material (American Academy of Pediatrics, *Laws and Policies Around AI-Generated Deepfakes & Pornography*, 2025). These measures reflect an evolving consensus that, while free expression remains a constitutional

cornerstone, digital fabrications that exploit others, especially minors, fall outside the protections of the First Amendment.



Image 6.2

(University of San Diego, 2019)

8. Symbolic Speech

Symbolic speech refers to actions that convey ideas, such as wearing an armband, burning a flag, or staging a silent protest. In *United States v. O'Brien* (1968), the Supreme Court upheld the conviction of a man who burned his draft card on the steps of a Boston courthouse to protest the Vietnam War, reasoning that the law prohibiting destruction of draft cards served important administrative purposes and did not target expression itself. From this case, the Court developed the **O'Brien Test**, which allows the government to regulate symbolic conduct if (1) the regulation is within the government's constitutional power; (2) it furthers an important or substantial government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the incidental restriction on speech is no greater than essential to further that interest.

The following year, in *Tinker v. Des Moines Independent Community School District* (1969), the Court took a more protective stance when students were suspended for wearing black armbands to protest the Vietnam War, ruling in their favor because **their silent, peaceful expression did not cause a material and substantial disruption of school operations.** Justice Abe Fortas famously wrote that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Two years later, *Cohen v. California* (1971) reaffirmed that offensive expression remains protected speech, holding that a man could not be punished for wearing a jacket reading "Fuck the Draft" in a courthouse corridor. The Court explained that although the message was vulgar, it was not a direct personal insult or an incitement to violence, emphasizing that the First Amendment protects the emotive and political force of speech even when the language offends some members of the public.

In *Texas v. Johnson* (1989), the Supreme Court struck down a Texas law criminalizing flag burning, holding that the government may not prohibit expressive conduct simply because it offends or angers others. **The Court emphasized that the act of burning the American flag in protest was a form of symbolic speech intended to convey a political message, and that suppressing such expression amounted to viewpoint discrimination.** Although Congress and several state legislatures have repeatedly attempted to pass a constitutional amendment or federal statute banning flag desecration, these efforts have failed, leaving *Johnson* as the controlling precedent. (Congressional Research Service, *Flag Desecration: Constitutional Issues and Congressional Proposals*).

C. Freedom of the Press

The word **"press"** refers to the institutions and individuals who gather, produce, and distribute news or information to the public. This has traditionally meant newspapers, magazines, the radio, and television, but now it also includes digital and online journalism. (Encyclopaedia Britannica, 2024). The First Amendment clearly states that, ***"Congress shall make no law ...abridging the freedom of speech, or of the press."*** Historically, this meant that the government cannot engage in **prior restraint**, which refers to official actions that prevent speech or publication before it occurs, such as blocking the press from releasing information (Cornell Law School, Legal Information Institute, Prior Restraint).

Freedom of the Press has been one of the most fiercely protected elements of the First Amendment. The Supreme Court first defined its boundaries in *Near v. Minnesota* (1931), when it struck down a state law that allowed local officials to shut down newspapers deemed "malicious, scandalous, or defamatory." The case involved *The Saturday Press*, a small Minneapolis paper known for harshly criticizing public officials. The Court ruled that this type of conduct, known as **prior restraint**, was unconstitutional, establishing the principle that the government generally may not prevent the press from publishing information it seeks to disseminate, absent extraordinary circumstances that would justify such restraint.

Four decades later, the press faced a new challenge over national security in *New York Times Co. v. United States* (1971), known as the infamous **"Pentagon Papers"** case. The Nixon Administration sought to prevent *The New York Times* from publishing excerpts of a classified government report detailing U.S. involvement in the Vietnam War, arguing that release of the information would endanger national security. The Supreme Court rejected that claim, ruling that prior restraint on publication is unconstitutional unless the government can show the material would cause direct, immediate, and irreparable harm to the nation. Because the articles described past government actions, rather than current military operations, the Court found no such threat. The decision reaffirmed that even in cases involving national security, the government bears a heavy burden when attempting to censor the press.

In ***Hazelwood School District v. Kuhlmeier*** (1988), the Supreme Court drew a distinction between professional journalism and student publications. The case arose after a high school principal removed two articles from a student newspaper prior. One article discussed teen pregnancy and the other addressed the impact of divorce on students. The principal insisted that the articles were inappropriate for younger readers. The Court upheld the principal's decision, ruling that school officials may exercise editorial control over school-sponsored publications if their actions are "reasonably related to legitimate pedagogical concerns." The decision clarified that while students do not "shed their constitutional rights at the schoolhouse gate," those rights are more limited in educational settings and do not extend as broadly as the press freedoms enjoyed by professional journalists.

Most recently, in *Moody v. NetChoice, LLC* and *NetChoice v. Paxton* (2024), the Supreme Court addressed how the First Amendment applies in the digital age. The cases involved Florida and Texas laws that sought to limit how large social media platforms moderate user content, based on claims that the platforms were engaging in political bias. The Court vacated the lower court rulings and remanded the cases back to the lower courts, concluding that they had failed to properly analyze the First Amendment issues raised by the contested laws. **Although the decision did not resolve all constitutional questions, the Court emphasized that platforms' decisions to curate, promote, or remove user content may involve protected editorial judgment, signaling that traditional First Amendment principles extend into the modern digital landscape.**

On September 19, 2025, the U.S. Department of Defense announced restrictions requiring journalists covering the Pentagon to sign a pledge agreeing not to gather or use any information that had not been formally approved for release, with violators risking the loss of their credentials. The policy also limited reporters' movement inside the Pentagon, sharply reducing unescorted access to areas previously open to the press. The National Press Club and First Amendment advocates condemned the move as an unprecedented threat to independent journalism, warning that it would severely restrict the public's access to information about military operations. Critics argued that forcing journalists to agree not to use "unauthorized" information amounts to a form of prior restraint. By conditioning press access on compliance with pre-publication approval, the Pentagon's new policy risks violating this principle. **The policy has since been challenged in federal court, with *The New York Times* filing suit in December 2025, arguing that the restrictions amount to an unconstitutional prior restraint on the press**. A federal court is expected to hear the case in March 2026, and the case remains pending (Bensinger, 2025, *The New York Times*).

Questions about how much the government can regulate the media date back to 1934, when Congress passed the Communications Act of 1934, which included the **Equal Time Rule**. This rule requires broadcast stations using the public airwaves to provide legally qualified political candidates with comparable opportunities, meaning that if one candidate uses a station outside of regular news programming, the station must offer other candidates a similar amount of time in a comparable time slot. In 1949, the Federal Communications Commission (FCC) introduced the **Fairness Doctrine**, which

required broadcasters to present contrasting viewpoints on controversial public issues, along with related rules granting individuals a right to respond to personal attacks aired on public frequencies. In 1970, the FCC adopted the **Zapple Corollary** as an extension of the Fairness Doctrine, requiring broadcasters who provided airtime to a candidate's supporters or spokespeople to offer comparable time to supporters of opposing candidates, whether the message praised one candidate or criticized another (Congressional Research Service, 2023; Federal Communications Commission, 2024).

Beginning in the 1980s, the FCC moved to dismantle many of these policies, reasoning that technological advances and the growth of additional media outlets made government-enforced balance unnecessary. The Fairness Doctrine was repealed in 1987, and the personal attack and political editorial rules were eliminated in 2000. In 2014, the FCC formally concluded that the Zapple Corollary no longer had legal effect. Because cable television, which expanded rapidly in the 1990s, does not rely on the public airwaves, it has never been subject to the Fairness Doctrine and remains outside its scope today.

The Equal Time Rule continues to apply to broadcast stations using the public airwaves but generally does not apply to national cable networks, except in limited circumstances involving certain community access channels. In addition, the Equal Time Rule does not apply to exempt news programming, including regularly scheduled newscasts, news interview programs, documentaries in which a candidate's appearance is incidental, and live coverage of bona fide news events. **This broader trend of deregulation, combined with the rise of cable news and social media, has enabled media outlets to present news from more distinct political perspectives and has contributed to a more opinion-driven and ideologically polarized media environment.** Algorithm-driven content on social media platforms further reinforces these divides, leading many Americans to encounter current events through sharply different lenses and, at times, to inhabit separate information realities (Congressional Research Service, 2023; Federal Communications Commission, 2024).

D. Freedom to Assemble and Petition the Government

The right of Americans to assemble, petition the government, and engage in protest is set out in the First Amendment, which states, ***"Congress shall make no law … abridging the … right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*** This right is historically rooted in the English tradition of petitioning the King for relief from injustices and was seen by the Founding Founders as an essential safeguard for democratic participation and accountability (Mark 1988).

In *Cox v. New Hampshire* (1941), the U.S. Supreme Court upheld the convictions of Jehovah's Witnesses who had marched without obtaining a parade permit. The Court ruled that the permit requirement was a reasonable, content-neutral regulation of the time, place, and manner of public assemblies, designed to ensure public safety and order, not to suppress speech or religion. ***Cox*** **became a key precedent affirming that the government can impose reasonable time, place, and manner restrictions as long as they are applied fairly and do not target specific viewpoints.**

Later cases provided further analysis of time, place, and manner restrictions. In *Ward v. Rock Against Racism* (1989), the Court upheld a New York City rule requiring performers in Central Park to use city-provided sound systems and technicians. The Court reasoned that this was a *content-neutral* regulation intended to control excessive noise and protect the community's quality of life without restricting the performers' message.

More than two decades later, in *Snyder v. Phelps* (2011), the Court faced a painful clash between free speech and personal dignity. Members of the Westboro Baptist Church picketed the funeral of Marine Lance Corporal Matthew Snyder carrying signs that read "Thank God for Dead Soldiers" and "God Hates the

USA." The soldier's father sued for intentional infliction of emotional distress, but the Court ruled 8–1 in favor of the protesters. Chief Justice Roberts explained that, although the speech was deeply offensive, it addressed matters of public concern and occurred on public land in accordance with local regulations. The record showed that the protesters demonstrated peacefully about 1,000 feet away from the church, notified local authorities in advance, followed all time, place, and manner restrictions, and stayed out of sight and earshot of the mourners. **The decision reaffirmed that even hateful or hurtful speech remains protected when it takes place peacefully in a public forum.**

A few years later, in *McCullen v. Coakley* (2014), the Court struck down a Massachusetts law that created a 35-foot "buffer zone" around reproductive health clinics to keep abortion protesters away from entrances. While acknowledging the state's interest in ensuring safety and patient access, the Court found the law too broad because it burdened more speech than necessary. The Justices noted that the law prevented even quiet, consensual conversations and leafletting on public sidewalks. Following the ruling, Massachusetts revised its statute to rely on narrower, content-neutral measures, such as prohibiting obstruction and harassment, rather than broadly excluding all speakers from a specific area.

E. Freedom of Association

Freedom of Association is inferred from the First Amendment, rather than explicitly stated, and protects the ability to join, form, or leave groups and organizations without government restriction. This principle was first recognized in *NAACP v. Alabama ex rel. Patterson* (1958), where the Court struck down the state of Alabama's attempt to force the NAACP to disclose its membership lists. The Court reasoned that compelling disclosure the names of members would discourage participation in the NAACP and expose its members to harassment.

Decades later, in *Roberts v. United States Jaycees* (1984), the Supreme Court upheld Minnesota's anti-discrimination law, ruling that requiring the Jaycees to admit women did not violate the First Amendment. The Court explained that the organization's activities were primarily civic and commercial rather than focused on promoting a particular viewpoint, so applying the law did not interfere with protected speech or association.

Years later, questions about association arose in the context of public events and expression. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), the case centered on Boston's St. Patrick's Day parade. The private organizers of the parade refused to allow a gay rights group to march under its own banner, arguing that being forced to include the group would compel them to express a message they did not endorse. The Supreme Court agreed, holding that parade organizers have a First Amendment right to control the content of their expressive event, even when it takes place in public. Although the *Hurley* ruling remains in effect, the South Boston parade organizers later changed their policy, and since 2015 LGBTQ+ groups have been allowed to march openly, a reflection of shifting public attitudes, rather than a change in the law.

Years later, questions about association arose in the context of public events and expression. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), the case centered on Boston's St. Patrick's Day parade. The private organizers of the parade refused to allow a gay rights group to march under its own banner on the ground that including the group would alter the message they wished to convey. **The Supreme Court agreed, holding that parade organizers have a First Amendment right to control the content of their expressive event, even when it takes place in a public space, and that the state may not compel inclusion of a message the organizers do not wish to present.** Although the *Hurley* ruling remains in effect, the South Boston parade organizers later changed their policy, and since 2015 LGBTQ+ groups have been allowed to march openly, a reflection of shifting public attitudes, rather than a change in the law (WBUR, 2015).

The tension between free association and anti-discrimination laws surfaced next in a case involving moral and religious expression of a private group. In *Boy Scouts of America v. Dale* (2000), the Boy Scouts dismissed James Dale, an assistant scoutmaster, after learning he was openly gay and active in a gay rights organization. Dale sued under New Jersey's public accommodations law, arguing that his dismissal was discriminatory. The Boy Scouts argued that their values, including those grounded in traditional moral and religious beliefs, opposed homosexual conduct and that being forced to keep Dale as a scoutmaster would violate their First Amendment right to expressive association. **The Supreme Court agreed, holding that compelling the Scouts to include a leader whose presence contradicted their stated beliefs would unconstitutionally interfere with their ability to express those values.**

Conclusion

Over time, the Supreme Court has repeatedly clarified the protections of the First Amendment, often reaffirming that its guarantees extend to speech and expression that many Americans find offensive. New challenges to these freedoms will continue to arise, sometimes in unexpected forms or in ways that test the boundaries of decency.

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Chapter Seven

Chapter Seven

The Second Amendment and Gun Control

Chapter Outline

A. Overview

B. Historical Context

C. Modern Federal Laws and Supreme Court Cases

D. State Approaches

E. The Continuing Debate

A. Overview

The Second Amendment states, ***"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."*** For an amendment that is only 27 words long, it has caused some of the most intense and lasting controversies of any words in the Constitution. Over the past century, two opposing and extreme viewpoints have shaped the public's perception of the gun control debate. However, most Americans hold a much more moderate position on gun ownership than the two positions often highlighted in public debates and media coverage.

Before exploring these contrasting points of view, it is important to understand what is meant by the term **"militia."** Historically, a militia referred to a military force composed of civilians raised to supplement a regular army in times of emergency. Under current federal law, private militias are not permitted to operate without government authorization. Most states have similar regulations. The modern equivalent of a lawful militia is generally considered to be the National Guard, which functions under both state and federal authority. The word militia *is not* synonymous with the military. **In other words, the Army, Navy, Air Force, and Marines are *not considered* part of a "militia"** (Legal Information Institute, n.d.).

Understanding the term "militia" provides the necessary context for examining the three basic interpretations of the Second Amendment. **First, Second Amendment absolutists oppose virtually all forms of gun control.** Sometimes referred to as **2A Advocates,** they view the amendment as granting individual citizens the right to bear arms and believe that militias are mentioned only incidentally. A subset of these advocates even oppose laws that require individuals to obtain a license to own or carry a firearm, as well as requirements to register their weapons. Although most most 2A Advocates do not oppose licensure requirements, many see **red flag laws, also known as extreme risk protection orders,** as an example of government overreach and oppose bans on military-style weapons, universal background checks, and restrictions on so-called **"ghost guns."** They regard these measures as incremental steps toward a total gun ban and fear that a tyrannical government could easily disarm the American citizenry if such laws continue (NRA-ILA, n.d.).

Second, those who support gun control interpret the Second Amendment as primarily granting the right to bear arms to organized militias, not individuals. This interpretation is based on the amendment's opening phrase, *"A well regulated Militia...".* They support all forms of gun control mentioned above (Brady United, n.d.). Although a subset believe that only the armed services, military, and police should own firearms, most of those who support gun control laws believe that private individuals should still be able to own weapons for hunting and self-defense as long as strict gun control laws remain in place (National Coalition to Ban Handguns, 1980).

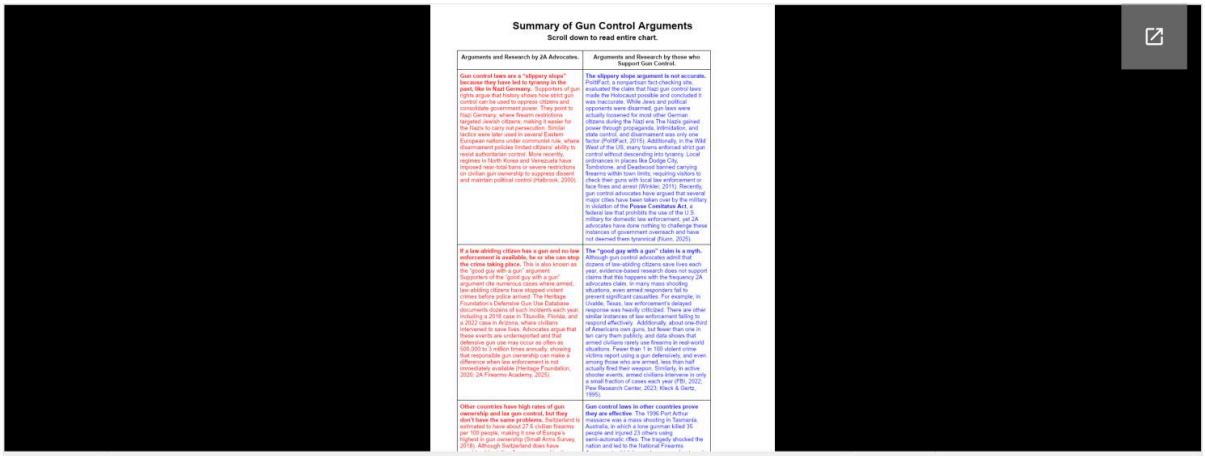
Third, research shows that the majority of Americans' views fall somewhere between these two perspectives. A typical American believes the Second Amendment provides individuals, the military, police, *and* government-approved militias with the right to bear arms. They do not believe all guns should be banned.

Most support red flag laws, bans on military-style weapons, and universal background checks (Pew Research Center, 2023; Gallup, 2023). Like other hot-button issues, such as abortion and immigration, the most Americans do not hold extreme views about the Second Amendment.

Before exploring the history of gun control, it is helpful to understand the arguments behind these debates, including more polarized views, to better understand the challenges Congress and the Supreme Court have faced over the past century. Please review the **Summary of Gun Control Arguments** below. The arguments in red represent common "pro-gun" arguments. The arguments in blue represent common gun control arguments. The argument is purple font at the end of the chart has data supporting both sides of the Second Amendment debate.

Image 7.1

Source: Data compiled and summarized by Professor Heidi Getchell-Bastien from multiple publicly available sources cited in the chart.



Summary of Gun Control Arguments

A. Overview - continued

After reviewing the arguments both for and against gun control, it is very important to review unbiased data and research before forming an opinion on such a complex issue. Social media, news outlets, websites, family members, friends, and even educators may unintentionally present information to students from a particular perspective. Therefore, it is important for students to think critically and reach their own conclusions. For the most recent, nonpartisan statistics on gun violence and firearm ownership, see the **Pew Research Center's report, "What the Data Says About Gun Violence in the U.S."** (2023).

B. Historical Context

The **National Firearms Act of 1934** (NFA) was one of the first major federal gun laws. It required federal registration, taxation, and regulation of certain categories of firearms, such as machine guns, suppressors (silencers), and short-barreled rifles and shotguns. It did not completely ban civilian ownership of these items. While the Act imposed taxes on transfers and increased regulatory burdens, Congress intended not only to raise revenue but to also restrict access to weapons frequently used in violent crime.

The constitutionality of the National Firearms Act was tested in *United States v. Miller* (1939), the first major Supreme Court case to interpret the Second Amendment. The case challenged the Act's requirement that sawed-off shotguns be registered, which significantly restricted their ownership. Sawed-off shotguns, meaning shotguns with shortened barrels, are easier to conceal, have a wider shot spread at close range, and can cause greater destructive impact when fired at short distances. **The Supreme Court upheld the law, ruling that the right to bear arms was connected to the preservation of a "well-regulated militia."** Because there was no evidence that a short-barreled shotgun had a reasonable relationship to militia efficiency, the Court concluded that the Second Amendment did not protect possession of that weapon.

The next major piece of legislation was the **Gun Control Act of 1968.** The GCA regulated interstate firearm commerce and banned interstate transfers of firearms to private persons. It also placed new restrictions on who could legally possess or receive firearms, banning felons from owning them. It strengthened licensing requirements for gun dealers and imposed record-keeping duties. This law helped shape early interpretations of gun laws that emphasized collective or regulatory control, rather than purely individual rights.

In 1980, a convicted felon challenged the Gun Control Act of 1968 in *Lewis v. United States*. Lewis argued that the law violated his Second Amendment rights. The Supreme Court upheld the law, ruling that a prior felony conviction, even one obtained without counsel, is a valid basis for restricting firearm possession. **The Court confirmed that Congress may prohibit felons from owning guns as part of its authority to regulate firearms under the Gun Control Act of 1968.**

C. Modern Federal Laws and Supreme Court Decisions

After 1980, three major federal gun laws were passed in succession. The **Law Enforcement Officers Protection Act of 1986** prohibited the manufacture and sale of armor-piercing ammunition capable of penetrating bulletproof vests worn by police officers. The **Undetectable Firearms Act of 1988** banned the production and possession of guns that could evade metal detectors or X-ray machines, addressing the growing concern over plastic and composite firearms. Finally, the **Gun-Free School Zones Act of 1990** made it a federal offense to knowingly possess a firearm within 1,000 feet of a school.

After the passage of laws regulating certain types of weapons and where they could be used, later legislation addressed who could purchase firearms. **The Brady Act**, named after White House Press Secretary James Brady, who was permanently injured during the 1981 assassination attempt on President Ronald Reagan, was signed into law in 1993 and fully implemented by 1998. The law required federal background checks on individuals purchasing firearms from licensed dealers and initially imposed a five-day waiting period before a

handgun could be transferred. When the **National Instant Criminal Background Check System (NICS)** became operational in 1998, the waiting period was replaced with an instant computerized check to determine whether a buyer is prohibited from purchasing a gun due to factors such as felony conviction, domestic violence, or mental health adjudication. The Brady Act significantly expanded federal oversight of handgun sales and remains a cornerstone of federal background check procedures.

Officially part of the Violent Crime Control and Law Enforcement Act of 1994, the **Federal Assault Weapons Ban (FAWB)** prohibited the manufacture, sale, and possession of certain semiautomatic firearms defined as "assault weapons," as well as large-capacity magazines that could hold more than ten rounds of ammunition. The law identified 19 specific firearm models by name and applied a feature-based definition covering semiautomatic rifles with detachable magazines and at least two military-style features (such as a pistol grip, flash suppressor, or folding stock). **The FAWB included a 10-year sunset clause, meaning it expired automatically in 2004.** Although studies disagree on its effectiveness, most researchers found that mass-shooting fatalities declined during the ban and increased afterward (DiMaggio et al., 2019).

The **Lautenberg Amendment**, enacted in 1996 as part of the Omnibus Consolidated Appropriations Act, expanded the Gun Control Act of 1968 by prohibiting individuals convicted of misdemeanor crimes of domestic violence from possessing or purchasing firearms. Unlike earlier laws that applied only to felons, this amendment closed a loophole that had allowed many domestic abusers to legally own guns. The law also applies to law enforcement and military personnel, meaning even on-duty possession is banned if the individual has a qualifying conviction.

The next major Supreme Court case analyzing the Second Amendment did not present itself until 2008. In ***District of Columbia v. Heller***, the Supreme Court struck down a Washington, D.C. handgun ban and their requirement that firearms in the home be kept inoperable. The Court held, for the very first time, that the Second Amendment **protects an individual right to possess firearms** unconnected to militia service, particularly for lawful purposes such as self-defense within one's home. **This landmark decision overturned decades of precedent interpreting the Second Amendment as a collective right and fundamentally reshaped modern gun rights jurisprudence.**

Two years later the Supreme Court decided ***McDonald v. Chicago***. **In that case the Supreme Court ruled that the Second Amendment applies to the states through the Incorporation Doctrine.** This decision extended the individual right to bear arms recognized in *Heller* to all fifty states and local governments. This decision limited the ability of states and municipalities to enact total firearm bans.

In ***New York State Rifle & Pistol Association v. Bruen*** (2022), the Supreme Court struck down New York's century-old law that required applicants to show "proper cause" to obtain a license to carry a handgun in public. The Court held that the Second Amendment protects an individual's right to carry firearms outside the home for self-defense and established a new standard for evaluating gun regulations. Under this **"history and tradition"** test, modern firearm laws are constitutional only if they are consistent with the nation's historical tradition of firearm regulation. The decision significantly expanded gun rights and made it more difficult for states to justify restrictive public carry laws.

Two days after the Court decided ***Bruen***, President Biden signed the Bipartisan Safer Communities Act (2022), which was the most significant federal gun legislation in nearly three decades. It expanded background checks for gun buyers under age 21, closed the "boyfriend loophole" by restricting firearm access for dating partners convicted of domestic violence, and provided funding for state red-flag laws and mental health programs. The act sought to balance gun rights with public safety concerns in response to mass shootings in Uvalde, Texas, and Buffalo, New York.

For the most recent Supreme Court case addressing gun control, please read the excerpt from ***United States v. Rahimi*** (2024) below. This decision clarified how the "history and tradition" test applies to firearm restrictions, particularly for individuals subject to domestic violence restraining orders.

Summary of Gun Control Arguments

Scroll down to read entire chart.

Arguments and Research by 2A Advocates.	Arguments and Research by those who Support Gun Control.
Gun control laws are a "slippery slope" because they have led to tyranny in the past, like in Nazi Germany. Supporters of gun rights argue that history shows how strict gun control can be used to oppress citizens and consolidate government power. They point to Nazi Germany, where firearm restrictions targeted Jewish citizens, making it easier for the Nazis to carry out persecution. Similar tactics were later used in several Eastern European nations under communist rule, where disarmament policies limited citizens' ability to resist authoritarian control. More recently, regimes in North Korea and Venezuela have imposed near-total bans or severe restrictions on civilian gun ownership to suppress dissent and maintain political control (Halbrook, 2000).	**The slippery slope argument is not accurate.** PolitiFact, a nonpartisan fact-checking site, evaluated the claim that Nazi gun control laws made the Holocaust possible and concluded it was inaccurate. While Jews and political opponents were disarmed, gun laws were actually loosened for most other German citizens during the Nazi era.The Nazis gained power through propaganda, intimidation, and state control, and disarmament was only one factor (PolitiFact, 2015). Additionally, in the Wild West of the US, many towns enforced strict gun control without descending into tyranny. Local ordinances in places like Dodge City, Tombstone, and Deadwood banned carrying firearms within town limits, requiring visitors to check their guns with local law enforcement or face fines and arrest (Winkler, 2011). Recently, gun control advocates have argued that several major cities have been taken over by the military in violation of the **Posse Comitatus Act**, a federal law that prohibits the use of the U.S. military for domestic law enforcement, yet 2A advocates have done nothing to challenge these instances of government overreach and have not deemed them tyrannical (Nunn, 2025).
If a law-abiding citizen has a gun and no law enforcement is available, he or she can stop the crime taking place. This is also known as the "good guy with a gun" argument. Supporters of the "good guy with a gun" argument cite numerous cases where armed, law-abiding citizens have stopped violent crimes before police arrived. The Heritage Foundation's Defensive Gun Use Database documents dozens of such incidents each year, including a 2018 case in Titusville, Florida, and a 2022 case in Arizona, where civilians intervened to save lives. Advocates argue that these events are underreported and that defensive gun use may occur as often as 500,000 to 3 million times annually, showing that responsible gun ownership can make a difference when law enforcement is not immediately available (Heritage Foundation, 2020; 2A Firearms Academy, 2025).	**The "good guy with a gun" claim is a myth.** Although gun control advocates admit that dozens of law-abiding citizens save lives each year, evidence-based research does not support claims that this happens with the frequency 2A advocates claim. In many mass shooting situations, even armed responders fail to prevent significant casualties. For example, in Uvalde, Texas, law enforcement's delayed response was heavily criticized. There are other similar instances of law enforcement failing to respond effectively. Additionally, about one-third of Americans own guns, but fewer than one in ten carry them publicly, and data shows that armed civilians rarely use firearms in real-world situations. Fewer than 1 in 100 violent crime victims report using a gun defensively, and even among those who are armed, less than half actually fired their weapon. Similarly, in active shooter events, armed civilians intervene in only a small fraction of cases each year (FBI, 2022;

Pew Research Center, 2023; Kleck & Gertz, 1995).

Other countries have high rates of gun ownership and lax gun control, but they don't have the same problems. Switzerland is estimated to have about 27.6 civilian firearms per 100 people, making it one of Europe's highest in gun ownership (Small Arms Survey, 2018). Although Switzerland does have considerable civilian firearm ownership, its firearm homicide and mass shooting rates remain relatively low compared to many countries (Stroebe, 2024). In the Czech Republic, gun laws are more permissive than in many European nations, requiring licensing, training, and background checks, yet its firearm-related deaths remain low by global standards (Czech Ministry of the Interior, 2022). Finland also ranks among the higher-ownership European countries and maintains comparatively low rates of violent crime. (Vlaams Vredesinstituut, 2019; UNODC, 2023).

Gun control laws in other countries prove they are effective. The 1996 Port Arthur massacre was a mass shooting in Tasmania, Australia, in which a lone gunman killed 35 people and injured 23 others using semi-automatic rifles. The tragedy shocked the nation and led to the National Firearms Agreement, which banned many semi-automatic rifles and shotguns, required registration of all firearms, and implemented a massive national buyback program. Studies show a significant decline in firearm deaths, especially suicides, in the years following the reforms, and no mass shootings of similar scale have occurred in Australia since (Chapman et al., 2016; RAND Corporation, 2020). Japan maintains some of the world's strictest gun control laws and records only a handful of firearm homicides each year, while the United Kingdom reports a firearm homicide rate of about 0.07 per 100,000 residents, compared with over 4 per 100,000 in the United States (UNODC, 2023). Canada also maintains a firearm homicide rate several times lower than the U.S., supported by strict licensing, background checks, and safe storage laws (RAND Corporation, 2020; UNODC, 2023).

Crime rates are out of control, which justifies gun ownership for the purpose of self-defense. Although violent crime overall has declined in recent years, the number of murders has increased in several major U.S. cities, contributing to public concern. According to the Council on Criminal Justice,, national data show that robbery and aggravated assault rates fell in 2024, yet homicides rose by roughly 6% across large cities, reversing part of the decline that began after 2021. Cities such as Washington, D.C., Memphis, and Seattle experienced double-digit percentage increases in homicides, while others, including New York and Los Angeles, saw smaller fluctuations. (Council on Criminal Justice, 2025; FBI, 2025).

Crimes rates are down; however, the number of mass shootings is up, which shows the need for more gun control. Supporters of gun regulations argue that many major crimes have become less frequent over the decades, yet deadly incidents like mass shootings continue to rise. Over the past 30 years, violent crime in the U.S. has declined significantly. For example, between 1993 and 2022, the violent crime rate fell by about 49 % (Pew Research Center, 2024). In 2024, national violent crime fell by an estimated 4.5% compared to 2023, and murder and non-negligent manslaughter dropped by roughly 14.9% (FBI, 2025) Yet, mass shooter incidents have increased over time. Between 2019 and 2023, there were 229 such incidents, an 89% increase over 2014–2018 (FBI, 2023).

There is no standard definition of "assault rifle", so the Assault Weapons Ban makes no sense. Critics of assault weapons bans argue that the laws are flawed because there is no universally accepted definition of what constitutes an "assault weapon." The term does not describe a distinct mechanical function but instead refers to cosmetic or military-style

Defining an Assault Weapon might be difficult, but common sense must prevail to save lives. Weapons available to civilians, like the AR-15, are semiautomatic, which means they fire one bullet per trigger pull. Although there is no federal definition of an assault weapon, most states define them as a semiautomatic firearm with a detachable

features, such as pistol grips or folding stocks, that do not necessarily make a firearm more lethal (NRA-ILA, n.d.). Many hunting rifles that are more powerful than AR-15s were completely legal under the now expired 1994 Federal Assault Weapons Ban. Additionally, there is no standard federal definition, and states have their own definitions. (U.S. Congress, 1994).

magazine and one or more military-style features, like a pistol grip, folding stock, or flash suppressor. Studies show that in the United States, AR-15–style rifles and other semiautomatic weapons have become increasingly common in mass shootings. In the past three years, such rifles were used in about 59% of these incidents. Well-known tragedies such as the 2017 Las Vegas shooting, the 2022 Uvalde school shooting, and dozens of other involved AR-15–type weapons, which can fire high-velocity rounds capable of inflicting catastrophic injuries (Everytown, 2025; Pew Research Center, 2024).

More guns equal less crime. More gun control leads to less crime.

Research shows that neither claim is true and that the relationship between gun control and crime remains statistically inconsistent, depends on context, and is complex due to unique aspects of American culture. Supporters of gun control laws argue that stronger laws reduce gun violence and save lives. Studies have found that states with comprehensive background checks, safe storage laws, and restrictions on high-capacity firearms tend to have lower firearm homicide and suicide rates. (RAND Corporation, 2020; Fleegler et al., 2013) For instance, analyses by Everytown for Gun Safety show that states with the strongest gun laws have nearly 40% fewer gun deaths per capita than those with the weakest regulations. At the same time, those who oppose gun control argue that looser gun laws and expanded concealed carry rights can deter criminals by increasing the likelihood that potential victims are armed. So-called "shall-carry" or "will-carry" states, which require authorities to issue concealed carry permits to applicants who meet basic qualifications, are often cited as examples of policies that empower law-abiding citizens to protect themselves. Early studies, such as Lott and Mustard's (1997) *More Guns, Less Crime*, found modest reductions in violent crime after right-to-carry laws were enacted, though later research has challenged those findings. Adding to this confusion is the existence of statistical outliers. For example, Chicago has some of the strictest gun laws in the nation, yet it continues to experience high rates of gun violence. Meanwhile, San Diego is a big city with strict gun control and very low crime rates. Rural Anchorage, Alaska has a high crime rate, while Lewiston, Maine is also rural with a low crime rate. Researchers note that extreme arguments are not accurate, and that these patterns reflect a mix of socioeconomic, cultural, and law enforcement factors, rather than gun policy alone. Most researchers have concluded that correlation does not equal causation and that statistical evidence remains mixed, suggesting that gun control is a complex issue (Everytown, 2025.; Lott & Mustard, 1997; Pew Research Center, 2023; 2024; 2025).

Landmark Case Spotlight:
***United States v. Rahimi* (2024)**
Case Excerpt (Not Full Case)
Click here for full text.

Chief Justice Roberts delivered the opinion of the Court.

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. §922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

I A In December 2019, Rahimi met his girlfriend, C.M., for lunch in a parking lot. C.M. is also the mother of Rahimi's young child, A.R. During the meal, Rahimi and C.M. began arguing, and Rahimi became enraged. C.M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C.M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C.M. or the witness. Rahimi later called C.M. and warned that he would shoot her if she reported the incident.

Undeterred by this threat, C.M. went to court to seek a restraining order. In the affidavit accompanying her application, she recounted the parking lot incident as well as other assaults. She also detailed how Rahimi's conduct had endangered A.R. Although Rahimi had an opportunity to contest C.M.'s testimony, he did not do so. On February 5, 2020, a state court in Tarrant County, Texas, issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed "family violence." It also found that this violence was "likely to occur again" and that Rahimi posed "a credible threat" to the "physical safety" of C.M. or A.R. Based on these findings, the order prohibited Rahimi from threatening C.M. or her family for two years or contacting her during that period except to discuss A.R. It also suspended Rahimi's gun license for two years.

In May, however, Rahimi violated the order by approaching C.M.'s home at night. He also began contacting her through several social media accounts. In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon. While Rahimi was under arrest for that assault, Texas police identified him as the suspect in at least five additional shootings.

The first, which occurred in December 2020, arose from Rahimi's dealing in illegal drugs. After one of his customers "started talking trash," Rahimi drove to the man's home and shot into it. While driving the next day, Rahimi collided with another car, exited his vehicle, and proceeded to shoot at the other car. Three days later, he fired his gun in the air while driving through a residential neighborhood. A few weeks after that, Rahimi was speeding on a highway near Arlington, Texas, when a truck flashed its lights at him. Rahimi hit the brakes and cut across traffic to chase the truck. Once off the highway, he fired several times toward the truck and a nearby car before fleeing. Two weeks later, Rahimi and a friend were dining at a roadside burger restaurant. When the restaurant declined

his friend's credit card, Rahimi pulled a gun and shot into the air. The police obtained a warrant to search Rahimi's residence. There they discovered a pistol, a rifle, ammunition—and a copy of the restraining order.

B Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. §922(g)(8). At the time, such a violation was punishable by up to ten years' imprisonment (since amended to fifteen). A prosecution under §922(g)(8) may proceed only if three criteria are met.

First, the defendant must have received actual notice and an opportunity to be heard before the order was entered. Second, the order must prohibit the defendant from either "harassing, stalking, or threatening" an "intimate partner" or the partner's child, or "engaging in other conduct that would place [the] partner in reasonable fear of bodily injury." Third, the order must either contain a finding that the defendant "represents a credible threat to the physical safety" of the intimate partner or child, or explicitly prohibit the "use, attempted use, or threatened use of physical force" against them.

Rahimi's restraining order met all three criteria. He received notice and a hearing, the order prohibited him from contacting or threatening C.M., and it found that he posed a credible threat to her safety.

Rahimi moved to dismiss the indictment, arguing that §922(g)(8) violated the Second Amendment on its face. The District Court denied his motion, and Rahimi pleaded guilty. On appeal, he again raised his Second Amendment challenge. After this Court decided *New York State Rifle & Pistol Association v. Bruen* (2022), which held that firearm regulations must be consistent with the nation's "historical tradition of firearm regulation," the Fifth Circuit reversed and held §922(g)(8) unconstitutional. The Supreme Court granted certiorari.

II **When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect.** Since the founding, U.S. firearm laws have included provisions preventing individuals who threaten physical harm from misusing firearms. As applied to Rahimi, §922(g)(8) fits comfortably within this tradition.

The Court reaffirmed that the Second Amendment protects an individual right to bear arms, but that this right, like most others, is not unlimited. Historical evidence from the colonial and founding eras shows that governments regulated the misuse of weapons, prohibited the carrying of "dangerous and unusual weapons," and imposed restrictions on individuals who posed threats to others. Early "surety" and "going armed" laws allowed courts to require individuals likely to breach the peace or threaten others to post bonds or be disarmed temporarily.

These laws, which provided procedural safeguards and limited durations, were aimed at preventing violence before it occurred. The Court found §922(g)(8) analogous in both purpose and method: it applies only to individuals found by a court to pose a "credible threat" to another's physical safety and imposes only a temporary restriction on firearm possession.

The Court rejected Rahimi's argument that *District of Columbia v. Heller* (2008) forbids such laws because they restrict possession in the home. *Heller* held that some restrictions—such as those on felons or the mentally ill—are "presumptively

lawful." Likewise, §922(g)(8) is lawful because it targets individuals judicially determined to be dangerous.

The Court also clarified that *Bruen* does not require modern laws to have identical historical twins, only that they be "relevantly similar" in purpose and scope to historic firearm regulations. The Fifth Circuit erred by applying too strict a historical test and by treating hypothetical cases as determinative rather than focusing on the statute's constitutionality as applied to Rahimi.

Finally, the Court rejected the government's argument that Rahimi could be disarmed simply because he was "not responsible." That standard, the Court said, is vague and not grounded in precedent.

III. Holding

The Court held that *18 U.S.C. §922(g)(8)* is constitutional as applied to individuals found by a court to pose a credible threat to others' safety. Such persons may be temporarily disarmed consistent with the Second Amendment.

The judgment of the Court of Appeals for the Fifth Circuit was reversed and the case remanded.It is so ordered.





D. State Approaches

Even though the Supreme Court has affirmed that the Second Amendment protects an individual right to bear arms and that this right applies to the states, firearm regulations continue to differ significantly across the country. For example, **Massachusetts** is known for its strict licensing requirements and limits on certain types of firearms, while **Texas** has some of the most permissive gun laws in the nation, allowing permitless carry for most adults.

Although **Everytown for Gun Safety** is a well-known gun control advocacy organization, its online comparison tool for state gun laws is considered accurate and informative. The tool is also regularly updated by the researchers who maintain the database. **Click here to compare gun laws in Massachusetts and Texas.** (Other organizations have similar online comparison tools, such as the National Rifle Association, the Giffords Law Center, and the RAND Corporation, but most students find the Everytown tool is the easiest to navigate.)

When comparing the two states, you will see that Massachusetts ranks #2 in the nation for gun law strength, according to Everytown's analysis, while Texas ranks #32. Massachusetts has one of the lowest gun death rates in the country at 3.7 per 100,000 residents, compared with 14.9 per 100,000 in Texas. Massachusetts has comprehensive firearm laws, including mandatory background checks, concealed carry permits, extreme risk protection orders, and a ban on assault weapons and high-capacity magazines. The state also regulates ghost guns, requires dealer licensing, and allows local governments to enact additional gun restrictions.

By contrast, Texas has few statewide restrictions. It does not require background checks for private sales or gun show purchases, permits open and concealed carry without a license, and has no bans on assault-style weapons, bump stocks, or high-capacity magazines. However, Texas does have laws prohibiting gun possession by convicted felons, domestic abusers, and those under restraining orders, and it supports violence intervention programs (Everytown for Gun Safety Research & Policy, 2025).

It's also helpful to compare two other states, such as **California and Idaho**, by looking directly at their crime rates and gun control laws while setting aside the site's subjective rankings. **What patterns emerge from the data? What factors are you seeing that cannot be explained by data alone?** Correlation does not equal causation, but state-by-state law comparison tools can offer useful, objective data to help understand the complex issue of gun control.

E. The Continuing Debate

In the future, federal changes to gun laws will likely depend on new legal challenges arising from state gun regulations that are appealed to the Supreme Court. Some special interest groups contend that current laws in states such as Massachusetts and California violate recent Supreme Court decisions by imposing overly restrictive limits on gun ownership. Gun control advocates, however, continue to argue that the ongoing rise in gun violence and mass shootings demonstrates that reviving the federal Assault Weapons Ban is long overdue.

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Chapter Eight

Chapter Eight

The Rights of The Criminally Accused Part One: Searches, Investigations, Arrests, and Evidence

Chapter Outline

- A. Overview
  1. Origins
  2. Guiding Principles
  3. *Powell v. Alabama*
- B. Searches
  1. Analytical Approach
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- D. Evidence
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A. Overview

1. Origins

To understand the rights guaranteed to those accused of crimes in the United States, it helps to first look where they came from. Many people are surprised to learn that the Articles of Confederation did not include any references to the rights of people accused of crimes. Before the U.S. Constitution was ratified, civil rights and civil liberties were governed by state constitutions. Pennsylvania, Virginia, Maryland, North Carolina, and other states had provisions in their constitutions that protected those accused of crimes. The Massachusetts Constitution, which was written in 1780, made specific references to search warrants, protection against self-incrimination, trial by jury, and bans on cruel and unusual punishment. Later, when the need for a stronger national government became apparent, the Massachusetts Constitution served as an important model for many of the provisions in the U.S. Constitution and the Bill of Rights. Those who drafted the amendments, like John Adams and James Madison, drew on English legal traditions like the Magna Carta and the English Bill of Rights of 1689 (Cornell Law School, n.d.).

The Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution were written to prevent the kinds of abuses of power that colonists had suffered under British rule, like unreasonable searches and seizures,

forced confessions, trials without juries, and excessive punishments. This chapter will explore the civil liberties that pertain to searches, investigations, arrests, and evidence that are based on the Fourth and Fifth Amendments. The topics of trials, sentencing, and punishments are covered by the Sixth and Eighth Amendments and will be examined in Chapter Nine.

2. Guiding Principles

When starting to analyze the rights of the accused, keep three important principles in mind:

- **First,** the government must always balance the need for public safety with the protection of individual rights. A law that enhances public safety might infringe upon one of the amendments. At the same time, a rigid interpretation of an amendment could limit the government's ability to protect the public in certain situations. **Striking this balance has always been, and will continue to be, one of the most difficult challenges faced by legislatures and courts.**
- **Second,** all criminal defendants are entitled to due process. In this context, this means the government must follow fair and consistent legal procedures before depriving anyone, even those who are not citizens, of their freedom. The Fifth Amendment guarantees that ***"no person... shall be deprived of life, liberty, or property, without due process of law"***. Due process must also be provided to juveniles and to those involved in civil proceedings. **In short, due process is supposed to protect everyone from unfair treatment by the government.**
- **Third**, according to the Bureau of Justice Statistics, tens of millions of Americans report some form of contact with police each year, meaning roughly hundreds of thousands of daily interactions. The overwhelming majority of those encounters do not result in any complaints, investigations, or allegations of unfair treatment. At the same time, public databases and Bureau of Justice Statistics reports indicate that anywhere from 25,000 to 50,000 complaints are filed each year against law enforcement agencies and courts. Thousands of other incidents are likely unreported. While it is very likely most people are treated fairly by the criminal justice system, it is also likely that many people believe their rights are not respected by law enforcement (U.S. Department of Justice, Bureau of Justice Statistics, 2022; Police Scorecard, 2023). **Despite competing narratives that play out in the media, data does not support the view that all police misuse their authority, nor does it support the view that police officers rarely act without regard for the rights of citizens.** The truth is more complex than either narrative suggests.

Keep these three concepts in mind as you read this chapter and begin to contemplate whether the goals of the Founding Fathers have been realized. A good place to start is by reading ***Powell v. Alabama***, known as the **Scottsboro Boys** case.

3. *Powell v. Alabama*



Figure 8.1
(Signature Theatre, n.d.)

***Powell v. Alabama* (1932)**
The Scottsboro Boys Case
Summary by Heidi Getchell-Bastien, J.D.

Background

During the Great Depression, it was very common for unemployed people to illegally ride freight trains across the country in search of work or food. Known as “hobos” or “riders of the rails,” they risked injury and were frequently arrested for vagrancy, trespassing, or illegally riding trains without paying. Despite these risks, widespread unemployment and poverty left many young people with no other way to travel or survive. This period of economic hardship coincided with the height of Jim Crow segregation in the South, where racial hierarchies and discriminatory laws shaped nearly every aspect of daily life. Black Americans lived with a constant threat of violence. False accusations, lynchings, and unequal treatment in the courts were common realities that made routine interactions with white citizens or police officers potentially dangerous (PBS, 2013).

The Arrests

On March 25, 1931, a Southern Railroad freight train was traveling from Chattanooga, Tennessee, toward Memphis when a fight broke out between groups of white and black youths who were both riding illegally in the open railcars. Accounts indicate that the conflict between the groups began after some of the white youths tried to force the black riders off the train. The black youths reportedly defended themselves, and in the ensuing struggle, several of the white boys were pushed off the moving railroad cars. The white youths reported the incident at the next stop, claiming they had been attacked. When the train reached Point Rock, Alabama, a posse of armed men, including the local sheriff and deputies, was waiting to arrest the black teenagers.

The officers boarded the train in Point Rock, removed nine black teenagers, and arrested them on the spot. **The youths were named Olen Montgomery, Clarence Norris, Haywood Patterson, Ozie Powell, Willie Roberson, Eugene Williams, Charlie Weems, and brothers Andy and Roy Wright.** Shortly after the teens were arrested, two young, white female “riders of the rails,” named Victoria Price and Ruby Bates, accused the boys of rape. **These events led to the now-famous Scottsboro Boys case.**

The teens were quickly jailed and charged with rape, which was a capital offense at the time, meaning it was punishable by death. The trials were scheduled less than two weeks later, an extraordinarily short time for death penalty cases. While awaiting trial, mobs gathered outside the courthouse, threatening to lynch the accused. To prevent mob violence, the National Guard surrounded the jail. The trials went forward almost immediately, even though the defendants were given virtually no time to meet with their lawyers or prepare a defense (Carter, 1979).

The Trials

The trials were held in **Scottsboro, Alabama,** a town of just 2,000 people that swelled to nearly 10,000 spectators during the proceedings. The court had appointed two attorneys at the last minute. One was Stephen Roddy, an out-of-state volunteer from Tennessee who was unfamiliar with Alabama law. The other was Milo Moody, a 69-year-old local lawyer who hadn’t practiced in years. Under Alabama law at the time, women were officially

barred from serving on juries, and black people were excluded by practice, leaving each defendant to face an all-white, all-male jury. Each trial lasted about a day. Because the defense had less than two weeks to prepare for trial, they did not have time to subpoena witnesses of their own or prepare adequately for cross-examination, the process of questioning opposing witnesses to test their truthfulness and expose inconsistencies. This allowed the prosecution's version of events to go essentially unchallenged (Cose, 2020).

The trials took place in April of 1931. **Viewed through a modern lens, the details of these trials raise serious concerns about fairness and due process:**

- The joint trial of **Clarence Norris** (19) and **Charlie Weems** (20) was held on April 6, 1931. Victoria Price testified that she and Ruby Bates saw a fight between the two groups of teens. She also said that one of the black men had a pistol and that all of the defendants raped her at knifepoint. Her testimony included sarcastic remarks that drew laughter from the courtroom. Ruby Bates failed to mention rape until she was cross-examined. The prosecution rested without calling any of the white youths as witnesses. Charlie Weems testified that he had not been part of the fight, had not seen the white girls until the train reached Paint Rock, and that Haywood Patterson had been the one holding the pistol. Clarence Norris shocked the courtroom by taking the stand and claiming he had seen other defendants commit the rapes from atop a nearby boxcar, though he denied taking part himself. The defense called no additional witnesses. During closing arguments, the prosecution implied that if the jury did not give the defendants death sentences, the electric chair might as well be abolished. The defense made no closing argument. The jury deliberated less than two hours before finding both teens guilty and sentencing them to death.
- **Haywood Patterson** (18) was tried next on April 7th. Victoria Price again testified that Patterson raped her and claimed he shot at one of the white youths. A doctor testified that, while his findings did not contradict the prosecution's story, he found no physical injuries or signs of force on the young women. Other witnesses said they had seen the black defendants and the two white women in the same gondola car. Patterson took the stand, first saying he saw other men rape Price, but then he recanted, insisting he had seen no white women until the train reached Paint Rock. Co-defendants Andy Wright, Eugene Williams, and Ozie Powell testified that they had not seen any women on the train, while Olen Montgomery said he had been riding alone. Despite these conflicting testimonies, the jury convicted Patterson and sentenced him to death.
- The joint trial of **Ozie Powell (16)**, **Willie Roberson (17)**, **Eugene Williams (13)**, **Olen Montgomery (17)**, and **Andy Wright (19)** began on April 8th, right after Patterson's trial ended. Victoria Price repeated her story, adding new details, like her claim that the black youths divided into two groups of six to rape her and Ruby Bates. She accused Eugene Williams of holding a knife to her throat and claimed all of the others carried knives. Under cross-examination, Price offered even more new information, including testimony about how someone pulled a knife on one of the white boys during the assaults. Ruby Bates testified that all five defendants were among those who had "put off the whites" and "ravished" her and Price. A doctor testified that Willie Roberson suffered from severe syphilis and gonorrhea, which would have made sexual activity nearly impossible. The defense was limited to calling only the defendants themselves, and no new evidence was introduced. Despite the lack of physical evidence or corroboration, the jury quickly found all five youths guilty and sentenced them to death.

- **Roy Wright** (13) was tried last on April 9th. Prosecutors conceded that he was too young for the death penalty and did not seek it. The prosecution presented only the testimony of Price and Bates. By the next morning, Wright's jury remained split. All jurors agreed he was guilty, but seven wanted the death penalty while five jurors favored life imprisonment. The judge declared a mistrial, sparing Roy Wright's life for the time being (Carter, 1979).

In just over four days, eight of the nine Scottsboro defendants had been convicted and sentenced to death. **On April 9, 1931, Clarence Norris, Charlie Weems, Haywood Patterson, Ozie Powell, Willie Roberson, Eugene Williams, Olen Montgomery, and Andy Wright were formally sentenced to die in the electric chair.** Reporters described the young men as "stoic" as the judge read the sentences (Linder, 1999).

After the Convictions

The defendants were transferred from the Jackson County Jail to Kilby Prison in Montgomery, Alabama to await execution after their convictions. The executions were scheduled for July 10, 1931, the earliest date allowed by state law. Before that date arrived, the Alabama Supreme Court granted stays of execution, allowing the defense to file appeals. While incarcerated, the young men had limited contact with others, were kept under constant security due to threats of mob violence, and were confined in cells next to the execution chamber. Records indicate they heard the July 10, 1931 execution of another black man, Will Stokes, a sound that haunted them in the years to come (Carter, 1979).

The International Labor Defense (ILD), a civil rights and legal defense organization, filed appeals for all of the convicted defendants with the Alabama Supreme Court. On March 24, 1932, the court upheld seven of the eight convictions but reversed the one for Eugene Williams due to concerns about his young age and the lack of due process during his trial. Williams was released, but the death sentences for the remaining seven defendants were upheld. Those seven, along with Roy Wright, remained at Kilby Prison in Montgomery while awaiting further appeals to the Supreme Court of the United States (Cose, 2020).

The Supreme Court Hears the Case

The Alabama Supreme Court's ruling set the stage for the ILD to take the case to the U.S. Supreme Court later that year with help from the American Civil Liberties Union (ACLU). In November 1932, the Supreme Court of the United States issued the landmark decision in ***Powell v. Alabama*****,** ruling that the Scottsboro defendants had been denied their right to counsel and due process under the Fourteenth Amendment, declaring that their rushed trials "amounted to no trial at all." The Justices pointed out that the court-appointed attorneys had been assigned at the last minute, giving them no time to prepare an adequate defense. The Court also emphasized that due process requires fair and orderly legal procedures, which were not provided at the trials of the nine defendants. **This decision established that in capital cases, both state and federal courts must provide defendants with effective legal representation and sufficient time to prepare, marking a major step forward in protecting the rights of the criminally accused** (Legal Information Institute, n.d.).

Retrials and Aftermath

The Supreme Court ruling required Alabama to retry the cases. The retrials that followed were again held before all-white juries. During this period, the ILD continued to organize rallies, raise funds, and coordinate legal strategy, while the ACLU provided legal expertise. However, several of the young men were convicted a second time, although some sentences were later reduced or overturned (Cose, 2020).

The appeals and related legal proceedings came to reflect a profoundly unfair chapter in American legal history:

- **1932 – Eugene Williams** was only 13, one of the youngest of the nine defendants. The Alabama Supreme Court reversed his conviction because his trial had been improper and unconstitutional, particularly given his age and the lack of time and opportunity for his attorneys to prepare a defense. Rather than retry him, the state dropped all charges, and he was released in March 1932 following the court's decision. After his release, Williams lived a quiet life and was never arrested again.
- **1937** – **Olen Montgomery**, who was nearly blind and consistently maintained his innocence, was released in 1937 when the state dropped the charges against him rather than retry his case. Prosecutors concluded they could not sustain a conviction, noting the lack of evidence linking him to the alleged attack and the fact that his severe vision impairment made the accusers' testimony against him lack credibility.
- **1937 – Willie Roberson,** who was ill with syphilis and gonorrhea at the time of his arrest, had all charges dropped after serving six years in prison while awaiting a second trial. Medical testimony showed that his advanced illness made it physically impossible for him to have committed the alleged rapes, leading the state to dismiss the charges.
- **1937 – Roy Wright** was also thirteen years old at the time of his arrest, although he was reportedly close to fourteen. Because his jury had been unable to reach a verdict at the first trial and prosecutors later concluded there was not enough credible evidence to convict him, the state dropped all remaining charges, and he was released in 1937. Wright later married and served in the U.S. Army. In 1959, believing his wife had been unfaithful, he fatally shot her and then himself in a murder-suicide. He once said, *"Everywhere I go, it seems like Scottsboro is throwed up in my face… I don't believe I'll ever live it down.*"
- **1943 – Charlie Weems** was retried in July 1937 and received a 75-year sentence. He spent approximately twelve years in prison before being paroled in 1943. Following his release, Weems moved to New York, where he worked in factories and lived quietly to avoid publicity, later returning to Georgia. He remained free for the rest of his life.
- **1944 – Andy Wright,** the older brother of Roy Wright, was convicted of rape at his new trial and sentenced to 99 years in prison. He was released on parole in 1944 after being imprisoned for approximately 13 years, but was later returned to prison after a parole violation. He was paroled again in 1950.
- **1946 – Ozie Powell** tried to stab a deputy with a knife while being transported to a court hearing related to the Scottsboro retrials and was shot in the face, suffering permanent brain damage. He survived the shooting, and his rape charge was dropped after he pleaded guilty to assaulting the officer. He was sentenced to 20 years for

the assault and was paroled in 1946.

- **1946 – Clarence Norris,** the oldest of the defendants and the last to remain in Alabama custody, was retried in 1937 and again convicted. He spent roughly fifteen years incarcerated before being paroled in 1946. Fearing for his safety, Norris left Alabama shortly after his release and lived under an assumed name for many years before eventually settling in New York. In 1976, Alabama Governor George Wallace granted him a full pardon, making Norris the only Scottsboro defendant to receive an official pardon during his lifetime. He later published a memoir titled *The Last of the Scottsboro Boys* and worked to educate others about racial injustice before his death in 1989.

- **1952 – Haywood Patterson** was granted a new trial but was convicted again, even though Ruby Bates took the stand and recanted her testimony. **She admitted that no rape had occurred and that she and Victoria Price had fabricated the story to avoid being arrested themselves for riding the train without paying and for possible "morals" charges, which many observers interpreted to mean prostitution charges.** Victoria Price continued to insist that the assaults had taken place. Although Patterson was initially sentenced to death, his sentence was later reduced to 75 years in prison. He escaped from Alabama custody in 1948 and fled to Detroit, Michigan, where the governor refused Alabama's request for extradition because Michigan had abolished the death penalty and was under political pressure over the case. While living in Detroit in 1950, he wrote a memoir titled *Scottsboro Boy*, which described his experiences with the trials and the racial injustices of the era. He was later convicted of manslaughter in 1951 for fatally stabbing a man during a barroom fight. He died of cancer in 1952 in a Michigan prison hospital.

- **2013 –** The State of Alabama issued posthumous (after-death) pardons for Haywood Patterson, Charlie Weems, and Andy Wright, formally acknowledging that their convictions were unjust and that the Scottsboro trials had denied them fair treatment under the law (Carter, 1979; Linder, 1999; Associated Press, 2013).

As for the two accusers, Victoria Price never recanted and lived quietly in Alabama until her death in 1982. Ruby Bates withdrew from public life after admitting the story was false and died in poverty in 1976. The white boys who had fought with the Scottsboro Boys on the train faced no charges, despite also riding illegally. After reporting the incident that led to the arrests, they were never charged and were barely mentioned in trial records, highlighting the racial inequalities that defined the case (Linder, 1999).

The nine defendants' families were impoverished sharecroppers from Georgia and Alabama who lacked funds to visit their sons in prison or provide financial assistance for their attorneys. During his incarceration, Haywood Patterson wrote to his mother, *"Do all you can to save me from being put to death for nothing. Mother, do what you can to save your son."* Many families suffered harassment from neighbors, job loss, and eviction after the arrests, relying on donations from the ILD and NAACP. Some of the parents died before their sons saw justice. Ada Wright, the mother of Roy and Andy Wright, became a passionate advocate, traveling across the U.S. and Europe to raise awareness and turning the Scottsboro case into an international symbol of racial injustice (Signature Theatre, n.d.).

The Scottsboro Boys case revealed deep racial injustice embedded in the U.S. criminal justice system. As the ACLU later reflected, the case offered *"an unforgettable window into the South's brutal system of justice and how it*

failed Black Americans." Its legacy remains a powerful reminder of the consequences of injustice and should serve as motivation for continued progress toward racial equality in America (Cose, 2020).

B. Searches

1. Analytical Approach

Understanding the injustices faced by the **Scottsboro Boys** helps to provide a clear foundation for analyzing the rights of the criminally accused. **Moving onto more nuanced cases about the Fourth Amendment might seem intimidating at first, but using a simple three-step approach makes case analysis more manageable:**

1. Read the original language of the applicable amendment.
2. Review that language when it has been "translated" into modern-day language.
3. Analyze the relevant Supreme Court cases that establish how the amendment, or parts of it, are currently interpreted.
4. An unofficial **fourth** step, which only takes place in limited circumstances, is to look at the constitution of the state where the crime occurred to see if it provides more rights than the United States Constitution. For example, in Massachusetts, prosecutors in criminal trials cannot mention that a defendant refused to take a breathalyzer test at trial, but in many other states, prosecutors are permitted to introduce such evidence (Commonwealth v. Jones, 1981). **For clarity and consistency, this chapter will use the three-step approach as its guiding framework. However, students of civil rights should keep in mind that states may provide defendants in criminal cases rights that exceed the federal standard.**

2. Original Language of the Fourth Amendment

> ***"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*** *— U.S. Const. amend. IV*

3. Modern "Translation" of the Fourth Amendment

- The general rule is that the police can't search you or your property without a warrant or your consent.
- If the police don't follow this general rule, then the evidence they seize can be thrown out of court.
- Situations that involve technology or other factors that did not exist at the time the Constitution was written are decided on a case-by-case basis using the guiding principle of one's "reasonable expectation of privacy".
- Warrants must be very specific about the places the police want to search, the things the police are looking for, and what they plan to take into evidence.
- In order to get a warrant, the police need to sign a statement under oath, present it to a neutral judge, and the judge must find probable cause before signing the warrant.
- There are over a dozen exceptions to the general rule that the police need a warrant or consent to search.

4. Important Cases

The information outlined in the bullet points above seems straightforward because it condenses complex principles developed over decades of Supreme Court decisions interpreting the Fourth Amendment. To fully grasp these principles, it is important to examine the landmark cases that established them and understand their historical context. Only then is it possible to identify patterns and recognize the issues that have generated the most debate.

The general rule of needing a warrant or consent to search was articulated in *Weeks v. United States* (1914). In that case, federal officers entered Fremont Weeks's home without a search warrant and seized letters and papers belonging to him that were later used to convict him of illegal gambling. The U.S. Supreme Court unanimously ruled that the search violated the Fourth Amendment's protection against unreasonable searches and seizures because there was no warrant and Weeks did not give consent.

The *Weeks* decision also held that evidence obtained through an illegal search could not be used in federal court, establishing what became known as the **exclusionary rule.** This rule was designed to deter government officials and law enforcement from violating constitutional rights by making illegally obtained evidence inadmissible in court. It is important to note that this rule is not explicitly written in the Fourth Amendment, although it is inferred from its principles.

Nearly fifty years later, the Supreme Court revisited the exclusionary rule in *Mapp v. Ohio* (1961). In that case, Cleveland police officers entered Dollree Mapp's home without a valid warrant while searching for a suspect in a crime that did not involve Mapp. They did not find the suspect but discovered written materials that were considered obscene and illegal at the time, which led to Mapp's arrest and conviction under state law. **The Supreme Court overturned her conviction, ruling that the exclusionary rule established in *Weeks* must also apply to the states through the Incorporation Doctrine of the Fourteenth Amendment.** From this point forward, all major protections for the criminally accused started to gradually become incorporated and applied to the states through the Fourteenth Amendment, except for grand jury rights, which are discussed later in this chapter.

The Supreme Court created the "reasonable expectation of privacy" rule when addressing a situation that did not exist when the Constitution was written. In *Katz v. United States* (1967), the Court redefined the scope of the Fourth Amendment's protection against unreasonable searches and seizures. Charles Katz was convicted of illegal gambling after FBI agents recorded his phone conversations by placing an electronic listening device on the outside of a public pay phone he used. The government argued that no physical intrusion onto Katz's property occurred, so the Fourth Amendment did not apply. The Supreme Court disagreed, ruling that the Fourth Amendment protects people, not places. **The Court established the "reasonable expectation of privacy" test, holding that a search occurs whenever the government intrudes upon an area where a person has a reasonable expectation of privacy that society recognizes as legitimate.** This decision extended constitutional protections beyond physical spaces to include private conversations and electronic surveillance.

When it comes to warrants, the Court started to develop important criteria for issuing them and what they must include. Warrants must be supported by a sworn statement, called an **affidavit**, which is a written declaration signed under oath by the officer outlining the facts that form the basis for the warrant. In *Marron v. United States* (1927), the Supreme Court ruled that **general or vague warrants are unconstitutional**, requiring that warrants clearly specify the persons or things to be seized, thereby limiting officer discretion. **Additionally, a neutral and detached judge must review the affidavit to ensure that the government's actions are lawful and not based on arbitrary judgment,** as emphasized in *Johnson v. United States* (1948). Later, in *Stanford v. Texas* (1965), the Court reaffirmed that overly broad warrants granting unlimited discretion to seize materials, such as books or papers, violate the Fourth Amendment's protection against unreasonable searches. These requirements ensure that searches remain limited in scope, are based on facts, and are consistent with constitutional safeguards.

Even if a warrant meets all of the criteria above, it must be based on probable cause, meaning there is probability, based on facts, not mere suspicion, that evidence of a crime will be found in the place to be searched. Some describe probable cause as existing when it is "more likely than not" that criminal evidence will be found, or liken it to 51% certainty. However, that level of proof better describes the **preponderance of the evidence** standard used in civil cases. Most legal experts advise against numerical measurements when it comes to probable cause

and instead emphasize that judges need to make an objective determination of whether the evidence makes it *probable* that a crime has occurred. In *Illinois v. Gates* (1983), the Supreme Court ruled that judges should apply a **totality of the circumstances test,** which requires considering all available information together, such as the reliability of informants, corroborating evidence, and overall context.

5. Exceptions to the Warrant Rule

When it comes to **exceptions to the warrant rule,** there are over a dozen scenarios where the police might not need a warrant or the consent of a suspect. The number of exceptions might make it seem as though these exceptions swallow the rule itself. While that may be a fair observation, understanding each exception is required to fully understand the scope of what the Fourth Amendment allows.

a. Search Incident to Lawful Arrest: A search incident to a lawful arrest does not require a warrant. If someone is *lawfully* arrested, the police may search the person and any area or items within the person's immediate reach or "wingspan" (*Chimel v. California*, 1969). The rationale is that the searching for objects within a suspect's reach is permissible as a safety measure after the arrest but before placing the suspect in custody. However, in *Riley v. California* (2014) the Supreme Court held that police must obtain a warrant to search the digital contents of a suspect's cellphone, recognizing that modern phones contain vast amounts of private information. If officers are concerned that data might be remotely erased, they can place the phone in a **Faraday bag,** a specialized pouch lined with conductive material that blocks wireless signals to preserve electronic evidence. Recent appellate decisions in the circuit courts have begun to address how the Riley rule applies to other hand-held electronic devices and cloud-based data, but the Supreme Court has not yet settled all of these questions (*United States v. Morton*, 5th Cir. 2021; *United States v. Smith*, 2d Cir. 2020).

b. Plain View Exception: No warrant is required to seize evidence that is in plain view if the police are lawfully present at the location where the evidence can be seen. The officer must be able to view the item without taking additional steps that would constitute a search, such as moving objects or changing position to gain a better view. The Supreme Court affirmed this principle in *Coolidge v. New Hampshire* (1971), holding that evidence in plain view may be seized if three conditions are met: the officer is lawfully present, the item's incriminating nature is immediately apparent, and the officer has lawful access to the object itself.

c. Consent: This is an exemption to the warrant rule, rather than an exception, meaning that when a person voluntarily agrees to a search, the Fourth Amendment's warrant requirement is not triggered in the first place because the search is considered lawful from the outset. This topic is explained in this list for better understanding. **If consent is voluntarily given by a person reasonably believed to have authority over an area or property, no warrant is required.** For example, if a suspect's significant other provides police with a key to the suspect's apartment and police reasonably believe she lives there, the search is valid even if the suspect did not actually consent (*Illinois v. Rodriguez*, 1990). However, if officers know the person lacks authority, or if the suspect is present and expressly refuses consent, a warrant is required (*Georgia v. Randolph*, 2006). Courts consider several factors to determine whether consent is valid, such as who has control of the area, whether the area was locked, and whether the suspect demonstrated an expectation of privacy. Consent must be voluntary and not the result of coercion or implied pressure (*Schneckloth v. Bustamonte*, 1973).

In situations where adults live with parents or roommates, courts analyze whether the person giving consent had actual or apparent authority over the space. Judges typically consider questions such as: Did the consenting person have control and authority over the area that was searched? If so, the search is often upheld. Did the suspect pay rent or have exclusive possession of a room? If yes, a warrant is more likely to be required. Was the area capable of being locked, and was it locked at the time? Unlocked common areas are

more likely to be subject to a valid consent search. Did the suspect attempt to hide items or otherwise show an expectation of privacy? If so, a warrant is generally necessary (*United States v. Matlock*, 1974).

d. Stop and Frisks, also known as Terry Stops: In the case *Terry v. Ohio (*1968), the Supreme Court ruled that police officers may stop and briefly detain a person and conduct a threshold inquiry if they have reasonable suspicion that the person is involved in criminal activity. An explanation of the terms used in the Terry case is useful here. A brief **detention** is a short period of time during which someone is not free to leave while an officer conducts an investigation. It is not an arrest. A **threshold inquiry** consists of brief questions regarding a suspect's identity or the conduct that gave rise to the officer's suspicions. **Reasonable suspicion** exists when a police officer can point to specific facts that he or she can articulate, based on observation, experience, or reliable information, that would lead a reasonable officer to believe a crime may be occurring or about to occur. It requires more than a hunch, but less evidence than **probable cause**, which demands a fair probability that a crime has been committed or that evidence of a crime will be found. **The Terry case was groundbreaking because it allowed brief detentions and limited searches based on a level of proof that was less than probable cause.**

During a legitimate Terry stop, an officer may also perform a limited pat-down (frisk) of the suspect's outer clothing to check for weapons if the officer reasonably believes the person is armed and dangerous. Police officers still need probable cause to make an arrest, but if that pat-down reveals evidence of a crime, it can then provide the probable cause necessary to justify an arrest. The *Terry* ruling has been extremely controversial because it has been linked to numerous instances of racial profiling and over-policing (*Arizona v. Johnson*, 2009; *Kansas v. Glover*, 2020; *Floyd v. City of New York*, S.D.N.Y. 2013).

One might wonder what qualifies as reasonable suspicion but not probable cause. The quintessential example of reasonable suspicion occurs when an officer sees someone "casing" a business before a robbery. Consider this scenario: An officer observes a man repeatedly pacing back and forth in front of a closed jewelry store late at night, looking into the windows and adjusting something in his waistband. The suspect appears to be sweating profusely, even though it is a cool evening, and he keeps glancing around to see if he is being watched. In this situation, the officer would have reasonable suspicion that something illegal was happening or about to happen. The officer could briefly stop and question the suspect and perform a pat-down (frisk) to check for weapons because the behavior suggests he might be planning a robbery. However, the officer does not yet have probable cause because there is no direct evidence that a crime has been committed. The officer cannot arrest the man or search his belongings without consent or further proof and may only search for weapons. However, if the officer discovers an unregistered firearm during the pat down, for example, this discovery would create probable cause and justify an arrest.

e. Automobile Exception: Because vehicles are mobile and easily moved, police may search a vehicle without a warrant if they have probable cause to believe it contains evidence, contraband, or the fruits or instrumentalities of a crime. This exception was first recognized in *Carroll v. United States* (1925). Officers may search any area of the vehicle, including containers, where the object of the search could reasonably be found (*California v. Acevedo*, 1991). For officer safety, police may order a driver and any passengers to step outside a vehicle during a lawful traffic stop (*Pennsylvania v. Mimms*, 1977; *Maryland v. Wilson*, 1997). However, the areas searched must logically relate to the suspected evidence or contraband. Courts continue to refine how this exception applies to modern vehicles equipped with digital technology, such as GPS systems and onboard computers. In *United States v. Jones* (2012), the Supreme Court ruled that attaching a GPS tracking device to a vehicle constitutes a search under the Fourth Amendment and therefore requires a warrant, acknowledging that advancing technology creates new privacy concerns even in the context of vehicles.

f. Hot Pursuit: If officers are actively pursuing a suspect who enters private property while fleeing, they may follow without a warrant, even if the suspect has no connection to the property owner. This prevents escape, destruction of evidence, or harm to others. The rule was first recognized in *United States v. Santana* (1976). However, in *Lange v. California* (2021), the Court held that pursuit of someone on the run from committing a misdemeanor does not automatically justify a warrantless entry, requiring a case-by-case analysis of urgency and offense severity.

g. Open Fields Doctrine: The Fourth Amendment protects "persons, houses, papers, and effects," but not open fields. Police may enter and observe unoccupied or undeveloped land outside the curtilage of a home without a warrant, since there is no reasonable expectation of privacy there. The term **curtilage** refers to the immediate area surrounding a home that is closely tied to the activities of domestic life, such as a fenced backyard, a patio, or a detached garage. These areas receive the same constitutional protections as the home itself because they are associated with privacy and family life. In contrast, land beyond the curtilage, like open farmland, wooded property, or a field far from the home, is not protected. For example, if officers walk several hundred feet past a home's fenced yard into a nearby cornfield and discover marijuana plants in plain view, that observation is lawful because the area is considered an open field and not part of the home's protected curtilage (*Hester v. United States*, 1924; *Oliver v. United States*, 1984).

In ***United States v. Dunn*** (1987), the Supreme Court explained that no fixed distance determines the boundary of curtilage. Instead, courts apply a four-factor test to decide whether an area is protected: the proximity of the area to the home; whether the area is within an enclosure surrounding the home; the nature and use of the area; and steps taken to protect it from observation, such as fences, hedges, or privacy barriers. The Supreme Court has also ruled that aerial surveillance from public airspace does not violate the Fourth Amendment. In *California v. Ciraolo* (1986) and *Florida v. Riley* (1989), the Court held that police flying over a property at legal altitudes could observe evidence, such as marijuana plants in a greenhouse, without a warrant. However, in *Kyllo v. United States* (2001), the Court drew a line when technology was used to obtain details from inside a home, such as using thermal imaging to detect heat patterns inside the home.

h. Exigent Circumstances and Community Caretaking/Emergency Aid Doctrine: The Supreme Court has long recognized that certain urgent or emergency situations allow officers to act without a warrant when obtaining one would endanger lives, allow evidence to be destroyed, or enable a suspect to escape. Police may enter a home to prevent harm during a domestic violence incident, chase a fleeing suspect, or stop the imminent destruction of evidence. The related community caretaking and emergency aid doctrines allow officers to act without a warrant when their purpose is to render aid, not conduct an investigation. In *Cady v. Dombrowski* (1973), the Court upheld a warrantless vehicle search to secure a firearm for public safety. In *Brigham City v. Stuart* (2006), officers entered a home to break up a violent altercation. The protective sweep doctrine also permits officers to quickly check areas near an arrest for hidden dangers. Together, these doctrines balance public safety with the Fourth Amendment's protection of the home (*Maryland v. Buie*, 1990).

i. Good Faith and Inevitable Discovery: These doctrines apply when officers act with an honest belief that their conduct is lawful. In *United States v. Leon* (1984) and *Massachusetts v. Sheppard* (1984), the Court held that evidence obtained in good-faith reliance on a warrant that was later found to be invalid due to a magistrate's error may still be admissible. In *Nix v. Williams* (1984), the Court adopted the inevitable discovery doctrine, allowing evidence that would have been lawfully uncovered anyway to be admitted. Courts continue to debate how these two doctrines apply to modern digital forensics, and many states only allow these exceptions in narrow circumstances.

j. Inventory Searches: When police officers lawfully take custody of property, such as when they impound a vehicle or book a suspect, they may inventory the contents to protect property, safeguard officers, and prevent theft claims. The search must follow standard departmental procedures and serve a legitimate, non-investigatory purpose (*South Dakota v. Opperman*, 1976). This includes items in a suspect's bag or car, but not digital devices such as phones or computers, which require a warrant (*Riley v. California*, 2014).

k. Search of Probationers and Parolees: Probation and parole officers may conduct warrantless searches of individuals under supervision if authorized by law and permitted in a signed supervision agreement. Most individuals faced with the opportunity to be on probation or parole instead of being incarcerated will sign supervision agreements that allow certain warrantless searches. These conditions are part of avoiding or reducing incarceration, and such individuals will accept diminished privacy expectations (*Samson v. California*, 2006). Recent cases have addressed digital searches of phones and computers of those on probation and parole. Courts generally uphold them when tied to legitimate supervision goals but have warned against overly broad or arbitrary searches. (*United States v. Lara*, 2016; *United States v. Fletcher*, 2023).

l. Student Search Exception: In *New Jersey v. T.L.O.* (1985), the Supreme Court ruled that kindergarten through grade twelve administrators may search students based on reasonable suspicion rather than probable cause to maintain safety. The search must be reasonable in scope, conducted by an administrator or School Resource Officer, and consistent with school policy. In the digital era, many state courts using the Riley standard have held that while schools may seize phones for safety or discipline, searching the phone's content usually requires a stronger justification, such as individualized reasonable suspicion or a warrant-like standard. Later cases have upheld suspicionless drug testing of student athletes and extracurricular participants if the program serves a legitimate interest in preventing drug use, imposes only minimal intrusion on privacy, and applies uniformly to students who voluntarily choose to participate in those activities and agree to their rules (*Vernonia School District v. Acton*, 1995; *Board of Education v. Earls*, 2002, *Gallimore et al v. Henrico County School Board,* 2014).

m. Border and Checkpoint Searches: Routine searches at borders, airports, or checkpoints do not require warrants or probable cause. The government's interest in security allows inspection of people, luggage, and vehicles. For digital devices, courts distinguish manual from forensic searches. Most circuits permit warrantless manual searches of phones but require reasonable suspicion for any forensic data extraction. Body-cavity searches at borders require reasonable suspicion and must be medically appropriate. TSA searches are limited to aviation safety and cannot be used for general law enforcement unless contraband is found in plain view (*United States v. Montoya de Hernandez*, 1985; *United States v. Cano*, 2019; *Alasaad v. Mayorkas*, 2021).

n. Administrative or Regulatory Searches: Administrative searches ensure compliance with health, safety, and regulatory laws, not criminal enforcement. Examples include housing inspections and workplace safety checks. In *Camara v. Municipal Court* (1967), the Court held such inspections valid if conducted under a neutral plan, though an administrative warrant is required if entry is refused. Administrative warrants require only a showing that the inspection is part of a reasonable regulatory scheme. These searches are deemed reasonable when limited in scope, conducted under established procedures, and not used as pretext for criminal investigation (*New York v. Burger*, 1987; *Skinner v. Railway Labor Executives' Ass'n,* 1989; *Michigan Department of State Police v. Sitz,* 1990).

o. Abandonment: When people abandon property, such as leaving trash for pickup or fleeing a vehicle, they lose any reasonable expectation of privacy in what they discarded. Police may search or seize the items

without a warrant because the person has voluntarily relinquished ownership and any privacy interests. This principle was established in *California v. Greenwood* (1988), where the Supreme Court ruled that police did not need a warrant to search trash left on the public curb for collection. The Court reasoned that once garbage is placed outside for pickup, it is accessible to the public and therefore no longer private. The abandonment rule also applies when suspects drop personal items while fleeing or leave vehicles unattended after a crime.

C. Investigations and Arrests

1. Original Language of the 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."***— U.S. Const. amend. V

2. Modern "Translation" of the Fifth Amendment

- No person can be tried for a serious federal crime without a grand jury indictment.
- A person cannot be tried twice for the same offense (Double Jeopardy).
- No one can be forced to testify against themselves (Right against self-incrimination).
- No one can be deprived of life, liberty, or property without due process of law.
- Private property cannot be taken for public use without fair compensation (Takings Clause).

3. Important Cases

A **grand jury** is a group of 16 to 23 citizens who decide whether the government has probable cause to charge someone with a felony. If they determine that sufficient evidence exists, they issue what is called an **indictment**, a formal charge. If not, they return what is known as a "**no true bill.**" The Founders created this requirement in the Fifth Amendment for federal cases in order to provide a screening process before citizens could be formally charged with serious crimes. A grand jury differs from a trial jury, also known as a "petit jury," because a grand jury decides only whether there is enough evidence for a case to proceed to trial, while a petit jury determines whether the defendant is guilty beyond a reasonable doubt at the end of a trial. Not all states rely on grand juries for state-level charges (*Hurtado v. California*, 1884). Some states instead allow prosecutors to bring charges through a process called an **information,** which is a formal written accusation filed directly by the prosecutor after a preliminary hearing, without involving a grand jury.

The Fifth Amendment also prohibits **Double Jeopardy**, which means that defendants cannot be charged twice for the same offense. This principle prevents the government from prosecuting or punishing someone more than once for the same criminal act after an acquittal or conviction. It reflects a commitment to fairness and finality in criminal proceedings, ensuring that individuals are not subjected to repeated trials or government harassment (*Green v. United States*, 1957). The Supreme Court clarified the scope of this protection in several key cases. In *Blockburger v. United States* (1932), the Court established the **Blockburger test,** which asks whether each charged offense requires proof of a fact that the other does not. If two offenses each contain an element the other lacks, they are considered distinct crimes, and prosecution for both crimes does not violate Double Jeopardy. However, when one offense is a lesser-included offense of another, meaning it contains no elements beyond those in the greater charge, a person cannot be separately prosecuted for both. For example, if someone is acquitted of first-

degree murder, they cannot later be tried for the lesser-included charge of manslaughter arising from the same act (*Brown v. Ohio*, 1977).

The ban on Double Jeopardy also limits retrials. Once a defendant is acquitted, the government cannot appeal or retry the person for that same offense, even if new evidence emerges (*United States v. Ball*, 163 U.S. 662, 1896). A significant limitation to this protection is **the dual sovereignty doctrine**, reaffirmed in *Gamble v. United States* (2019), which allows both federal and state governments to prosecute the same act if it violates their separate laws. In other words, an individual can face federal and state charges for the same conduct without violating Double Jeopardy because each government is considered a distinct sovereign with its own authority to enforce its laws. The Gamble case is very controversial and many think it should be overturned.

Perhaps the most famous part of the Fifth Amendment is the right against self-incrimination. No one can be forced to testify against themselves at a trial. Additionally, no one can be forced to make incriminating statements during a police interrogation or arrest. In *Escobedo v. Illinois* (1964), the Supreme Court ruled that a criminal suspect has the right to consult with an attorney during police questioning once the investigation begins to focus on that person as a suspect. Danny Escobedo was arrested on suspicion of murder and repeatedly asked to speak with his lawyer, who was present at the police station but was denied access. During several hours of interrogation without counsel, Escobedo made incriminating statements that were later used against him at trial. The Court held that his Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination had been violated. It reasoned that when the police investigation shifts from a general inquiry to focusing on a particular suspect, and the suspect requests an attorney but is denied one, any resulting confession cannot be admitted as evidence. This Escobedo case was a major step toward protecting suspects' rights during custodial interrogation and directly paved the way for *Miranda v. Arizona*.

In ***Miranda v. Arizona*** (1966), the U.S. Supreme Court held that the Fifth Amendment's protection against self-incrimination requires police to inform suspects of certain rights before questioning them while in custody. The Court ruled that any statement obtained during a custodial interrogation is inadmissible unless the suspect has been clearly informed of these rights and has voluntarily waived them. Before any questioning begins, police must advise the suspect of the following Miranda warnings:

- The right to remain silent.
- Anything said can and will be used against them in a court of law.
- The right to consult with an attorney and to have the attorney present during questioning.
- If they cannot afford an attorney, one will be appointed to represent them before any questioning if they so desire.

Once a suspect is informed of these rights, the police must make sure the suspect understands the warnings and that any waiver of them is knowing, and voluntary. If a suspect invokes the right to remain silent or requests an attorney, all questioning must stop immediately. Although the *Miranda* decision does not require police to give these warnings during arrests when no interrogation occurs, most law enforcement agencies choose to do so as a standard precautionary policy.

The Fifth Amendment also guarantees that "no person shall be deprived of life, liberty, or property, without due process of law." This protection applies to all people within the United States, not just citizens. In *Reno v. Flores* (1993), the Supreme Court confirmed that undocumented immigrants are entitled to due process protections under the Constitution. The case arose after a group of minors from Central America were detained by the Immigration and Naturalization Service, the former name for ICE. The Court reviewed the government's policy of holding undocumented children in secure facilities while awaiting immigration proceedings. Although the Court ultimately upheld parts of the policy, it emphasized that noncitizens, especially children, still have the right to fair treatment while in government custody The adequacy of how these rights are applied to undocumented

individuals will be discussed later in this chapter.

Because due process is such a broad principle and refers to fair treatment at every stage of a legal proceeding, precedent cases that reference it are examples are abundant. The *Powell v. Alabama* case is a classic example of procedural due process because it involved the denial of fair legal representation and a host of other trial rights. A more recent example is *Glossip v. Oklahoma* (2025), in which the Court held that a criminal defendant is entitled to a new trial when the prosecution knowingly fails to correct false testimony and that error could have contributed to the verdict.

The final part of the Fifth Amendment, known as the **Takings Clause**, states that "private property [shall not] be taken for public use, without just compensation." This clause protects property owners from government seizure of land without fair payment, most often in eminent domain cases where property is taken for projects like highways or schools. It guarantees that property owners receive just compensation, typically the property's fair market value. The Takings Clause applies to civil property disputes, not criminal cases. If a person's property is seized as evidence or forfeited as part of a lawful criminal sentence, that is not considered a "taking" under the Fifth Amendment. **Forfeiture** is governed instead by criminal and civil forfeiture laws, which allow the government to permanently seize property connected to criminal activity, such as money, vehicles, or real estate used in or obtained through the commission of a crime.

D. Evidence

Evidentiary rules in criminal courts are extremely complex. Some of these rules are rooted in constitutional rights, while others are not. The detailed study of these rules is better suited for a course focused on criminal law and procedure. Section B of this chapter already examined evidentiary issues governed by the Fourth Amendment when focusing on searches and seizures of physical evidence. Section C of this chapter examined evidentiary issues governed by the Fifth Amendment when focusing on confessions and incriminating statements, which are considered **testimonial evidence**. Together, these concepts offer a basic foundation for understanding evidentiary rules as they pertain to the rights of the criminally accused. **However, two additional concepts are worth mentioning here: hearsay and the "fruit of the poisonous tree" doctrine.**

The rules regarding **hearsay** are extremely detailed and include dozens of exceptions. Hearsay is defined as *"any out-of-court statement offered at trial to prove the truth of what it asserts."* In plain English, it is when someone tries to testify about what another person said outside the courtroom. Using hearsay is problematic because the person who made the statement cannot be cross-examined, which violates confrontation rights. For this reason, hearsay is generally not admissible. However, there are many exceptions, such as **confessions** and **dying declarations.** These rules, including their exceptions, are governed by both federal and state evidentiary rules (*Federal Rules of Evidence* 801–804).

The **fruit of the poisonous tree** doctrine was first recognized in *Silverthorne Lumber Co. v. United States* (1920) and later reinforced in *Wong Sun v. United States* (1963). This rule provides that if police obtain evidence illegally, then any evidence that flows from that illegal act cannot be used in court either. It operates as an extension of the **exclusionary rule.** In simple terms, if the original evidence (the "tree") was gathered in violation of the Constitution, then any later evidence (the "fruit") is also "poisoned." For example, if police conducted an unlawful search and discovered a list of names, and then used that list to locate additional evidence or witnesses, all of that information would be excluded because it "grew out of" the unlawful search.

There are a few exceptions to the **fruit of the poisonous tree** doctrine. Evidence may still be allowed if it was found from an independent source, such as a legal search that was separate from the illegal one, or if it would have been inevitably discovered anyway. Additionally, if enough time or events have passed since the illegal search occurred,

it can remove the taint of the original illegality, a principle known as **attenuation** in criminal cases (*Nix v. Williams*, 1984; *Utah v. Strieff*, 2016).

Additionally, many evidentiary rules relate to what happens during the trial and sentencing phases rather than during searches, investigations, or arrests. These include procedures governed by the Sixth Amendment, such as the right to confront witnesses and the right to effective counsel. These topics, along with other modern evidentiary and procedural issues, will be addressed in the next chapter.

E. Current Challenges

There are many present-day situations involving the rights of the criminally accused that are not spelled out in the language of the Fourth and Fifth Amendments. The framers could not have predicted many of the legal and practical challenges that exist today. This section looks at two modern examples that raise these issues: ICE raids and the rapidly changing legal rules surrounding technology and cybercrime.

1. ICE Raids*

Please note that this section was written prior to the ICE Raids in Minnesota. It will be updated in the future. In the meantime, use the sources below to stay informed about ICE activity and immigration enforcement practices.

- **Boston Globe - Immigration Unmasked: Gives readers unique insights and reporting about the ways in which President Trump's mass deportation policy is playing out in communities across Massachusetts.**
- **Deportation Data Project: Provides publicly available data on ICE arrests, detentions, and deportation trends, allowing readers to track enforcement patterns over time.**
- **American Civil Liberties Union (ACLU): Publishes updates on lawsuits, policy challenges, and constitutional concerns related to ICE and CBP enforcement practices.**
- **The New York Times – "Can ICE Do That?": Offers explanatory reporting that helps clarify what ICE is legally permitted to do and how courts and communities are responding. (Contact your campus library to get information about how to bypass the paywall for this article.)**

Below is the subsection of this chapter that was written, prior to the deployment of ICE to Minnesota:

Many Americans have read news stories about ICE raids and wonder how such actions can occur given the constitutional protections regarding searches and due process discussed in this chapter. In reality, there are clear constitutional limits on home entry and warrant requirements that apply to immigration agents, despite what may appear in television or social media portrayals. Like local police, ICE agents cannot legally enter a home without a valid warrant. However, it is important to understand that not all warrants are the same. **There is a critical difference between judicial warrants and administrative warrants.**

A judicial warrant is a court order signed by a judge or magistrate based on probable cause that a crime has been or is being committed. It specifies the exact address to be searched, describes the person or property involved, and limits when and how the search can occur. It is signed by a judge and has a court caption like "*Commonwealth of Massachusetts v. Jones*" on it that references the name of the underlying court case. By contrast, an administrative warrant is issued by a federal agency such as the Department of Homeland Security (DHS) or Immigration and Customs Enforcement (ICE) and is signed by an ICE officer, not a judge.

Administrative warrants authorize ICE to arrest individuals suspected of violating immigration laws, but they do not permit ICE to enter private residences without consent. If ICE agents arrive at a home with only an administrative warrant, individuals have the right to refuse entry by stating they do not consent and are advised to refrain from displaying any signs of physical resistance. If it is safe to do so, individuals should keep their front

doors closed and locked and ask agents to slide any warrant under the door. This allows residents to review the document and confirm whether it is a judicial warrant before deciding whether to open the door (Motion Law, 2025).

These raids, arrests, and detentions have been the subject of numerous lawsuits against the federal government, demonstrating that constitutional guarantees still exist but are not always upheld in practice. Understanding the difference between warrant types helps citizens and non-citizens alike recognize their rights during immigration encounters.

For more information about these protections, visit the **"Know Your Rights"** section of the Massachusetts Immigrant and Refugee Advocacy (MIRA) Coalition website. The resources include visual aids that help people understand the difference between judicial and administrative warrants (Massachusetts Immigrant and Refugee Advocacy Coalition, n.d.). Ongoing court challenges over these raids illustrate how the boundaries of government authority and individual rights continue to evolve under constitutional scrutiny.

2. Cybercrime

The constitutional rules that govern cybercrime and digital evidence are another area of law that is still evolving. This chapter already discussed how police must obtain a warrant to search mobile phones and computers when arresting suspects (*Riley v. California*, 2014). When it comes to digital surveillance, the government might need to gather evidence long before an arrest because an investigation is necessary to determine the identity of those engaged in criminal activity. The laws regarding digital surveillance were once rooted in the USA PATRIOT Act, which expanded investigative powers after the September 11 attacks. However, the PATRIOT Act is no longer in effect. Today, digital surveillance frequently operates under the Foreign Intelligence Surveillance Act (FISA), which allows secret courts to approve national security-related searches and electronic monitoring. FISA warrants require the government to show probable cause that the target is a foreign power or agent of one. Oversight of FISA courts has become more stringent following criticism of overreach and privacy violations (Electronic Privacy Information Center [EPIC], n.d.).

In *Carpenter v. United States* (2018), the Supreme Court ruled that the government must obtain a search warrant before accessing historical **cell-site location information (CSLI)** from phone companies. The Court held that individuals have a reasonable expectation of privacy in the detailed location data their phones generate, even though that data is held by third parties. This decision significantly reshaped digital privacy law by limiting the long-standing "third-party doctrine," which previously allowed law enforcement to access records held by service providers without a warrant.

Modern cybersearch warrants can now extend to online communications, encrypted data, and cloud storage accounts. Under the **Stored Communications Act** and the **CLOUD Act**, law enforcement may seek warrants compelling companies such as Google, Apple, or Microsoft to turn over user data, even if that data is stored on servers outside the United States. However, these warrants must be specific about what information is sought, and courts increasingly require narrow, particularized requests to avoid violating the Fourth Amendment.

The **Electronic Communications Privacy Act** (ECPA) builds on these principles by establishing rules for when the government can intercept or access electronic communications, while the **Computer Fraud and Abuse Act** (CFAA) criminalizes unauthorized access to computers and digital networks. Police officers and prosecutors frequently enroll in professional development courses to keep up to date on cybercrime regulations and this ever-changing area of the law.

Together, these statutes form the backbone of federal cybercrime law and help define when accessing or collecting digital evidence constitutes a lawful search. There are numerous other laws that govern online privacy, hacking,

surveillance, and electronic evidence, and a complete understanding of these topics would require a separate course focused specifically on cybercrime and digital forensics.

Conclusion

The rules about searches, investigations, arrests, and evidence are meant to protect people's rights while allowing the government to keep the public safe. Court decisions continue to shape how these protections apply to U.S. citizens, especially as technology and political actions create new challenges. Knowing these principles helps students understand how constitutional rights still guide the criminal justice system today.

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72. Stored Communications Act of 1986, 18 U.S.C. §§ 2701–2712.

73. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

74. *Stanford v. Texas*, 379 U.S. 476 (1965).

75. *Terry v. Ohio*, 392 U.S. 1 (1968).

76. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

77. *United States v. Ball*, 163 U.S. 662 (1896).

78. *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019).

79. *United States v. Dunn*, 480 U.S. 294 (1987).

80. *United States v. Fletcher*, 93 F.4th 812 (8th Cir. 2023).

81. *United States v. Jones*, 565 U.S. 400 (2012).

82. *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016).

83. *United States v. Leon*, 468 U.S. 897 (1984).

84. *United States v. Matlock*, 415 U.S. 164 (1974).

85. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

86. *United States v. Morton*, 984 F.3d 421 (5th Cir. 2021).

87. *United States v. Santana*, 427 U.S. 38 (1976).

88. *United States v. Smith*, 967 F.3d 198 (2d Cir. 2020).

89. *Utah v. Strieff*, 579 U.S. 232 (2016).

90. *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

91. *Weeks v. United States*, 232 U.S. 383 (1914).

92. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Chapter Nine

The Rights of the Criminally Accused Part Two
Trials, Sentencing, and Punishment

Chapter Outline

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A. Overview

While Chapter Eight examined the Fourth and Fifth Amendments and how they govern investigations, searches and seizures, arrests, warrants, and interrogations, this chapter analyzes the Sixth and Eighth Amendments. This chapter will use the same three-step approach as Chapter Eight to maintain clarity and organization. As before, we will look at the original text of each amendment, examine a "translation" of the amendment into plain English, and review the leading Supreme Court cases that shape how these rights are interpreted today.

B. The Sixth Amendment

1. Original Language of the 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 previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."*** *— U.S. Const. amend. VI*

2 Modern "Translation" of the Sixth Amendment

In plain English, this means that defendants in criminal cases have the right to:

1. Trial procedures that guarantee fairness;
2. A speedy trial;
3. A public trial;
4. The right to an impartial jury;
5. The right to be informed of charges against them;
6. The right to confront witnesses against them;
7. The right to call witnesses in their own defense ;
8. The right to assistance of counsel, meaning the right to have a lawyer.

The plain language of these eight phrases may seem straightforward at first glance, but their meaning has evolved over more than two centuries. The Supreme Court has expanded, clarified, and at times narrowed their scope as new legal challenges have emerged. In doing so, the Court has revisited basic assumptions about criminal procedure and adapted constitutional protections to the modern criminal justice system.

3. Essential Trial Rights

Basic trial protections that guarantee fairness were developed long ago, and many of them were based on the Fourteenth Amendment's Due Process Clause in addition to Sixth Amendment trial rights. In *Coffin v. United States* (1895), the Supreme Court strongly articulated the **presumption of innocence** as a foundational principle of American criminal justice, though later decisions clarified that this presumption operates primarily through the reasonable doubt standard, rather than as a separate constitutional principle. Another core protection is the **duty of prosecutors to disclose evidence** that may help the defendant. In ***Brady v. Maryland*** (1963), the Court held that due process requires prosecutors to provide the defense with any evidence that is favorable to the accused and material to guilt or punishment.

The trend toward protecting the rights of defendants continued in 1970 when the Supreme Court decided *In re Winship* (1970), where they held that **the burden of proof rests entirely on the government,** which must prove every element of a crime **beyond a reasonable doubt**, the highest standard of proof in our legal system. This means jurors must be firmly convinced of the defendant's guilt based on the evidence, with no reasonable hesitation. This is a much higher standard than reasonable suspicion or probable cause. Although the *Coffin, Brady, and Winship* rulings arise from the Fourteenth Amendment's Due Process Clause, rather than the Sixth Amendment, the Supreme Court recognizes these principles as fundamental rights that are essential to a fair trial (Legal Information Institute, n.d.).

4. Right to a Speedy Trial

The Sixth Amendment guarantees the right to a speedy trial, but **the Constitution does not specify a set time period for when a trial must occur after arrest,** nor does it define what "speedy" means. The Supreme Court offered guidance in *Barker v. Wingo* (1972) by creating a **four-factor balancing test** that considers the length of the delay, the reason for the delay, whether the defendant asserted the right, and whether the delay prejudiced the defendant. The Court also emphasized that **a defendant may effectively waive the right** to a speedy trial by failing to assert it or by agreeing to repeated delays. It is worth noting that defendants rarely insist on their right to a speedy trial unless they are incarcerated pending trial. Delays often benefit defendants more than prosecutors because witnesses may forget facts, move away, or become unavailable over time (Rubine, 1972; National Association of Criminal Defense Lawyers [NACDL], n.d.).

Although defendants may waive their right to a speedy trial, thousands do not, and it remains essential to safeguard this right to protect defendants from undue delay and to ensure the integrity of the justice system. In *Strunk v. United States* (1973), the Supreme Court ruled that **dismissal of charges is the only proper remedy for a proven violation of the speedy trial right**, and in *Doggett v. United States* (1992), the Court held that extremely long, government-caused delays can violate this right even when a defendant cannot show specific prejudice.

Recent data shows the need for speedy trials. In 2024, the Vera Institute of Justice and the Prison Policy Initiative reported that approximately two-thirds of people held in jail nationwide are not yet convicted, representing roughly 400,000 to 500,000 individuals awaiting trial. While no comprehensive national statistics track how long people are held before trial in all states, a *CalMatters* investigation found that in California alone nearly 6,000 people were held in county jails for longer than one year without a conviction or any imposed sentence as of 2021 (Vera Institute of Justice & Prison Policy Initiative, 2024; Lewis, 2021).

5. Right to a Public Trial

The right to a public trial is also guaranteed. Holding trials in secret creates the potential for governmental abuse. **Yet, there are limits on this right.** Although the general public may attend federal and state trials and the press may report on them, Federal Rule of Criminal Procedure 53, written in the 1940s, prohibits televising, photographing, or otherwise recording federal courtroom proceedings. As a result, even high-profile federal trials still rely on courtroom sketch artists. By contrast, all states except New York allow trials to be televised and/or photographed, and even New York allows audiovisual recordings in limited circumstances (Ballard Spahr, 2024).

One exception is that federal **juvenile proceedings** are not open to the public under 18 U.S.C. § 5038, which was first enacted in 1974 and requires confidentiality to protect the privacy and rehabilitation interests of minors. Most states have similar rules governing juvenile matters. Similar confidentiality rules also apply in criminal proceedings involving juveniles and in cases involving adoption, child custody, and parental fitness (Justia, 2025).

The Supreme Court further refined the limits of the public trial right in *Waller v. Georgia* (1984), a case involving the temporary closure of a court hearing to the public in order to prevent the disclosure of sensitive wiretap evidence that would have compromised an ongoing criminal investigation. **The Court held that a courtroom may be closed to the public only in rare circumstances where there is an overriding interest supported by specific findings, and only for the portion of the proceedings where closure is necessary.** The Court also required judges to consider reasonable alternatives first, such as protecting a witness's identity or limiting what is disclosed, and to ensure any closure is no broader than necessary.

6. Right to an Impartial Jury

Defendants are also entitled to impartial juries. This does not mean a defendant must have a jury trial. Defendants may choose to waive this right. In *Patton v. United States* (1930), the Supreme Court held that a criminal defendant may waive the right to a jury trial only if the waiver is knowing, voluntary, and intelligent, and if both the judge and the government agree. Some defendants prefer a **bench trial**, where a judge decides the case, because it can move more quickly or because they fear juror bias based on the nature of the charges.

For defendants who choose jury trials, the impartiality of jurors can be compromised through discriminatory jury selection practices. The Supreme Court has made clear that the right to an impartial jury requires juries to be selected from a fair and representative cross-section of the community. In *Strauder v. West Virginia* (1880), the Court held that states may not exclude jurors on the basis of race, recognizing that systematic exclusion of Black citizens undermines equal protection and the fairness of criminal trials. Nearly a century later, in *Taylor v. Louisiana* (1975), the Court ruled that women cannot be systematically excluded from jury pools, emphasizing

that a diverse jury pool is essential to fairness and public confidence in the justice system. Building on this principle, ***B**atson v. Kentucky* (1986) held that prosecutors may not use **peremptory strikes**, which allow attorneys to remove potential jurors without stating a cause, to exclude jurors solely on the basis of race. When challenged, prosecutors must provide a race-neutral explanation, further protecting defendants from discrimination in jury selection.

Excessive trial publicity can also compromise a defendant's ability to be tried before an impartial jury. In *Irvin v. Dowd* (1961), widespread media coverage in a small Indiana community repeatedly referred to the defendant as a "mad dog killer," and eight of the twelve jurors admitted they believed he was guilty before the trial began. The Court overturned the conviction, stressing that jurors must be truly impartial. Two years later, in *Rideau v. Louisiana* (1963), the Court reversed a conviction after the defendant's filmed jailhouse confession was broadcast on local television three times to thousands of viewers, ruling that such exposure created a presumption of prejudice and required a change of venue. The most dramatic example of this issue is *Sheppard v. Maxwell* (1966), where the highly sensationalized trial of Dr. Sam Sheppard, accused of murdering his wife, was conducted in a chaotic atmosphere. Reporters filled the courtroom, jurors were exposed to inflammatory press coverage, and the judge made little effort to control media influence. The Court found that the trial judge failed to protect Sheppard's rights and overturned the conviction, emphasizing that courts must take steps such as sequestering the jury, changing the venue, or limiting media coverage when publicity threatens fairness.

Decades later, in *Skilling v. United States* (2010), the Court clarified that pretrial publicity does not automatically violate the Sixth Amendment, holding that former Enron executive Jeffrey Skilling received a fair trial in Houston because juror screening procedures were effective and no actual bias was shown. Although no single case spells out a test for when publicity has compromised a defendant's right to an impartial jury, courts take precedent cases into account and look for either real proof that jurors were biased, or they look for situations where the publicity was so extreme that the law assumes the jury could not be fair, even without individual proof of bias.

7. Right to be Informed of Charges

The Sixth Amendment also guarantees that anyone accused of a crime has the right to be informed of the charges against them. In *Cole v. Arkansas* (1948), the Court held that a defendant must be clearly told what crime they are charged with and cannot be punished based on a different legal theory than the one formally charged. In *Hamilton v. Alabama* (1961), the Court explained that an **arraignment**, which is the first formal court hearing after arrest where charges are read aloud, is a "critical stage" of the criminal process. During arraignment, the judge informs the defendant of the charges, explains their rights, and usually considers bail. The accused must know exactly what they are being charged with and have a fair chance to defend themselves from the very beginning of the case.

Although the U.S. Constitution does not set a specific time limit between arrest and arraignment, the Supreme Court held in *County of Riverside v. McLaughlin* (1991) that individuals arrested without a warrant must receive a judicial determination of probable cause within **48 hours**, absent extraordinary circumstances. Many states have adopted similar timelines for defendants' first court appearances, called arraignments, because they are often held at the same time as probable cause determinations and bail hearings. While the 48-hour rule technically applies to probable cause determinations, requiring an arraignment within the same timeframe helps ensure timely compliance with constitutional safeguards (National Conference of State Legislatures, 2023).

8. Right to Confront Witnesses

The Sixth Amendment also guarantees the right to confront witnesses, including one's accuser. The phrase, "***In all criminal prosecutions, the accused shall enjoy the right to … be confronted with the witnesses against him,***" is known as the **Confrontation Clause.** This ensures that defense attorneys can challenge the prosecution's evidence through live **cross-examination**, which allows them to test a witness's truthfulness and reliability, something that cannot be achieved by reviewing written or recorded statements. In *Crawford v. Washington* (2004), the defendant's wife made a recorded statement to police describing a stabbing incident, but then she asserted her marital privilege and did not testify at trial. Prosecutors sought to use her recorded statement instead. The Supreme Court rejected this request, ruling that testimonial statements cannot be admitted unless the witness is unavailable and the defendant had a prior opportunity to cross- examine them.

Four years later, in *Melendez-Diaz v. Massachusetts* (2009), the Court held that forensic lab certificates are testimonial and forensic analysts must testify in person if their results are used at trial. The Court reaffirmed this principle in *Bullcoming v. New Mexico* (2011), ruling that a substitute analyst who did not perform or observe the lab testing cannot testify in place of the actual analyst. **Together, these cases ensure that if the prosecution relies on testimonial evidence, the defendant has a constitutional right to confront and cross-examine the actual person providing it (**Donahue, 1998).

While the federal Constitution sets a minimum standard for confrontation, some states impose stricter requirements based on their state constitutions. In *Maryland v. Craig (*1990), the United States Supreme Court held that child abuse victims may testify outside the defendant's physical presence through alternative methods, like through closed-circuit television, if a judge finds that in-court testimony would cause serious emotional trauma to the child. By contrast, in *Commonwealth v. Johnson,* (1994), the Massachusetts Supreme Judicial Court interpreted Article 12 of the Massachusetts Declaration of Rights to require true face-to-face confrontation, even for child witnesses. That provision states that "***every subject shall have a right … to meet the witnesses against him face to face.***" Public outcry followed because the ruling raised fears that child victims could be retraumatized and successful prosecutions could become more difficult.

In response, Massachusetts voters adopted a constitutional amendment in 1996, commonly referenced as **Article XLIII of the Amendments**, permitting alternative testimony methods for children if a judge finds by **clear and convincing evidence** that testifying in the defendant's physical presence would cause serious emotional trauma. The amendment allows testimony by two-way electronic devices, meaning real-time audio-visual technology that lets the defendant see and hear the child witness and communicate with their attorney during testimony. Although this amendment preserves real-time cross-examination, it also requires additional steps, procedures, and advocacy for child victims in Massachusetts compared with the federal standard (Donahue, 1998).

9. Right to Call Witnesses

Defendants have a Sixth Amendment right to call witnesses in their defense, a protection known as the right to compulsory process. In *Washington v. Texas* (1967), the Supreme Court struck down a Texas rule that barred defendants from calling a co-defendant as a witness, holding that the state cannot arbitrarily block testimony that could help the defense. In *Chambers v. Mississippi* (1973), a defendant was prevented by rigid state evidence rules from presenting testimony that another man had repeatedly confessed to the crime and from cross-examining him. The Supreme Court determined that the rule was unconstitutional because it stopped the defendant from presenting important and reliable evidence. Together, these cases make clear that defendants must have a meaningful and fair opportunity to present their version of events.

10. Right to Counsel

The Sixth Amendment also guarantees the right to the assistance of counsel, meaning the right to be represented by an attorney. In *Johnson v. Zerbst (1938)*, the Supreme Court held that indigent defendants in federal criminal prosecutions have a constitutional right to appointed counsel, unless that right is knowingly and voluntarily waived. Later, in *Betts v. Brady (1942)*, the Court considered whether this same right applied to state criminal prosecutions. Smith Betts, who could not afford a lawyer, was charged with a felony in a Maryland state court and requested court-appointed counsel. The trial judge denied the request. Betts represented himself at trial and was convicted. **Writing for the majority, Justice Owen Roberts held that although the Sixth Amendment guarantees the right to counsel, that right had not yet been incorporated through the Fourteenth Amendment to apply to the states.** Instead, the Court concluded that appointed counsel was required in state felony cases only under "special circumstances," such as when a defendant was illiterate, mentally impaired, very young, or otherwise unable to adequately defend themselves due to the complexity of the case. This ruling meant many poor defendants in state courts went to trial without lawyers until *Betts* was overturned by ***Gideon v. Wainwright*** (1963).

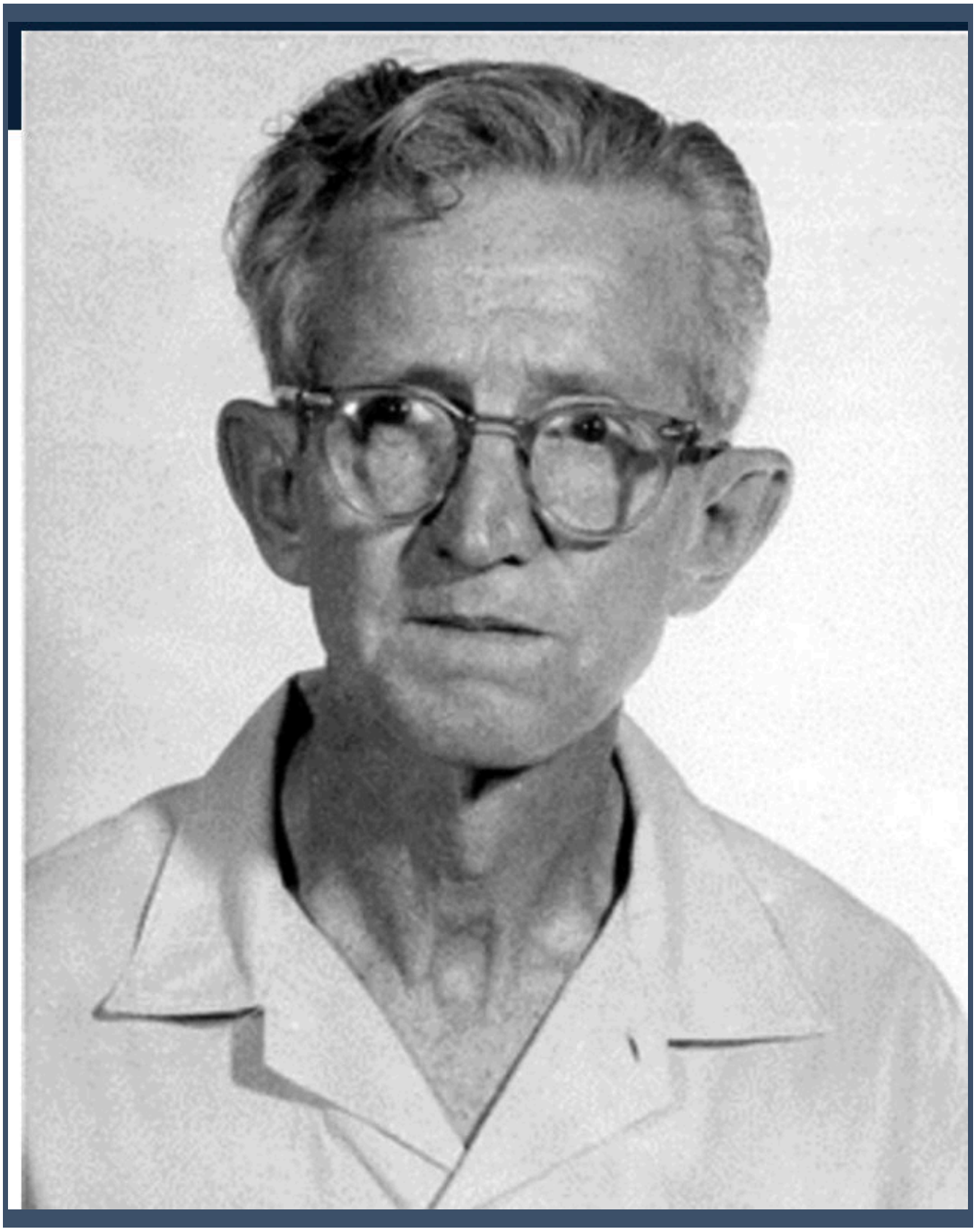


Image 9.1
(Florida Memory Project, 1961)

Landmark Case Spotlight:
***Gideon v. Wainwright*, 372 U.S. 335 (1963)**
Case Excerpt (Not Full Case)
Click here for full text.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case."

The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. (Gideon has prior offenses which contributed to this sentence.) Later, petitioner filed in the Florida Supreme Court this *habeas corpus* petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for *habeas corpus* as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion denied all relief

Since 1942, when *Betts v. Brady,* was decided by a dividedCourt, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari.. Since Gideon was proceeding *in forma pauperis,* we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: **"Should this Court's holding in *Betts v. Brady,*, be reconsidered?"**

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

Like Gideon, Betts sought release by *habeas corpus,* alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and, on review, this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which, for reasons given, the Court deemed to be the only applicable federal constitutional provision.

In Betts, the Court said:

"Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such

denial."

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process.

Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding, if left standing, would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel.

Upon full reconsideration, we conclude that *Betts v. Brady* should be overruled. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed
this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.".

In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered "[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date."

On the basis of this historical data, the Court concluded that "appointment of

counsel is not a fundamental right, essential to a fair trial." It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon, the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell v. Alabama,* a case upholding the right of counsel, where the Court held that, despite sweeping language to the contrary in *Hurtado v. California,* (1884), the Fourteenth Amendment "embraced" those "*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S. at 287 U. S. 67.*

We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

Ten years before *Betts v. Brady,* this Court, after full consideration of all the historical data examined in *Betts,* had unequivocally declared that "the right to the aid of counsel is of this fundamental character." *Powell v. Alabama,* (1932). While the Court, at the close of its *Powell* opinion, did, by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable.

Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language: "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

The Court in *Betts v. Brady* made an abrupt break with its own well considered precedents.

In returning to these old precedents, sounder, we believe, than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

A defendant's need for a lawyer is nowhere better stated than in the moving words

of Mr. Justice Sutherland in *Powell v. Alabama:* "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S. at 287 U. S. 68-69.

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down," and that it should now be overruled. We agree.

The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion. *Reversed. (Gideon was granted a new trial and was found not guilty when represented by counsel. Now defendants in state and federal courts are guaranteed the right to counsel if the charges against them could result in incarceration.)*

10. Right to Counsel - continued

Gideon v. Wainwright (1963) is one of the most important criminal procedure decisions in U.S. history because it ensures that defendants in both state and federal courts who cannot afford a lawyer have the right to appointed counsel, fundamentally reshaping the fairness of the criminal justice system. **Although *Gideon* initially applied only to felony cases, later decisions extended the right to counsel to any case in which incarceration is imposed** (*Argersinger v. Hamlin*, 1972; *Scott v. Illinois,* 1979).

To examine the Gideon case further, click here to watch an excellent video from the Annenberg Classroom series titled *One Man Changes the Constitution*. You can also click here to order the Gideon's Trumpet paperback book or click here to stream the movie.

In addition to guaranteeing the right to counsel, the Sixth Amendment also requires that representation be effective. The phrase "ineffective assistance of counsel" refers to situations where a defense lawyer's performance is so poor that it violates the defendant's constitutional right to a fair trial. In *Strickland v. Washington* (1984), the Supreme Court established a two-part test to determine when counsel is ineffective: (1) the attorney's performance must fall below an objective standard of reasonableness, and (2) there must be a reasonable probability that the outcome would have been different if the lawyer had provided competent representation.

The Supreme Court made clear that the right to effective assistance of counsel also applies during the plea bargaining process. In *North Carolina v. Alford* (1970), the Court held that a defendant may plead guilty while still maintaining innocence, as long as the plea is voluntary and the defendant believes it is in their best interest. This practice is now known as an *Alford plea*, and defendants need guidance from counsel to negotiate this type of plea. One year later, in *Santobello v. New York* (1971), the Court ruled that prosecutors must honor the promises they make in a plea agreement. If the government breaks its promise, the plea may be withdrawn or the defendant resentenced.

Over time, plea bargaining has become the dominant method of resolving cases. It is currently used to resolve 80 to 90 percent of criminal prosecutions. The Supreme Court has recognized the importance of competent legal representation during plea negotiations. In *Hill v. Lockhart* (1985), the Court held that a guilty plea may be invalid if poor legal advice caused the defendant to plead guilty. In *Missouri v. Frye* (2012), the Court ruled that defense attorneys must communicate formal plea offers to their clients because failing to do so may deprive a defendant of a favorable deal. Similarly, in *Lafler v. Cooper* (2012), the Court held that a defendant receives ineffective assistance of counsel if incorrect legal advice leads them to reject a plea offer and receive a harsher sentence after trial. **Together, these cases ensure that plea bargains are voluntary, honored by prosecutors, and negotiated with competent legal guidance.**

Honoring a defendant's right to counsel also means respecting a defendant's choice to represent themselves. In *Faretta v. California* (1975), the Supreme Court held that a defendant has a constitutional right to self-representation if they knowingly and voluntarily waive the right to counsel. In practice, when a defendant asks to proceed without a lawyer, the judge conducts a detailed **colloquy** (series of questions and warnings to ensure the defendant understands the risks) before granting the request. Courts often appoint a public defender as "standby counsel" to assist with procedural or technical issues if needed, but the defendant remains in control of the defense Later cases clarified limits to this right In *Martinez v Court of Appeal of California* (2000) the

Supreme Court held that defendants do not have a constitutional right to represent themselves on appeal, just at trial. And in *Indiana v. Edwards* (2008), the Court ruled that judges may require counsel for defendants who, although competent to stand trial, have severe mental illness that prevents them from managing their own defense. Although defendants who represent themselves rarely achieve favorable outcomes, the right to self-representation is firmly established and must be honored.

C. The Eighth Amendment

1. Original Language of the Amendment

> ***"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."***
> — *U.S. Const. amend. VIII*

2. Modern "Translation" of the Eighth Amendment

In plain English, this means that the criminal justice system cannot:

1. Require excessive bail;
2. Impose excessive fines;
3. Inflict cruel and unusual punishment in general;
4. Impose disproportionately harsh sentences;
5. Allow prison conditions that are inhumane, which includes denial of safety or basic medical care, intentional harm to inmates, or conditions that create serious risks to those incarcerated; or
6. Apply the death penalty arbitrarily or discriminatorily, or without constitutional safeguards.

Just like with the Sixth Amendment, the plain language of these Eighth Amendment guarantees may seem straightforward at first. However, the interpretation of these clauses has evolved significantly over time because the Supreme Court has considered a wide range of punishment and incarceration cases.

3. Bail

Courts cannot require excessive bail, meaning the amount may not be higher than what is reasonably necessary to ensure the defendant returns to court. In most jurisdictions, bail operates through a **cash bail system,** where defendants pay money as a guarantee that they will appear in court for future hearings and their trial. If the defendant appears for all scheduled matters, the money is refunded, but if not, the funds are forfeited. Some defendants use bail bonds, meaning they pay a commercial bail bond agent a non-refundable fee, often 10 percent of the bail amount, and the agent posts the full bail on their behalf (Justia, n.d.; *Stack v. Boyle, 1951).*

Many critics argue that the **cash bail system** is fundamentally unfair because in many instances, defendants with financial means can simply post bail and await trial at home, while those who cannot afford bail may remain incarcerated, even in scenarios where defendants have similar charges and criminal records. Such critics would also contend that even though individuals in both scenarios are presumed innocent, wealth can determine pretrial freedom, and that certain people are jailed solely because they are poor, not because they pose a danger or are likely to flee. In response to these concerns, several jurisdictions, including New Jersey, Illinois, and Washington, D.C., have significantly limited or eliminated cash bail and instead rely on risk assessments and other conditions of release to ensure court appearance and public safety. The California

Supreme Court ruled that judges must consider whether a defendant can afford bail and use non-monetary release conditions when possible. **However, cash bail has never been deemed unconstitutional by the Supreme Court** (Pretrial Justice Institute, 2020; Illinois Pretrial Fairness Act, 2021).

The Supreme Court has recognized that bail is not meant to punish someone before trial. Its sole purpose is to ensure the accused appears in court. If the government seeks to detain a person pretrial based on public-safety concerns, the Constitution requires the prosecution to conduct an evidentiary hearing, called a "dangerousness hearing" in many states, to show evidence that the defendant poses a danger to the community and that no release conditions can reasonably ensure public safety *(*Legal Information Institute, n.d.; *United States v. Salerno, 1987).*

4. Fines

Excessive fines are also prohibited by the Eighth Amendment. In many cases, the penalty for a criminal conviction, whether reached by plea or jury verdict, may include paying a fine instead of, or in addition to, incarceration. These fines are often fixed by statute or sentencing guidelines and may not take into account a defendant's income or ability to pay (Cornell Law School Legal Information Institute, n.d.).

In *Austin v. United States* (1993), the Court held that civil **forfeitures** can be considered punishment and therefore entitled to Eighth Amendment protection. In that case, the government sought to seize a defendant's auto-body shop and mobile home for a small-scale drug offense, even though the maximum criminal fine for his conduct was far lower, illustrating how forfeiture could be used in a punitive and disproportionate way. In *United States v. Bajakajian* (1998), the Court ruled that a forfeiture violates the Eighth Amendment when it is "grossly disproportional" to the gravity of the offense. In that case, the government attempted to confiscate $357,144 from a traveler who failed to report carrying the cash out of the country, even though the offense carried a maximum fine of $5,000. And in *Timbs v. Indiana* (2019) the Court strengthened protection against excessive financial penalties by holding that the Excessive Fines clause applies to the states.

5. Cruel and Unusual Punishments

Cruel and unusual punishments are also prohibited by the Eighth Amendment, but the Constitution appears to allow many punishments that are merely unusual without involving any cruelty. Although no Supreme Court cases directly address purely unusual punishments, there have been numerous state cases where judges imposed unusual sentences on defendants. When these cases were appealed, higher courts declined to review them. For example, in *Shaw v. State* (Ga. Ct. App. 1992), a domestic violence offender was required to wear a sign admitting his acts of abuse. In *People v. Letterlough* (N.Y. Ct. App. 1995), a DUI offender was required to place "DWI" license plates on his vehicle. In *United States v. Gementera* (9th Cir. 2004), a mail thief was required to stand outside a post office wearing a sign stating, "I stole mail."

Courts have struck down unusual or creative sentences when the primary purpose appears to be public humiliation, rather than rehabilitation. For example, in *State v. Driver* (Ohio Ct. App. 1992), the court invalidated a sentencing requirement that a DUI defendant place a bumper sticker on his car announcing his conviction. In *State v. Burdin* (Tenn. 1996), a similar "yard sign" requirement for a DUI offender was overturned as punitive shaming, rather than a legitimate correctional measure. Unusual or creative sentences are evaluated on a case-by-case basis, and courts look to whether the punishment serves valid sentencing purposes, such as rehabilitation, deterrence, and public safety, rather than simply imposing humiliation or degrading the defendant.

Punishments that are solely cruel, or are cruel *and* unusual, are clearly banned by the Eighth Amendment. In

Wilkerson v. Utah (1879), the Supreme Court held that execution by firing squad was constitutional, but emphasized that punishments such as torture or burning someone alive would violate the Eighth Amendment. More than a century later, in *Hope v. Pelzer* (2002), the Court ruled that handcuffing an inmate to a "hitching post" in the sun for hours without water or bathroom breaks constituted cruel and unusual punishment because it amounted to gratuitous humiliation and physical abuse without any legitimate correctional purpose.

6. Sentences

The Eighth Amendment also prohibits disproportionately harsh sentences. In *Solem v. Helm* (1983), the Supreme Court held that a sentence of life in prison without the possibility of parole for a minor, non-violent offense violated the Eighth Amendment's proportionality requirement. Other proportionality cases existed before *Solem*, but this case significantly strengthened the doctrine. In order to address concerns about sentencing disparities, Congress tried to make sentences more fair and uniform through the **Sentencing Reform Act of 1984**, which created the **Federal Sentencing Guidelines**, effective November 1, 1987. These guidelines established sentencing ranges based on the seriousness of the offense and the defendant's criminal history. They also required judges to consider aggravating and mitigating factors.

A major turning point for the Federal Sentencing Guidelines came when the Supreme Court decided *United States v. Booker* in 2005. Before *Booker*, the federal guidelines were mandatory, meaning judges had almost no discretion and were required to impose sentences within a narrow range determined by guideline calculations. **However, in *Booker*, the Supreme Court held that making the guidelines mandatory violated defendants' Sixth Amendment rights because judges were increasing sentences based on facts that had not been found by a jury.** To fix this constitutional problem, the Court ruled that the guidelines must be advisory, not binding. Now, judges must still calculate and consider the guideline range, but they may impose a higher or lower sentence if they provide a reasonable explanation grounded in the law and sentencing factors. This decision reshaped federal sentencing by restoring judicial discretion.

One example of the discretion gained by federal judges after *United States v. Booker* can be seen in drug sentencing cases formerly governed by the **Anti-Drug Abuse Act of 1986,** which created a 100:1 sentencing disparity between crack and powder cocaine offenses. Although the Supreme Court did not invalidate that disparity, increased judicial discretion and criticism of the Act that arose after the *Booker* case helped fuel legislative reform. In 2010, Congress finally succeeded in reducing the sentencing disparity between crack and powder cocaine to 18:1 by enacting the **Fair Sentencing Act of 2010**, significantly lowering mandatory minimum penalties for crack cocaine offenses and eliminating the mandatory minimum for simple possession

Additional cases regarding sentencing have clarified the principle that punishment must be proportionate to both the crime and the offender. In *Ewing v. California* (2003), the Supreme Court upheld California's "three-strikes" law, holding that a lengthy prison sentence for a repeat offender did not necessarily violate the Eighth Amendment's proportionality requirement. In *Miller v. Alabama* (2012), the Court ruled that mandatory life-without-parole sentences for juveniles are unconstitutional because youth must be considered as a mitigating factor and individualized sentencing decisions are required. In *Montgomery v. Louisiana (*2016), the Court made *Miller* retroactive, requiring states to provide resentencing or parole opportunities for individuals who had been sentenced to mandatory life-without-parole as juveniles. In short, the Supreme Court has made clear that punishment cannot be one-size-fits-all and must reflect both what someone did and who they are.

7. Conditions During Incarceration

When individuals become incarcerated, the Eighth Amendment does not allow inhumane prison conditions, denial of safety or basic medical care physical or mental abuse or conditions that create serious risks to

those incarcerated. A federal statute, 42 U.S. Code § 1983, is supposed to be the vehicle that allows inmates to sue for violations of their Eighth Amendment rights when prison officials, acting under color of state law, deny medical care, fail to ensure safety, or inflict abuse. Even though thousands of prisoners file §1983 suits each year, most do not proceed past the screening process. Many suits are dismissed at early stages due to procedural barriers, limited access to legal resources, failure to meet technical standards, or because they lack merit. This means even valid constitutional claims often struggle to proceed (Hanson & Daley 1995; Schlanger 2022).

Regardless, some § 1983 lawsuits are successful. In *Estelle v. Gamble* (1976), an inmate injured his back while lifting heavy cotton bales doing prison work in Texas. After the injury, he repeatedly sought medical care, complaining of severe pain, chest pains, and difficulty moving. His condition worsened over time, and he later reported long-term pain and physical limitations as a result of the untreated injury. Although prison medical staff saw him several times, he was ordered to return to work, and his symptoms were not properly treated. Gamble ultimately filed a lawsuit claiming prison officials knowingly disregarded his medical needs. **The Supreme Court held that deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment.** The Court explained further that negligence or medical malpractice is not enough to sustain a §1983 suit. Officials must know of and intentionally ignore a serious health risk for their conduct to be unconstitutional.

Just as the Eighth Amendment prohibits denying incarcerated individuals basic medical care and personal safety, it also forbids subjecting them to physical or psychological abuse. In *Hudson v. McMillian* (1992), a Louisiana inmate was handcuffed and shackled when two correctional officers punched and kicked him, causing bruises, swelling, loosened teeth, and a cracked dental plate. Although the record indicate these injuries were not severe, the Supreme Court held that the Eighth Amendment prohibits excessive force even when a prisoner does not suffer serious injury. What matters is whether the force was applied "maliciously and sadistically" to cause harm rather than to maintain order.

Despite the risk of psychological harm, the Supreme Court has not categorically banned solitary confinement. However, the Court has held that extreme or prolonged isolation may violate the Eighth Amendment in certain circumstances. In *Hutto v. Finney* (1978), the Supreme Court upheld limits on the use of solitary confinement in Arkansas by approving a 30-day cap at a facility where prisoners had been held in overcrowded, unsanitary cells without basic necessities. The Court emphasized, however, that this 30-day limit was not intended to be a rigid or universal rule and that longer periods of isolation may be permissible in certain circumstances. In *Wilkinson v. Austin* (2005), the Court ruled that inmates must receive due process protections before being placed in Ohio's "supermax" solitary units because the conditions were extremely isolating and potentially indefinite. Solitary confinement remains highly controversial, with civil-rights advocates arguing that it should be abolished due to its psychological harm, while corrections administrators contend that it is necessary to manage individuals who pose serious safety risks to themselves, correctional staff, and other inmates.

Conditions that expose incarcerated individuals to a serious risk of future or ongoing harm are also prohibited under the Eighth Amendment. In *Helling v. McKinney* (1993), the Supreme Court held that prisoners may challenge conditions, such as exposure to secondhand smoke, that pose serious health risks even if no injury has yet occurred. In *Farmer v. Brennan* (1994), the Court articulated the "deliberate indifference" standard, holding that prison officials violate the Eighth Amendment only when they are aware of and disregard a substantial risk of serious harm to an inmate. And in *Brown v. Plata* (2011), the Court required California to reduce extreme prison overcrowding after finding that it caused systemic failures in medical and mental health

care resulting in unconstitutional conditions.

8. The Death Penalty

Cases interpreting the Eighth Amendment also hold that states cannot apply the death penalty arbitrarily, discriminatorily, or without constitutional safeguards. The death penalty currently exists at the federal level and in twenty-seven states as of January, 2026. The jurisdictions that have it must follow specific constitutional requirements. To understand these safeguards, it is helpful to look at the applicable precedent cases.

In *Furman v. Georgia* (1972) the Supreme Court halted the death penalty nationwide because it found that the system for imposing capital punishment violated the Eighth Amendment. The Court emphasized that death sentences were being applied arbitrarily, with people convicted of similar crimes receiving vastly different punishments depending largely on chance. It also highlighted racial disparities, noting that Black defendants, particularly those accused of harming white victims, were disproportionately sentenced to death. In addition, the Court criticized the random and unpredictable nature of capital sentencing and concluded that states lacked meaningful procedural safeguards, allowing juries too much unguided discretion and enabling prejudice to influence life-or-death decisions. **Although the Court did not say the death penalty itself was unconstitutional, it required states to adopt clear guidelines to fix existing problems before capital punishment could be imposed. As a result, all existing death-penalty statutes were temporarily invalidated.**

Four years later, in *Gregg v. Georgia* (1976), the Supreme Court reinstated the death penalty. The Court ruled that capital punishment is constitutional if states provide procedural safeguards that prevent arbitrary or discriminatory sentencing. These safeguards include **bifurcated trials,** where the guilt phase and the sentencing phase are separated. This means the jury first decides whether the defendant is guilty or not guilty and then participates in a separate proceeding to determine the sentence. Jurors must also receive **guided discretion** in determining the appropriate penalty, including instructions on how to apply statutory aggravating and mitigating factors. In addition, states must provide **automatic appellate review** of death sentences and may not impose mandatory death penalties. Instead, juries must make **individualized sentencing determinations** based on the facts of each case and the characteristics of each defendant.

Following the *Gregg* case, the Supreme Court continued to place limits on when the death penalty may be imposed. They ruled that the death penalty cannot be used for crimes where the victim does not die, holding that capital punishment is disproportionate for offenses such as rape, even when the crime is violent and serious (*Coker v. Georgia, 1977*). The Court also barred executing individuals with intellectual disabilities, recognizing that diminished culpability makes the death penalty unconstitutional in such cases (*Atkins v. Virginia, 2002*). Additionally, the Court banned executing of people who were under 18 years old at the time of the offense, noting that juveniles have less maturity, greater potential for rehabilitation, and should not be punished with society's most severe penalty (*Roper v. Simmons, 2005*). **Together, these decisions make clear that the death penalty is reserved only for the most culpable offenders and the gravest crimes.**

Cases after *Gregg* have clarified how the death penalty may be carried out. In *Baze v. Rees* (2008), the Supreme Court upheld Kentucky's three-drug lethal-injection protocol, ruling that a method of execution is constitutional unless it poses a *substantial* risk of severe pain compared to feasible alternatives. In *Glossip v. Gross* (2015), the Court reaffirmed this rule, allowing Oklahoma to use the sedative midazolam despite concerns it might not fully prevent pain, holding that inmates must identify a workable alternative method. In *Bucklew v. Precythe* (2019), the Court upheld Missouri's use of lethal injection for a prisoner with a rare medical condition that he argued would cause extreme suffering. The Court ruled the defendant failed to propose a viable alternative method **These cases underscore that challenges to execution methods must show both a**

significant risk of serious pain *and* a reasonable alternative method.

Conclusion

Civil rights and liberties must be respected throughout the criminal justice process, including trial proceedings, sentencing decisions, punishment, and even the imposition of the death penalty. Understanding these protections is vital to ensuring that the criminal justice system operates with fairness and accountability. This concern is especially important when the individuals most affected, including those who are detained or incarcerated, are out of public view.

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Chapter Ten

Civil Rights Part One: Race and National Origin

Chapter Outline

A. Overview
B. Civil Rights in Early America
C. The Civil War, Reconstruction, and New Amendments
D. The Jim Crow Era and Retrenchment
E. The Civil Rights Movement
F. Evolving Rights in the Modern Era

A. Overview

As stated in Chapter Four, there is a difference between **civil rights** and **civil liberties**. Although these two terms are often used interchangeably, **civil liberties** are basic freedoms found in the **Bill of Rights** that protect individuals from government interference, such as freedom of speech, protection from unreasonable searches, and the right to due process in court. The term **civil rights** pertains to the government's duty to ensure equal treatment under the law and prohibit discrimination (FindLaw, Civil Rights vs. Civil Liberties). **This chapter focuses on civil rights as they relate to race and national origin.** Issues involving gender, sexual orientation, age, disability, and other protected categories will be explored in the next chapter.

Although many groups in the United States have experienced racial discrimination, most historians agree that African Americans have endured the most severe and sustained forms of racism. Native Americans, Latinos, and Asians have also experienced significant inequities. Pacific Islanders, non-Latino Caribbean groups, and certain European immigrant groups, such as the Irish and Italians, have likewise been targets of unfair treatment tied to national origin (Equal Justice Initiative, 2022). **Due to the space constraints of an undergraduate textbook, this chapter primarily focuses on the rights of African Americans while also noting key events that significantly affected Native Americans, Latinos, Asians, and certain immigrant groups.** For a comprehensive historical overview of how all major immigrant communities were treated, Coming to America by Roger Daniels is an excellent resource.

B. Civil Rights in Early America

Slavery has existed throughout human history in many different forms. It was practiced in ancient Rome for centuries, as well as during the early Islamic conquests. Slavery also resulted from Viking raids and the Medieval Crusades. It was an established and accepted part of Aztec society and the Barbary slave trade. Slavery was common in numerous societies because winners of wars and military conflicts would routinely take prisoners of war and force them into unpaid labor. In many of these societies, people entered slavery through other means, such as caste systems, religious persecution, indebtedness, criminal punishment, or extreme poverty (The History Press, 2018).

However, the institution of slavery that developed in the Americas, particularly in what became the United States, had a specific combination of characteristics that set it apart from other systems. It was hereditary, legalized, and explicitly based on race, enduring for almost 400 years. It was also rooted in the kidnapping and forced trafficking of more than ten million people over thousands of miles, making it unparalleled in its scale, duration, brutality, and structure (Equal Justice Initiative, 2022).

Examining the history of slavery in the United States requires going back to the 1400s. During that time,

European powers such as Portugal, Spain, Britain, France, and the Netherlands sought wealth by sailing to different areas around the globe, including Africa and the Americas. Advances in shipbuilding and navigation made long ocean voyages possible and allowed these nations to create maritime routes, establish trade networks, colonize other regions, seize people by force, and transport those they abducted across the Atlantic on a massive scale. Prince Henry the Navigator of Portugal sponsored exploration along the African coast in the 1400s, and by the 1500s, Portuguese colonial leaders in Brazil, such as Duarte Coelho, expanded the forced transport of enslaved Africans to supply labor for sugar plantations (Encyclopaedia Britannica, n.d.).

During this same period, **Christopher Columbus** and other Spanish colonizers enslaved Indigenous people in the Caribbean, particularly on the island of Hispaniola, which is present-day Haiti and the Dominican Republic. Colonizers displaced Indigenous populations from their lands and devastated them through disease, famine, violence, and forced labor. A detailed account of these atrocities can be found in Chapter 1 of *A People's History of the United States* by Howard Zinn .

As Native populations declined, Europeans increasingly turned to Africa as a primary source of forced labor, a system made possible in part by numerous West and Central African kingdoms that sold prisoners of war and other captives to European slave traders in exchange for goods such as weapons and textiles. This demand for forced labor existed because plantation owners in the South chose not to hire or fairly compensate paid labor, instead relying on slavery to maximize profits. Industries in the North also willingly purchased the products of enslaved labor, despite knowing the exploitation involved in producing the goods. **Together, these practices created an economy that prioritized profit and wealth over human rights** (Encyclopaedia Britannica, n.d.).

This system took root in North America in 1619, when a ship brought about 20 enslaved Africans to Jamestown, Virginia, where they were sold to English colonists. This event directly connected the colonies to the **Transatlantic Slave Trade**, a global system that operated as a triangular trade route. The first leg involved ships carrying manufactured goods to Africa, the **Middle Passage** transported enslaved Africans across the Atlantic, and the third leg returned ships to Europe with goods produced through enslaved labor (Equal Justice Initiative, 2022).

The 1619 Project, an initiative by *The New York Times*, identifies this event, rather than 1776, as a critical turning point that shaped the economic foundations, legal systems, racial hierarchies, and political development of the United States. The project emphasizes that slavery and racial inequality are central, not incidental, to the American story (The New York Times, 2019). Critics of *The 1619 Project*, however, argue that while slavery is a central part of American history, it should not replace 1776 as the nation's founding framework or be treated as the primary explanation for American institutions and values (Wood et al., 2019).

Regardless of one's interpretation of the role of slavery in the founding of the United States, the nation's founding documents did not ensure any rights for enslaved people. The **Articles of Confederation** did not mention slavery, and when the **United States Constitution** was first ratified, it the referenced enslaved people only three times. In all three instances, it condoned the institution of slavery. The **Three-Fifths Compromise**, found in in *Article I, Section 2, Clause 3*, required that representation in the House of Representatives be based o***n "the whole Number of free Persons" plus "three fifths of all other Persons."*** *Article I, Section 9, Clause 3,* known as the **Slave Trade Clause**, stated that Congress was not allowed to ban the importation of people into the United States before the year 1808. And the **Fugitive Slave Clause**, found in *Article IV, Section 2,* required enslaved people who escaped to free states to be returned to their enslavers.

Almost two decades after the Constitution was ratified, Congress responded to political pressure to address the Transatlantic Slave Trade by using the power provided in the Slave Trade Clause. In 1807, it passed the **Act Prohibiting the Importation of Slaves**. The Act, which went into effect on January 1, 1808, did not ban slavery itself. It only made further importation of enslaved people illegal. It followed years of debate in Congress and reflected multiple political forces, including pressure from abolitionists, fears of slave uprisings, and the

economic interests of slaveholders. (Library of Congress, Act Prohibiting Importation of Slaves, n.d.).

In 1825, the Supreme Court of the United States had to consider how the **Act Prohibiting the Importation of Slaves** operated in an international context. That year, it decided ***The Antelope***, a case involving a ship carrying hundreds of Africans that had been seized by a privateer and later intercepted by a U.S. ship enforcing federal law. The Court had to determine the legal status of these Africans when their importation was illegal under U.S. law but remained legal under the laws of the nations whose ships and citizens had originally carried them. The Court acknowledged that ***"the African slave trade is contrary to the law of nature***," a historic statement about the immorality of slavery. Nevertheless, the Court held that the slave trade was legal in other nations and recognized the property claims of the enslavers. It ordered some of the Africans to be returned to them and ruled that the United States could not impose its anti-slavery laws on foreign vessels.

Almost two decades later, the Court decided ***Prigg v. Pennsylvania*** (1842), holding that federal fugitive slave laws were superior to state personal liberty laws. The Supreme Court ruled that states could not interfere with the recapture of enslaved people who had escaped from slave states into free states. The decision strengthened the power of slave catchers and limited state efforts to protect free Black residents. It remained binding precedent until slavery was abolished.

This history forms the backdrop to the first time African American people sought relief through the courts. In ***Dred Scott v. Sandford*** (1857), an enslaved man named Dred Scott argued that he had become free because he had lived with his enslaver in free territory. He asked the Supreme Court to recognize his freedom. The Court not only denied his claim but issued one of the most devastating rulings in American history. Chief Justice Roger Taney wrote that Black people, whether free or enslaved, "***had no rights which the white man was bound to respect,"*** and therefore could not be citizens under the Constitution or bring cases in federal court.

The ***Dred Scott*** ruling also struck down the **Missouri Compromise of 1820,** which had admitted Missouri as a slave state and Maine as a free state, while banning slavery in the northern part of the Louisiana Purchase. The Court contended that Congress lacked the constitutional authority to prohibit slavery in these areas and that doing so violated enslavers' Fifth Amendment property rights. By declaring Congress powerless to restrict slavery's expansion, the ***Dred Scott*** decision inflamed national tensions and moved the country closer to the Civil War. It also established the precedent that Black Americans, enslaved or free, were considered non-citizens under federal law and had no **standing** to seek relief in federal courts (Equal Justice Initiative, 2022).

Meanwhile, Native Americans, Asians, and Latinos also faced discrimination and violence during this era, although their experiences were shaped by different factors. Native Americans endured warfare, forced displacement, and repeated treaty violations by the federal government, culminating in the **Indian Removal Act of 1830** and the **Trail of Tears** in the late 1830s. Latinos living in the Southwest experienced political upheaval and widespread loss of land rights as the United States expanded westward, particularly after the **Mexican-American War** and the 1848 **Treaty of Guadalupe Hidalgo.** Asian immigration was limited during this period, but early Chinese migrants, especially on the West Coast, already faced hostility, exclusion, and discriminatory local laws (National Archives, n.d.; Library of Congress, n.d.; Smithsonian Institution, n.d.).

C. The Civil War, Reconstruction, and New Amendments

The tensions fueled by the *Dred Scott* decision pushed the United States toward a full political crisis. Eleven Southern states seceded from the Union following Abraham Lincoln's election. Their secession created a direct standoff between the states claiming independence, which joined together as the **Confederacy,** and the federal government asserting its constitutional authority. These events set the stage for armed confrontation between the two sides. **The Civil War began in April of 1861 when tensions between the Union and the Confederacy escalated into armed conflict at the Battle of Fort Sumter in South Carolina** (Library of Congress Timeline of

Civil War, n.d.).

The Civil War lasted four years and resulted in an estimated 620,000–750,000 military deaths. Modern demographic analysis suggests the total may be as high as 850,000 (Hacker, 2011). In addition, tens of thousands of enslaved and recently freed African Americans died from violence, disease, starvation, and harsh conditions in camps. **Some historians now argue that including the deaths of the enslaved raises the total Civil War death toll to well over one million**. The war ended in 1865 when the Confederacy was militarily defeated, its government collapsed, and Union forces occupied Southern territory (Downs, 2012).

When the Civil War ended and the Confederacy surrendered, the legal status of millions of formerly enslaved people began to change. President Lincoln's **Emancipation Proclamation** of 1863 declared that people enslaved in the Confederate states were free, but it did not apply to those in the Union's border states or in areas of the South already under Union control. Because Lincoln issued the proclamation as a wartime measure, its effect was limited to regions "in rebellion." These unequal laws, the devastation of the Southern landscape, and the need to bring the eleven formerly Confederate states back into the Union led the nation into a period called **Reconstruction** (U.S. National Archives & Records Administration, n.d.) .

The **Reconstruction** period, which lasted from 1865 to 1877, refers to when the United States worked to reintegrate the Southern states, rebuild the region, and define the rights of formerly enslaved people. This was done through new laws, federal oversight, and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. The process of drafting and ratifying all three amendments took five years in total, an exceptionally fast pace given their sweeping constitutional changes (U.S. National Archives & Records Administration, n.d.).

As in prior chapters, the original text of the amendments is quoted below. A plain-English explanation of the amendments follows. Later sections in this chapter explain how the courts have interpreted and applied these amendments.

The Reconstruction Amendments

Amendment XIII

- ***SECTION. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.***
- ***SECTION. 2. Congress shall have power to enforce this article by appropriate legislation.***

This amendment may seem like it needs no plain-English explanation, but it actually does. The Thirteenth Amendment abolishes slavery, but it still allows an exception for involuntary servitude *as punishment for a crime.* **This part of the Thirteenth Amendment remains controversial today because it means inmates in jails and prisons can legally be forced to work for little or no pay.** This exception clause has been the subject of significant debate and critique. The documentary *13th*, directed by Ava DuVernay, argues that the exception allowing involuntary servitude as punishment for a crime created a loophole that enabled systems of racial control to continue after the abolition of slavery, particularly through mass incarceration and what the film describes as the "prison industrial complex." According to the film, these practices function as a modern form of coerced labor that disproportionately affects African Americans (DuVernay, 2016). This interpretation is controversial, and critics argue that the film oversimplifies the history of criminal law, incarceration, and labor practices. They also argue it stretches the constitutional meaning of the Thirteenth Amendment. Students interested in this debate are encouraged to watch *13th* and to read scholarly and journalistic critiques that challenge its claims and historical accuracy.

Section 2 of the Thirteenth Amendment empowered Congress to pass enforcement legislation, which it did by enacting the **Civil Rights Act of 1866.** This Act was signed into law before the Fourteenth and Fifteenth Amendments were even ratified. It was the first federal law to define citizenship and to guarantee basic civil rights for all Americans. It declared that all people born in the United States, except Native Americans at that time, were citizens and were entitled to the same fundamental rights as white Americans, including the rights to make contracts, own property, and access the courts. Congress passed the Act specifically to counter the **Black Codes**, but Southern resistance and widespread noncompliance made enforcement difficult, ultimately leading Congress to secure these protections more firmly through the Fourteenth Amendment.

Amendment XIV

SECTION. 1. 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 begins by guaranteeing **birthright citizenship**, meaning that anyone born in the United States and subject to its jurisdiction is automatically a U.S. citizen and a citizen of the state where they live. It also states that no state may make or enforce laws that take away the **privileges or immunities** of U.S. citizens. This amendment also includes two major protections that apply to any person, not only citizens: states may not deprive any *person* of life, liberty, or property without **due process** of law, and they may not deny any *person* the **equal protection** of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

This part of the Fourteenth Amendment says that seats in the U.S. House of Representatives must be divided among the states based on their total population, counting everyone who lives there except Native Americans, who were not taxed at the time. It also says if a state takes away the right to vote from adult male citizens age 21 or older, or restricts their voting rights for any reason other than rebellion or a crime, then that state will lose a proportional share of its representation in Congress.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

This section says certain people are barred from holding government office. It applies to anyone who once swore an oath to support the U.S. Constitution, like a member of Congress, a federal or state official, or a member of the military. If that person later took part in a rebellion or insurrection against the United States, or helped its

enemies in any way, they cannot serve in Congress, cannot be an elector for President or Vice President, and cannot hold any federal or state office. The amendment also gives Congress a way to remove this ban. If two-thirds of both the House and the Senate vote to lift the restriction, the person can regain eligibility for office. This section has become newly relevant in recent years because courts and lawmakers have debated whether it applies to events like the January 6, 2021 attempted insurrection at the U.S. Capitol.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Put simply, the U.S. must pay all its lawful debts, especially those related to defeating the Confederacy, but neither the federal government nor any state can pay Confederate debts or compensate former slaveholders for losing enslaved people. This section was added to make sure the Confederacy could never be financially restored and to stop slaveholders from claiming they were owed money after emancipation.

SECTION. 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

This language gives Congress the authority to pass laws to enforce the Fourteenth Amendment. Many major civil rights laws, such as the **Civil Rights Act of 1964** and the **Voting Rights Act of 1965**, were passed under this enforcement power.

Amendment XV
SECTION. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION. 2. The Congress shall have the power to enforce this article by appropriate legislation.

The Fifteenth Amendment says neither the federal government or the states can deny someone the right to vote because of their race or because they were previously enslaved. **At the time it was passed in 1870, this protection applied only to males.** Even though the amendment banned racial discrimination in voting, many states developed new methods to prevent Black men from exercising this right. These methods included poll taxes, literacy tests, grandfather clauses, intimidation, and violence. As previously noted, Congress later used its enforcement power to pass laws such as the **Voting Rights Act of 1965** to stop these practices.

Although the Reconstruction Amendments promised freedom and new legal rights for formerly enslaved people, those protections were not immediately realized. As noted earlier, even while the Fourteenth and Fifteenth amendments were being drafted, Southern states enacted **Black Codes** that restricted nearly every aspect of life for newly freed people. Black Codes were state laws designed to control the movement, labor, and basic freedoms of African Americans in order to preserve a system as close to slavery as possible. For example, **Mississippi's 1865 Vagrancy Act** required African Americans to show written proof of employment and allowed arrests for unemployment, often forcing individuals into unpaid or underpaid labor. Other Black Codes limited job opportunities or required long term labor contracts. **When Reconstruction ended in 1877 and federal troops withdrew, white-controlled state governments regained full power, dismantled many remaining protections, and eventually replaced the Black Codes with the Jim Crow laws** (National Archives, n.d.; Mississippi Black Code, 1865*).*

D. The Jim Crow Era and Retrenchment

Beginning in the 1870s, Southern states began enacting **Jim Crow** laws. The term "Jim Crow" likely originated from a 19th-century minstrel-show character based on a derogatory and racist caricature of African American speech and dance. These state and local mandates formed a sweeping system of rules that enforced racial segregation and were promoted by white leaders known as **"Redeemers"**, a political coalition of Southern Democrats who sought to regain control after Reconstruction and roll back the civil and political rights newly gained by African Americans (Library of Congress, Jim Crow Era, n.d.).

Jim Crow laws mandated separate facilities for Black and white people in nearly every aspect of public life, including schools, transportation, housing, restaurants, hospitals, parks, restrooms, and drinking fountains. One prominent example was **Louisiana's Separate Car Act,** which required segregated railroad cars. These laws operated alongside voting restrictions, such as literacy tests, poll taxes, grandfather clauses, and strict residency and record-keeping requirements. These measures disenfranchised Black citizens and preserved unequal political and economic advantages for white Americans that lasted for generations (National Park Service, n.d.).

Before the Supreme Court ruled on the legitimacy of Jim Crow laws, it decided ***Yick Woo v. Hopkins*** (1886). In that case, the Court struck down San Francisco's discriminatory enforcement of a neutral laundry-permit ordinance that had been used almost exclusively to shut down Chinese-owned businesses. The Court held that unequal enforcement of a neutral law violated the **Equal Protection Clause of the Fourteenth Amendment**. More importantly, they ruled that these protections apply to *all persons* in the United States, not just citizens. Some legal scholars at the time believed the ***Yick Woo*** decision signaled a future in which the Supreme Court would no longer condone racial discrimination, but that prediction did not come true for almost 70 years. **Instead, American jurisprudence saw a series of Supreme Court decisions and acts of Congress that continued to uphold discriminatory practices** (Chin, 1998).

This trend began with ***Elk v. Wilkins*** (1884), a case in which the Court ruled that Native Americans who left their tribes and lived among the general population were not automatically citizens under the Fourteenth Amendment. The Justices made clear that citizenship required the consent of the U.S. government and that Congress had to grant it explicitly. In ***Chae Chan Ping v. United States*** (1889), the Court upheld the **Chinese Exclusion Act**, which banned Chinese laborers from immigrating and barred all Chinese immigrants from becoming citizens. The *Ping* decision established the **"plenary power"** doctrine, which gives Congress sweeping authority to exclude non-citizens from entering the country. And in ***Fong Yue Ting v. United States*** (1893), the Court held that Congress may deport non-citizens without a jury trial and characterized deportation as a civil rather than criminal process (Haney López, 2006).

Although they were later nullified by subsequent laws, two acts of Congress from this period further demonstrated the government's acceptance of discriminatory policies. The **Dawes Act of 1887** ended communal tribal landholding by Native Americans by dividing reservations into individual allotments for Native families. The Act also involved selling the remaining "surplus" land to white settlers, resulting in massive Native land loss. The **Curtis Act of 1898** extended these policies to the Five Civilized Tribes, dissolving many of their tribal courts and governments and further weakening tribal sovereignty (Library of Congress, Dawes Act and Curtis Act, n.d.).

These federal policies, combined with discriminatory state laws, set the stage for the Supreme Court to formally sanction segregation in ***Plessy v. Ferguson*** (1896). In 1892, Homer Plessy, a man of mixed Black and white ancestry, boarded a whites-only railroad car in Louisiana as part of a planned challenge to the state's segregation law. He openly told the conductor he was Black, refused to move to the "colored" car, and was arrested. Plessy argued that the law violated the Thirteenth and Fourteenth Amendments because it treated Black passengers as inferior citizens, but when his case reached the Supreme Court, the justices ruled against him. They declared that Louisiana's segregation law was constitutional, claiming that separating Black and white people did not

violate equal protection as long as the facilities were **"separate but equal." This decision gave formal legal approval to segregation, allowing Jim Crow laws to spread further across the South and shape American life for more than half a century.**





Image 10.1

The cartoon on the above left depicts Homer Plessy, but the black-and-white portrait on the right does not. The photograph is often mislabeled as Plessy, but it is actually P. B. S. Pinchback, a prominent Reconstruction-era politician and the first African American governor of any U.S. state, serving briefly in Louisiana. The two men were both mixed-race Creoles of color from New Orleans, which probably contributed to the confusion. Historians explain that the misidentification began when internet sources mistakenly labeled Pinchback's portrait as Plessy, and the error was then repeated across textbooks and websites for years. You can currently enter the name Homer Plessy into Google images today and get the photograph on the right, demonstrating the importance of verifying information available online. (Luxenberg, , 2019; Times-Picayune, 2017.)

Following *Plessy* v. Ferguson, the nation's attitudes regarding race combined with wartime fears during World War I started to prompt a new series of federal immigration laws. The **Immigration Act of 1917,** also called the **Asiatic Barred Zone Act,** expanded earlier restrictions by banning immigration from most of Asia beyond China. It was shaped by wartime nationalism and suspicion toward immigrants who were viewed as potential political or security risks. The **Immigration Act of 1924,** also known as the National Origins Act, went even further by creating strict national-origin quotas that favored immigrants from Northern and Western Europe, sharply limiting those from Southern and Eastern Europe, and completely banning immigration from nearly all Asian countries. Together, these laws reflected how wartime fears and racial attitudes produced some of the most restrictive and openly exclusionary immigration policies in U.S. history (Library of Congress, Immigration Act of 1917; Immigration Act of 1924, n.d.).

The climate of racial exclusion that shaped immigration policy in the 1910s and 1920s experienced a temporary shift during the **Great Depression** and **World War II**, but only for certain groups and largely for strategic reasons. During this period, Congress, responding to political pressure, reversed some of the earlier damage to Native American sovereignty by passing the **Indian Reorganization Act of 1934**. This Act ended allotment, the policy that divided tribal land into individual plots for Native families and sold the remaining "surplus" land to non-Native settlers. It also restored communal landholding and supported tribal self-government. Additionally, international alliances during **World War II**, particularly the U.S. partnership with China after it was attacked by Japan, pressured the United States to revisit immigration laws affecting Chinese nationals. This led to the **Magnuson Act of 1943,** which repealed the **Chinese Exclusion Act** and permitted limited Chinese immigration and naturalization (Library of Congress, Indian Reorganization Act of 1934; Magnuson Act of 1943, n.d.).

Although these mid-century reforms signaled a retreat from earlier discriminatory policies, they did not reflect a broad shift in civil liberties. An entirely different political climate emerged after the Japanese attack on Pearl Harbor in 1941. Although the United States granted more rights to Native Americans and eased restrictions on Chinese immigrants, it soon targeted Japanese Americans as security threats, issuing **Executive Order 9066** and authorizing their forced removal and incarceration in internment camps. In ***Korematsu v. United States* (1944),** the Supreme Court upheld this policy, accepting the government's wartime justifications even though the internment was based on race and lacked evidence of individual wrongdoing.

The *Korematsu* decision is now widely condemned, but it marked one of the first times the Court applied what would later be known as **strict scrutiny,** the highest level of review for government actions that classify people by race, although it did not use the words "strict scrutiny" yet. The Court did say that racial classifications are "immediately suspect," and that they "must be subjected to the most rigid scrutiny."

Under the Equal Protection Clause of the Fourteenth Amendment, courts eventually developed a **three-tiered system** for evaluating whether laws that treat groups differently are constitutional. This system asks how closely the government's purpose and its chosen method must be examined, depending on the type of classification involved. This system consists of:

- **Rational basis review**, the most deferential level, applies when a law does not involve a protected class or a fundamental right. The government only needs to show that the law is reasonably related to a legitimate public purpose.
- **Intermediate scrutiny** applies when the government uses classifications such as gender. The government must show that the law is substantially related to an important governmental objective.
- **Strict scrutiny**, the most demanding standard, applies when the government classifies people based on race or infringes on a fundamental right In these cases the government must prove that the law serves a compelling

interest and is narrowly tailored to achieve that interest (Chemerinsky, 2019.)

In the years after World War II, the United States began moving into a period characterized by significant shifts in constitutional law and expanding debates about individual rights.

E. The Civil Rights Movement

By the early 1950s, racial segregation in public schools and in many other areas of daily life had been deeply entrenched in the United States for generations. ***Brown v. Board of Education*** (1954) became the landmark case that directly challenged this system and reshaped the constitutional meaning of equality. Its ruling that "separate" was inherently unequal eventually helped dismantle segregation in other parts of American society, especially when reinforced by later civil rights legislation.

However, a lesser-known case decided just two weeks before *Brown* also deserves attention. It signaled that the Supreme Court recognized discrimination affecting groups beyond African Americans. In ***Hernandez v. Texas*** (1954), the Court held that Mexican Americans constituted a distinct class protected under the Fourteenth Amendment. The case arose after Pete Hernandez, a Mexican American farm worker, was convicted by an all-white jury in a Texas county where no person of Mexican descent had served on a jury for more than 25 years. The Court unanimously ruled that the Fourteenth Amendment protects all racial and ethnic groups, not only Black and white Americans, and that systematically excluding Mexican Americans from juries violated equal protection guarantees.

Only two weeks later, the Court decided *Brown v. Board of Education*.



Image 10.2

Lucinda Todd, a key NAACP activist who helped initiate and organize the Topeka school desegregation lawsuit, is shown with her daughter Nancy holding a newspaper announcing the Supreme Court's decision in *Brown v. Board of Education* (1954). Photo courtesy of the Library of Congress.

Landmark Case Spotlight:
***Brown v. Board of Eduction.* (1954)**
Case Excerpt (Not Full Case)
Click here for full text.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In

the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson*, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming* v. *County Board of Education*, 175 U.S. 528, and *Gong Lum* v. *Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sipuel* v. *Oklahoma*, 332 U.S. 631; *Sweatt* v. Painter, 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, supra, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the

actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

(National Archives, n.d., Brown v. Board of Education)



Image 10.3

(NAACP Legal Defense Fund, n.d.).

The Doll Test

In the 1940s, as part of the social science research later used in *Brown v. Board of Education*, psychologists Kenneth and Mamie Clark conducted the well-known "doll tests" to examine how segregation affected African American children's self-perception. Using four dolls that were identical except for skin color, they asked children which doll was "pretty," "good," "smart," or "looked like them." Most children chose the white doll for positive qualities and rejected the brown doll, leading the Clarks to conclude that segregation damaged Black children's self-esteem. In one especially troubling moment during testing in Arkansas, a young child pointed to the brown doll and said, "That's a ni$%&r. I'm a ni$%&r," a response Kenneth Clark later described as deeply disturbing. Although the doll test represented only one piece of Clark's expert testimony in *Brown v. Board of Education*, the Supreme Court cited his research in their decision, noting that segregation created a sense of inferiority "unlikely ever to be undone," and the Clarks' findings helped demonstrate clear evidence of the psychological harm caused by segregation (NAACP Legal Defense Fund, n.d.).

The victory in *Brown v. Board of Education* was significant, but it required a second ruling, ***Brown v. Board of Education II*** (1955), to address how desegregation would actually be carried out. In that follow-up decision, the Supreme Court ordered states to implement school desegregation ***"with all deliberate speed."*** Many states delayed compliance or engaged in open resistance of the Court's mandate. In some places, like Arkansas, the Little Rock Nine had to be escorted into school by federal troops to ensure their safety and enforce the Court's ruling. Similar federal interventions occurred in a half dozen other communities across the South. Although it was uncommon for the Supreme Court to issue a second decision to ensure its rulings are followed, massive resistance to desegregation made this additional step necessary (Library of Congress, School Desegregation and the Civil Rights Movement, n.d.).

As the civil rights movement gained momentum in the 1950s, Congress took steps toward addressing racial discrimination for the first time since Reconstruction. The **Civil Rights Act of 1957** created the **U.S. Commission on Civil Rights** and authorized the Justice Department to bring lawsuits against states that suppressed Black voting, marking the first federal civil rights law enacted in more than eighty years. The Act was largely symbolic because its enforcement mechanisms were weak, and many states continued to block Black voters through intimidation, literacy tests, and local obstruction. However, these limitations demonstrated that far stronger protections were needed (National Archives, Civil Rights Act of 1957, n.d.).

Those needs were met seven years later with the passage of the **Civil Rights Act of 1964**, the most significant legislative victory achieved by civil rights advocates. The law prohibited discrimination based on race, color, religion, sex, or national origin in several major areas of American life. Dr. Martin Luther King Jr. worked tirelessly to secure its passage by organizing marches, lobbying lawmakers, and building national pressure to end legal discrimination. The Act banned discrimination in public accommodations such as hotels, restaurants, and theaters. It also outlawed segregation in public facilities, authorized federal enforcement of school desegregation, cut off federal funding to programs that practiced discrimination, and prohibited employment discrimination. It further created the **Equal Employment Opportunity Commission** (EEOC) to enforce these protections (Miller Center, n.d.).

The 1964 Act addressed the weaknesses of the **Civil Rights Act of 1875**, which the Supreme Court had overturned because Congress lacked authority to regulate discrimination by private actors. **Congress avoided the state action barrier by grounding the 1964 law in its constitutional authority under the Commerce Clause and the Necessary and Proper Clause, justifications made clear in the Act's legislative history and later acknowledged in Supreme Court decisions upholding its constitutionality** (Miller Center, n.d.).

The next challenge for civil rights advocates was tackling the voting barriers that continued to prevent Black Americans and other groups from political participation. This led to the **Voting Rights Act of 1965**. This legislation outlawed discriminatory practices such as literacy tests, understanding tests, and other devices that states had long used to suppress minority voting. It also required federal oversight, known as **"preclearance,"** in jurisdictions with documented histories of racial discrimination. Under this system, those states and counties had to obtain federal approval before changing any voting rules or procedures. The Voting Rights Act dramatically increased voter registration and turnout among Black Americans and remains one of the most effective civil rights laws ever enacted. Later Supreme Court decisions weakened parts of the Act, raising new questions about how voting rights should be protected today. Those questions will be addressed in Chapter 14.

The year 1965 also saw the passage of the **Immigration and Nationality Act Amendments,** commonly known as the **Hart–Celler Act**. This law eliminated the discriminatory national-origins quota system that had long favored

immigrants from northern and western Europe and replaced it with a system based on family reunification and employment-based criteria. The Act opened the door to large-scale immigration from Asia, Latin America, Africa, and the Caribbean, permanently reshaping the demographic makeup of the United States (National Archives, Immigration and Nationality Act of 1965, n.d.).

As Congress reshaped the nation's immigration laws, the Supreme Court was also confronting other longstanding forms of racial discrimination. In ***Loving v. Virginia*** (1967) the Supreme Court struck down state laws that banned interracial marriage. At the time, sixteen states still enforced anti-miscegenation laws, statutes that made marriages between people of different races illegal. The case involved Richard Loving, a white man, and Mildred Loving, a Black woman, who had married legally in Washington, D.C. , but they were arrested when they returned to their home in Virginia. They were convicted under Virginia's Racial Integrity Act and ordered to leave the state for 25 years. The Lovings challenged their convictions, and in 1967 the Supreme Court unanimously ruled that laws prohibiting interracial marriage violated both the **Equal Protection Clause** and the **Due Process Clause** of the Fourteenth Amendment. **The Court held that marriage is a fundamental right and that racial classifications designed to preserve a racially segregated social order could not withstand constitutional scrutiny.**

The civil rights movement continued to expose discrimination beyond schools, workplaces, and voting, and Congress turned its attention to unequal treatment in housing. Decades of practices such as redlining and racially restrictive covenants contributed to deeply segregated neighborhoods across the United States. **Redlining** occurred when banks and federal agencies refused to insure mortgages in neighborhoods where Black or other minority residents lived. **Racially restrictive covenants** were private agreements that prevented homeowners from selling their property to nonwhite buyers. Together with other forms of discriminatory lending, these practices denied minority families equal access to housing and economic opportunity. The **Fair Housing Act of 1968** prohibited discrimination in the sale, rental, and financing of housing based on race, color, religion, or national origin. Congress enacted the law just one week after the assassination of Dr. Martin Luther King Jr. The Act marked a major step toward dismantling segregation in American neighborhoods (Mapping Inequality Project, n.d.).

Fifteen years of civil rights advocacy resulted in numerous legal victories for African Americans. Yet, America still did not treat them equally. **Before moving onto more recent civil rights, please view the slideshow from my family's visit to the National Civil Rights Museum in Memphis, Tennessee.** It provides an overview of key events and developments from the civil rights period. You may be asked questions about its content on a future quiz!



Scenes from the National Civil Rights Museum:

F. Evolving Rights in the Modern Era

The civil rights victories of the 1950s and 1960s coincided with a broader shift toward strengthening tribal sovereignty and protecting the rights of Native Americans. The **Indian Civil Rights Act of 1968** applied many core Bill of Rights protections to tribal governments while still recognizing their sovereign status. The **Indian Self-Determination and Education Assistance Act of 1975** expanded tribal authority by recognizing the rights of tribes to operate federal programs themselves, including schools, healthcare systems, and law-enforcement services. The **American Indian Religious Freedom Act of 1978** protected the rights of Native peoples to practice traditional religions, access sacred worship sites, and use ceremonial objects. And the **Indian Child Welfare Act of 1978** (ICWA) gave tribes authority over foster care and adoption decisions involving Native children, addressing the widespread and harmful removal of Native youth from their families and communities (National Park Service, The Struggle for Sovereignty n.d.).

Progress for Native Americans occurred alongside broader national efforts to eliminate discrimination, including in the workplace. One of the most significant of these efforts was the **Equal Employment Opportunity Act of 1972.** Although the Equal Employment Opportunity Commission (EEOC) had been created by the Civil Rights Act of 1964, the agency initially had very limited authority. It could receive discrimination complaints, investigate them, and attempt to resolve cases through voluntary conciliation, but it lacked the power to enforce the law or bring lawsuits on behalf of workers. If negotiations failed, the EEOC could only refer cases to the Justice Department, which could choose whether to take action. The Equal Employment Opportunity Act of 1972 changed this framework by giving the EEOC authority to sue employers directly for discrimination and improved enforcement procedures for federal employees. These reforms transformed the EEOC from a largely advisory body into an active civil-rights enforcement agency and significantly expanded workplace protections nationwide (U.S. Equal Employment Opportunity Commission, n.d.).

As the rights of Americans expanded in the workplace, new questions about fairness and equal treatment also emerged in education, particularly in the context of Affirmative Action. Merriam-Webster defines **Affirmative Action** as "*the use of policies, legislation, programs, and procedures to improve the educational or employment opportunities of members of certain demographic groups (such as minority groups, women, and older people) as a remedy to the effects of long-standing discrimination against such groups*." The constitutionality of Affirmative Action reached the Supreme Court in 1978.

The landmark case ***Regents of the University of California v. Bakke*** (1978) involved Allan Bakke, a white applicant to the UC Davis medical school who challenged the university's admissions policy. The policy reserved 16 out of 100 seats for applicants from designated minority groups as part of a special admissions program intended to expand diversity and remedy the effects of past discrimination. Bakke was rejected twice, despite having grades and test scores higher than some students admitted through the special program. He sued, arguing that the quota system discriminated against him based on race and violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Although the Court issued a fractured opinion, two major conclusions emerged. **First**, quotas were unconstitutional. Systems like the UC Davis practice of setting aside a fixed number of seats for specific racial groups violated equal protection. **Second**, the Court held that race could still be considered as one factor among many in an individualized, holistic admissions process. **As a result, *Bakke* was both a victory and a limitation for civil rights advocates. It prohibited strict racial quotas but preserved the ability of schools to consider race as part of efforts to promote diversity.**

The Supreme Court issued several later decisions refining how Affirmative Action could operate, but the core *Bakke* principle allowing race to be considered as one factor in admissions remained in place for over forty years until the Court sharply changed course In 2023 the Supreme Court fundamentally reshaped the legal landscape

of university admissions in ***Students for Fair Admissions v. Harvard*** and ***Students for Fair Admissions v. University of North Carolina***. In these consolidated cases, the Court held that colleges and universities may no longer consider race as a factor in their admissions decisions, ruling that the race-conscious policies used by Harvard and UNC violated the Equal Protection Clause. The majority decision stated that such programs relied on racial classifications in ways the Constitution does not permit and lacked sufficiently measurable objectives to justify their use. **This decision marked a major departure from prior decisions and effectively ended Affirmative Action policies nationwide.**

Even as the Supreme Court narrowed the scope of race-conscious policies in college admissions, a broader social and legal movement emerged to address other forms of racial discrimination that persisted in workplaces and educational institutions. The **CROWN Act** (Creating a Respectful and Open World for Natural Hair) prohibits race-based hair discrimination by providing legal protection to those who wear protective hairstyles, such as braids, locs, twists, Afros, and Bantu knots. The Act was first enacted in California in 2019, and it is now adopted by 28 states. The CROWN Act reflects an evolving understanding of how racial bias can operate through cultural and appearance-based standards, even after formal legal equality has been established. The CROWN Act's official website provides additional background on the movement, the law's legal framework, and current federal and state efforts to expand the Act.

An analysis of evolving rights based on race and national origin would be incomplete without also examining recent changes affecting undocumented people and understanding that immigration rights tend to expand or contract depending on the political climate and the priorities of national leaders. Starting this analysis requires briefly going back about forty years in time for context. In ***Plyler v. Doe*** (1982), the Supreme Court held that states cannot deny free K–12 public education to undocumented children because doing so violates the Equal Protection Clause. A few years later, Congress enacted the **Immigration Reform and Control Act of 1986 (IRCA),** which created a major legalization program, often referred to as "amnesty", that allowed millions of undocumented immigrants who met specific requirements to obtain legal status. Both of these developments occurred during the Reagan administration, and while it would be an oversimplification to describe Ronald Reagan as "pro-immigrant," he did sign the IRCA and often spoke favorably about immigration, including in his farewell address, where he remarked that ***"anyone, from any corner of the Earth, can come to live in America and become an American***" and warned that ***"if we ever closed the door to new Americans, our leadership in the world would soon be lost." (***Library of Congress, n.d.; U.S. Citizenship and Immigration Services, n.d.).

Fast forward to a decade later, public attitudes toward immigration had shifted considerably. Concerns about unauthorized immigration, initiatives such as California's Proposition 187, and a growing national focus on crime and security created political pressure for far stricter immigration laws. In 1996, Congress responded by passing the **Illegal Immigration Reform and Immigrant Responsibility Act** (IIRIRA), which expanded the range of deportable offenses, made many deportations mandatory, limited judicial review, and created faster "removal" procedures (IIRIRA, 1996). A few years later, after the 9/11 attacks, the federal government reorganized the entire immigration system, replacing the Immigration and Naturalization Service with three new agencies: **ICE, CBP, and USCIS**. ICE (Immigration and Customs Enforcement) carries out interior enforcement and deportations, CBP (Customs and Border Protection) oversees border security and entry into the United States, and USCIS (U.S. Citizenship and Immigration Services) administers immigration benefits such as visas, green cards, and naturalization. These agencies were placed under the newly created **Department of Homeland Security** (DHS). These changes occurred under two different presidents from different political parties, Bill Clinton and George W. Bush, yet they reflected a broader period in which public fears about job competition, crime, and terrorism shaped the nation's approach to immigration policy (Homeland Security Act of 2002) .

By 2012, the intense immigration crackdowns of the 1990s and early 2000s had begun to ease, creating space for policies that offered limited relief to certain undocumented residents. That year, the Obama administration created the **Deferred Action for Childhood Arrivals (DACA)** program through executive action. DACA does not provide lawful status or a path to citizenship, but it allows eligible undocumented individuals who were brought to the United States as children to receive temporary protection from deportation and work authorization, both renewable every two years. To qualify, applicants must have arrived before age 16, lived continuously in the United States since 2007, been under age 31 in 2012, be enrolled in school or have completed high school or military service, and have no significant criminal convictions. Although limited in scope and duration, DACA reflected a modest shift toward recognizing the humanitarian concerns surrounding young people who had long-established lives in the United States. (Napolitano, 2012). The program was created during a time period when Congress was deeply divided over immigration reform; however, the progressive stance of the Obama administration regarding immigration prompted it to act independently and provide limited relief to a narrow group of undocumented residents who had become known as "Dreamers."

After President Obama's term ended, Donald Trump was elected and took office in 2017. Trump adopted a sharply different philosophy on immigration and issued numerous **executive orders** that dramatically expanded enforcement, resulting in significantly reduced protections for undocumented immigrants. His first-term directives focused on accelerating construction of barriers along the southern border, increasing immigration detention capacity, and broadening interior enforcement so that nearly all undocumented immigrants could be targeted for removal. The administration also implemented travel bans, intensified cooperation between local police and ICE, reduced refugee admissions, and increased vetting for immigration benefits and naturalization. These actions eliminated many previous limits on immigration enforcement and contributed to widespread workplace and neighborhood raids. **Most of these first-term immigration policies remained in place after court challenges, except for portions of the original travel ban, which were struck down before the administration issued a revised version that the Supreme Court later upheld. The sanctuary-city penalty provisions of EO 13768, which sought to withhold federal funds from jurisdictions that limited cooperation with ICE, were struck down in court and never reinstated** (Executive Order 13767, 2017; Executive Order 13768, 2017; Proclamation 9844, 2019; Executive Order 13769, 2017).

During Trump's second term, which began in January of 2025, the administration has continued an aggressive approach toward immigration enforcement. Several new executive orders have expanded detention capacity for detainees, increased the number of immigration enforcement personnel, resumed border wall construction, broadened efforts to pressure or penalize jurisdictions labeled as "sanctuary" cities, and prioritized the removal of virtually all undocumented immigrant.s (Executive Orders 14165 and 14287). The administration has also issued a separate set of "citizenship integrity" orders, which has increased scrutiny in naturalization cases and expanded background checks and vetting for individuals applying for immigration benefits. (Executive Orders 14160 and 14161). In addition, Trump issued a renewed emergency declaration at the border, which redirected more federal funds toward enforcement. This has resulted in intensified and ongoing ICE raids throughout the country (Proclamation 10886).

Lawsuits challenging the administration's second-term executive orders as of November 2025 are too numerous to cover in full, but one key case is ***Trump v. CASA*** (2025). In that case, the Supreme Court reviewed the Trump administration's revised **public charge rule**, which made it more difficult for immigrants to obtain green cards if they had used, or were likely to use, certain public benefits. CASA de Maryland and several other public interest groups argued that the rule discriminated against low-income immigrants, conflicted with federal immigration law, and unlawfully expanded executive authority. The Court upheld the rule, concluding that the executive branch has broad discretion under the **Immigration and Nationality Act** to define who qualifies as a public charge and found no equal protection violation because the rule applied to all non-citizens regardless of national

origin. **The most consequential part of the decision, however, was the Court's holding that federal district court judges may not issue injunctions extending beyond their own geographic jurisdiction, unless Congress clearly authorizes it.** This part of the CASA ruling has overturned decades of practice in which nationwide injunctions were commonly used in immigration, civil-rights, voting-rights, and environmental cases. **As a result, people who believe their civil rights have been violated now must sue individually or attempt to meet the complex and burdensome requirements of class action litigation, rather than benefiting from a single injunction that protects everyone in the same situation.**

Less than two months later, the Supreme Court heard ***Noem v. Vasquez Perdomo*** (2025). In that case, the Supreme Court granted the federal government's request to pause a district court order that had blocked ICE and DHS from conducting immigration stops in Los Angeles based solely on factors such as race, speaking Spanish, location, or type of work. **Justice Kavanaugh's concurrence argued that immigration officers may rely on race among other factors and consider the "totality of circumstances" to form reasonable suspicion of unlawful presence.** Justice Sotomayor dissented, arguing that the government's mass raids violated the Fourth Amendment and that the stay allowed unconstitutional seizures of Latino residents to continue.

Legal advocates argue that ***Trump v. CASA*** and ***Noem v. Vásquez Perdomo*** appear to conflict with earlier Supreme Court decisions that recognized strong constitutional protections for non-citizens. For example, in ***Yick Wo v. Hopkins*** (1886), the Court held that the Equal Protection Clause protects *all persons*, regardless of citizenship, striking down discriminatory enforcement of a San Francisco ordinance against Chinese immigrants. After ***Wong Wing v. United States*** (1896) confirmed that non-citizens are entitled to core due-process protections in criminal proceedings, the Court continued to recognize additional constitutional safeguards. In ***Fong Yue Ting v. United States*** (1893), the Court acknowledged that deportation, although technically a civil process, still requires basic procedural fairness. And in ***SFFA v. Harvard*** (2023), the court said that treating individuals differently based on race violated equal protection guarantees. **Although these cases established robust constitutional protections for non-citizens, the durability of those principles remains uncertain, and future litigation will determine whether the Court continues to narrow or reaffirm these long-standing rights.**

Conclusion

The struggle for racial equality in the United States has not followed a linear path. African Americans and other groups have consistently struggled to have their rights recognized by the government, and other groups have consistently tried to maintain the status quo. The Supreme Court, Congress, and the Executive Branch have shaped civil rights in different ways and have contributed to evolving interpretations of equality as well as competing visions of how the nation should apply the law. These patterns make clear that civil rights in the United States are never static and always require continued vigilance and advocacy.

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Chapter Eleven

Civil Rights Part Two:
Gender, Sexual Orientation, Age, Disability,
and Other Protected Classes

Chapter Outline

A. Overview

B. Gender

C. Sexual Orientation

D. Age

E. Disability

F. Other Protected Classes

A. Overview

Chapter Ten focused on civil rights as they pertain to race and national origin. This chapter examines civil rights as they relate to gender, sexual orientation, age, disability, and other protected classes. The material is divided into sections by topic because the policies and motivations behind the inequitable treatment of each group developed for different reasons. The topic of reproductive rights is uniquely complex and multifaceted, so it is addressed separately in Chapter Twelve.

When reading this chapter, it is important to resist the temptation to compare which group had the biggest struggle. For example, some might point out that formerly enslaved men obtained the right to vote 55 years before women did. Others might observe that women benefited from civil rights legislation before people with disabilities did. Such comparisons are not productive. The forms and sources of disparate treatment are complicated, and comparing across groups is rarely helpful or informative. As emerging scholar and political essayist Amen Gashaw notes, "Indeed, the '**Oppression Olympics**' — the competition between people for the title of 'most oppressed' — attempts to identify one sole casualty of injustice, and consequently establishes an inefficient economy of reform, breeds intersectional resentment, and ultimately perpetuates the very oppression it vilifies" (Gashaw, 2021). **Focusing on each group's unique barriers, rather than comparing their struggles, leads to a more meaningful understanding of civil rights in the United States.**

B. Gender

The status of women's rights in early America is difficult to summarize. **Before the founding of the United States, no unified legal system existed, and women lived under a mix of Indigenous governance, laws that legalized slavery, English colonial law, and local religious customs, all of which overlapped or conflicted with one another.** Because these women came from diverse legal systems and experienced different levels of autonomy in their homelands, it is helpful to first consider the status of these women in the places from which they originated (Perdue, 1998).

Although the rights of Native American women differed significantly from one tribe or cultural group to another, those who were already living in the Americas generally had greater social, economic, and political rights than women in England during this time period. In many matrilineal Native societies, women controlled property, influenced political decisions, and exercised autonomy over marriage and family life (Perdue, 1998).

Likewise, prior to the transatlantic slave trade, many women living in West and West-Central African societies exercised more control over their daily lives than women living in England and Europe during the same time period. Although the rules and cultures they lived under differed widely across regions, women in these societies often worked their own farmland, participated in local markets, maintained strong family ties, and in some communities

could even divorce or serve as leaders (Gates, 2014).

By contrast, women in early modern England (1500–1750) had few legal rights once they married because of **coverture**, a legal doctrine under which a married woman's legal identity merged with her husband's so she could not own property, make contracts, or control her own wages. Coverture effectively erased women as independent legal actors. It had limited exceptions that emerged through the courts, but these protections were inconsistent and benefited only a small number of women, usually those with wealth (Kamp, 2008). In most European countries during this period, married women's rights were similar to or more restricted than those in England. Most legal systems in European nations treated wives as legally subordinate to their husbands, with some narrow exceptions (Merry, 2003).

After the American Revolution, neither the Articles of Confederation nor the U.S. Constitution mentioned women or their rights. Only New Jersey allowed some women, specifically property-owning women, to vote in the early republic (1776–1807). All other states restricted voting rights to men both before and after the Revolution. Other rights for women, such as property ownership, the right to divorce, the ability to enter contracts, and inheritance rights, varied by region. New England and Pennsylvania imposed strict limits in these legal areas, while Southern colonies and New York permitted women to enter into contracts before marriage or to hold "separate estates," property kept legally distinct from a husband's control (Salmon, 2006).

Divorce laws were inconsistent across states, a pattern that began in the colonial era and continued after the American Revolution. Widows received only limited economic protection through **dower,** a customary rule that guaranteed them use of a small portion of their husband's property upon his death, which often left women dependent on relatives or public assistance. Single women generally retained basic property and contract rights. However, married women lost nearly all legal autonomy under **coverture**, the system described earlier that had already carried over from English law (Salmon, 2006).

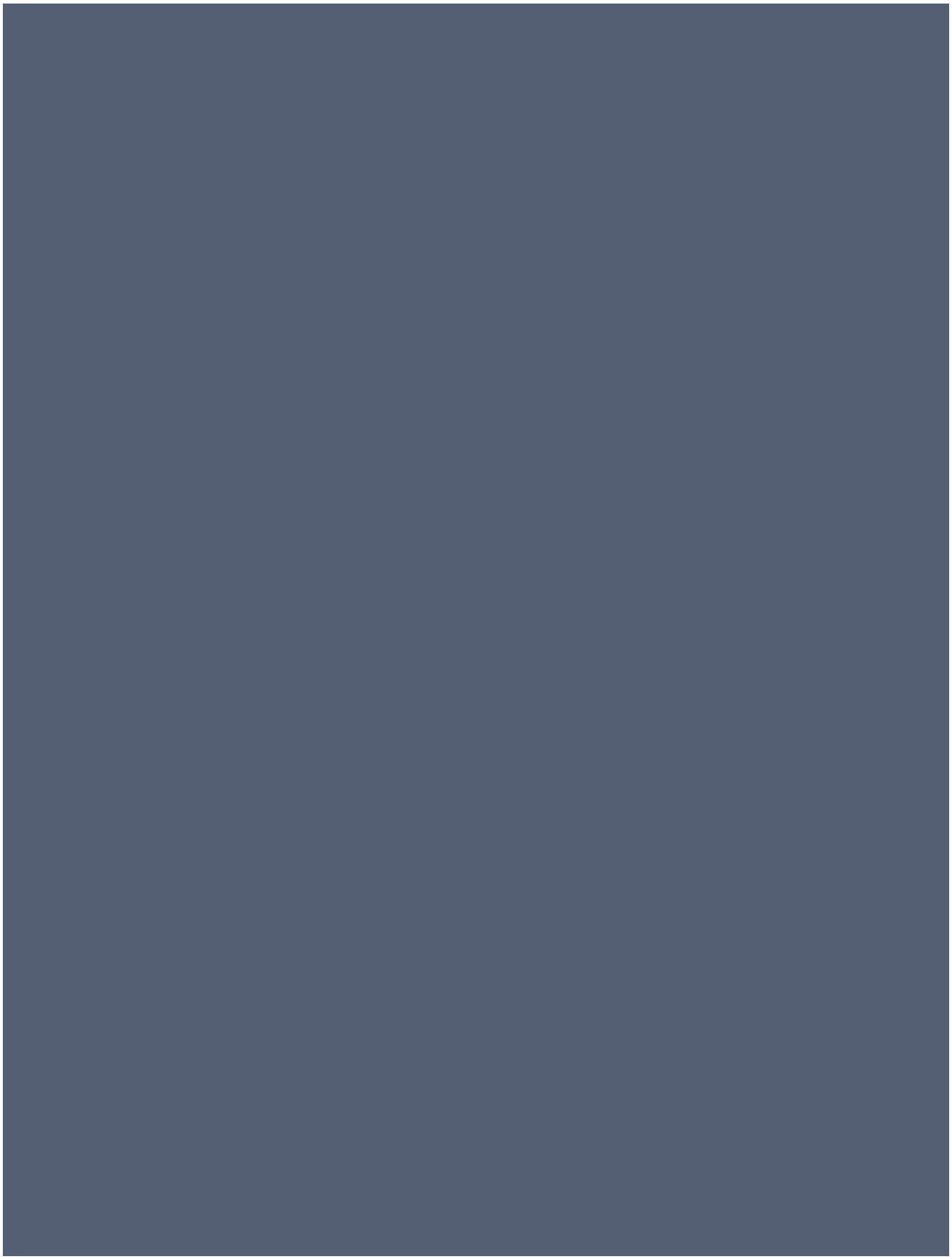
Many scholars trace the origins of the "first wave" of the women's rights movement to the **1848 Seneca Falls Convention**, where activists publicly organized for women's legal and political equality for the first time. Early feminists such as Elizabeth Cady Stanton, Lucretia Mott, Martha Coffin Wright, Mary Ann McClintock, and Jane Hunt organized this gathering, launching the first coordinated effort to challenge women's legal inequality. **Frederick Douglass**, a prominent abolitionist and advocate for African Americans, also attended and delivered a pivotal speech supporting women's suffrage. The delegates drafted the **Declaration of Sentiments**, modeled on the Declaration of Independence, which detailed the many ways women were denied basic civil, political, educational, religious, and economic rights. Although largely symbolic at the time, the convention laid essential groundwork for later women's rights activism. **Married Women's Property Acts** that were passed after the convention gradually expanded married women's rights to own property, enter contracts, and sue or be sued, but these reforms were slow, uneven, and they primarily benefited white women and those with greater economic resources, while women of color and poorer women often continued to face significant legal and practical barriers to exercising these rights (National Women's History Alliance, 1998).

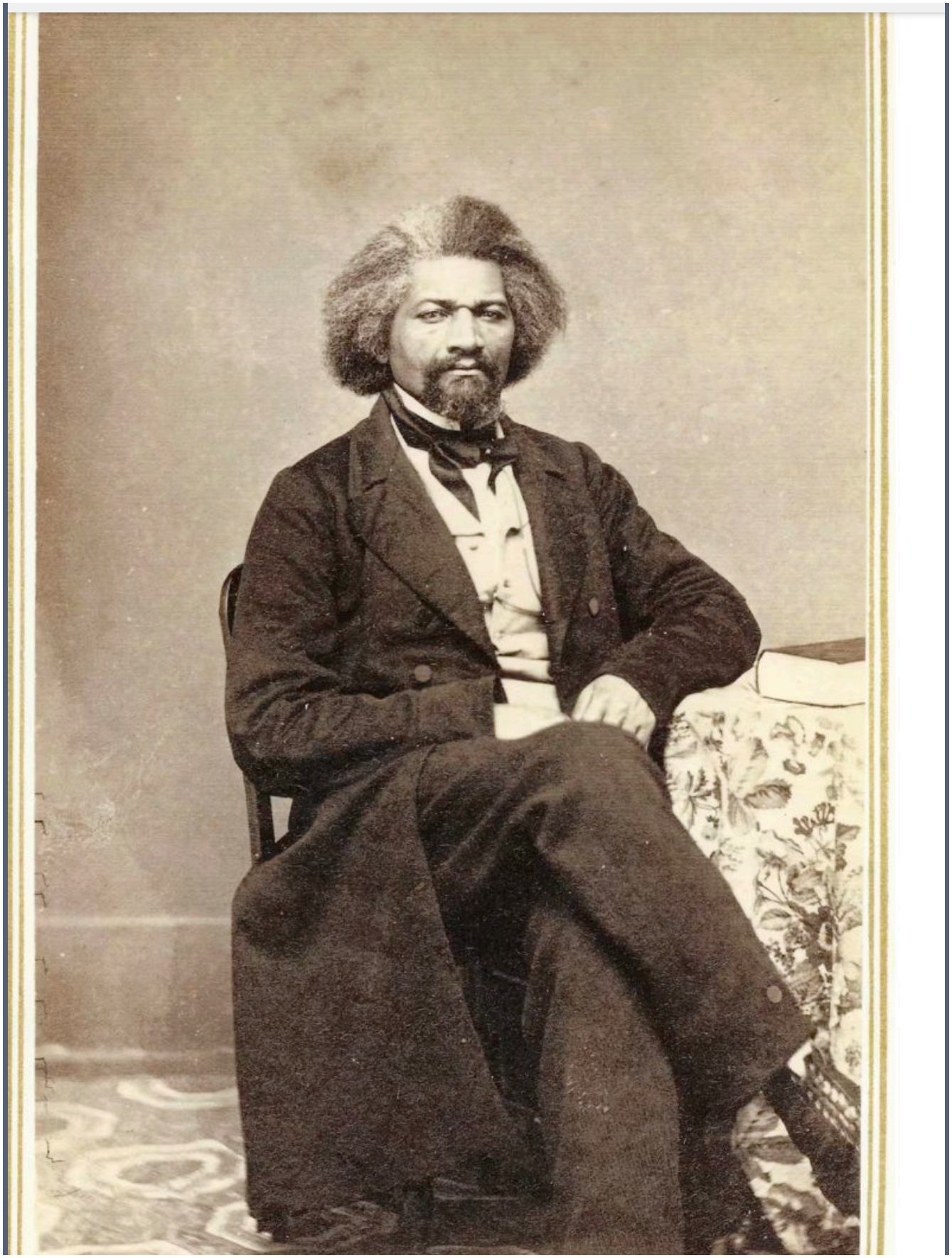
Satirical Engraving by George Cruikshank, Often Used to Illustrate Mockery of Women's Rights During the Seneca Falls Era



Image 11.1

(Cruikshank, G., ca. mid-19th century, Punch Magazine illustration)





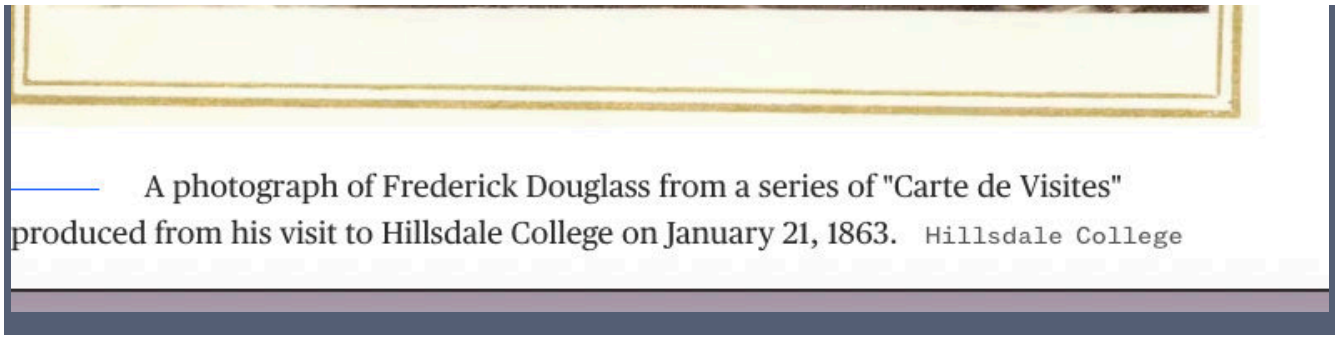


Image 11.2
(Johnson, 2017)

B. Gender-continued

Over the next several decades, activists across the United States created regional and national coalitions dedicated to reforming existing laws to ensure women were treated as equal and to secure the right to vote, known as **women's suffrage**. These activists, known as **suffragettes**, organized conventions and developed state and federal reform strategies. Unfortunately, the majority of these coalitions excluded African American women, even after the Civil War ended slavery, reflecting deep racial divisions within the movement. These reform efforts built on the momentum of Seneca Falls and started what many scholars call the "first wave" of feminism (National Women's History Alliance, 1998).

Starting in 1878, leaders of the suffrage movement repeatedly pressured Congress to adopt a constitutional amendment by testifying before committees, organizing petition drives, meeting with lawmakers, and staging highly visible protests, including hunger strikes. Several of these demonstrations led to the arrest and imprisonment of suffrage activists. Even though the Equal Protection Clause of the Fourteenth Amendment says that no state may ***"deny to any person within its jurisdiction the equal protection of the laws,"*** it took forty years of sustained legislative activism before two-thirds of both the House and Senate finally voted to approve the suffrage amendment in 1919. Congress then sent it to the states, where three-fourths of state legislatures were required to ratify it before it could become part of the Constitution. Over the next fourteen months, suffragists campaigned state by state until Tennessee's ratification on August 18, 1920, secured adoption of the Nineteenth Amendment (National Women's History Alliance, 1998; National Archives, 2022).

The Nineteenth Amendment to the United States Constitution says,

"*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."*

The wording of this amendment is straightforward, but, like many others, it contains limitations that may not be immediately clear to modern readers. At the time of its ratification, Americans had to be 21 to vote, and the voting age was not lowered to 18 until the **Twenty-Sixth Amendment** was adopted in 1971. Additionally, African American, Native American, and other women of color continued to face discriminatory state laws that blocked their access to the ballot. Many white women encountered immense pressure from their families that discouraged them from voting. These factors limited the immediate impact of the Nineteenth Amendment (National Archives, 2022).



Women celebrate the passage of the 19th Amendment outside the National Woman's Party Washington, DC headquarters in 1920. Collections of the Library of Congress (https://www.loc.gov/item/2016885217/)

Image 11.3

B. Gender-continued

After women won the vote, former suffragists founded organizations such as the **League of Women Voters** to help them use their new political power. Other groups worked to expand women's workplace rights by advocating for stronger labor protections for female workers, efforts that helped lead to the creation of the **U.S. Women's Bureau** in 1920. During the 1930s and 1940s, women's labor participation increased significantly, especially during World War II, when millions of women moved into industrial and wartime jobs. Many of these new economic roles were rolled back after the World War II ended because women were pushed out of factories to make room for returning soldiers (National Women's History Alliance, 1998).

By the early 1960s, the women's movement was revitalized in part because Eleanor Roosevelt and Esther Peterson, the Assistant Secretary of Labor and Director of the Women's Bureau, persuaded President Kennedy to create the **1961 President's Commission on the Status of Women.** The Commission studied discrimination against women nationwide, issued the landmark *American Women* report, and recommended major reforms in employment, education, childcare, and legal rights. This momentum continued when in 1964, **Title VII of the Civil Rights Act** was passed. The Act prohibited employment discrimination based on sex for the first time in federal legislation, opening the door for women to challenge unequal pay, discriminatory hiring, job segregation, and workplace policies that excluded married women, pregnant women, or mothers (Associated Press, 2025, Timeline).

The **Equal Employment Opportunity Commission** (EEOC) was created by the **Civil Rights Act of 1964.** In its early years, it had limited power to pursue sex-discrimination cases. Later amendments to the law expanded the EEOC's authority to investigate complaints, bring lawsuits, and require employer compliance. These strengthened protections helped women enter jobs previously closed to them, challenge workplace discrimination, and contributed to the emerging **second wave of feminism** (Associated Press, 2025, Timeline).

One notable paradox of this time period is the failed effort to pass the **Equal Rights Amendment.** The Equal Rights Amendment (ERA) was a proposed amendment to the United States Constitution that would have guaranteed equal rights under the law regardless of sex. First introduced by **Alice Paul** in 1923, the ERA did not gain significant momentum until 1972, when both chambers of Congress approved it by the required two-thirds vote and sent it to the states for ratification. Congress set a seven-year deadline, later extended to 1982, but the ERA ultimately fell short, with only 35 states voting to ratify it. As of January 2026, the Equal Rights Amendment has not been ratified and therefore is still not part of the United States Constitution **(**Associated Press, 2025, Timeline).

Over the past 80 years, Congress has enacted numerous laws that have expanded women's rights. Many historians speculate that these legislative changes have reduced public demand to ratify the ERA (Berry, 1986).

Federal Laws and Policies Advancing Women's Rights

1. 1946 – **United Nations Commission on the Status of Women**: The UN establishes the Commission on the Status of Women to safeguard women's rights globally.
2. 1961 - President Kennedy creates the 1961 **President's Commission on the Status of Women,** which studied discrimination against women nationwide, issued the landmark *American Women* report, and recommended major reforms in employment, education, childcare, and legal rights.
3. 1963 – **Equal Pay Act**: Congress passes the first federal law requiring equal pay for equal work regardless of sex.
4. 1964 - **Title VII of the Civil Rights Act of 1964** prohibits employment discrimination based on sex for the first time in federal law, opening the door for women to challenge unequal pay, discriminatory hiring, job segregation, and workplace policies that excluded married women, pregnant women, or mothers.
5. 1964 - The **Equal Employment Opportunity Commission (EEOC)** was created to enforce Title VII. The EEOC began enforcing federal bans on employment discrimination, giving workers a formal avenue to file complaints.
6. 1960s–1970s – **State Civil Rights Enforcement Agencies Established:** States create their own civil rights bodies, such as the Massachusetts Commission Against Discrimination (MCAD), in order to investigate discrimination and enforce state laws.
7. 1967 – Executive Order 11246 (**Sex Discrimination Amendment)**: Federal contractors must take affirmative action to prevent sex discrimination.
8. 1972 – **Title IX of the Education Amendments**: Bans sex discrimination in federally funded education and sports programs. Enforced by the Office for Civil Rights (OCR).
9. 1974 – **Equal Credit Opportunity Ac**t (ECOA): Makes it illegal to deny women credit, loans, or credit cards based on sex or marital status.
10. 1975 – **Women Gain the Right to Serve on Juries** Nationwide: The Supreme Court in *Taylor v. Louisiana* rules that excluding women from juries violates the Sixth Amendment.
11. 1978: **Pregnancy Discrimination Act:** Amends Title VII to prohibit discrimination based on pregnancy, childbirth, or related medical conditions.
12. 1981 – **Supreme Court Upholds Male-Only Draft:** In *Rostker v. Goldberg*, the Court holds that excluding women from military draft registration is constitutional.
13. 1993 – **Family and Medical Leave Act** (FMLA): Provides up to 12 weeks of unpaid, job-protected leave for childbirth, adoption, caregiving, or serious illness.
14. 1994 – **Violence Against Women Act** (VAWA): Creates legal protections, funding, and support programs to combat domestic violence, sexual assault, and stalking.
15. **2000 - The Trafficking Victims Protection Act (TVPA):** The first comprehensive federal law to address human trafficking, it created a framework focused on prevention, protection, and prosecution. It defined both sex and labor trafficking under federal law and has been repeatedly reauthorized to expand services and strengthen protections for survivors.
16. **2007–2009 – *Ledbetter v. Goodyear* and the Lilly Ledbetter Fair Pay Act:** The Supreme Court limited pay-bias claims to 180 days after the first discriminatory decision, and Congress overturned this by allowing each unequal paycheck to restart the filing deadline.
17. 2013 – **Ban on Women in Military Combat Roles Lifted:** The Pentagon removes its 1994 restriction, allowing women to serve in combat positions.
18. 2016 – **Survivors' Bill of Rights Act:** Establishes statutory rights for sexual assault survivors regarding forensic exams, rape kit preservation, and notification.
19. 2022 – **Pregnant Workers Fairness Act**: Requires reasonable accommodations for pregnancy, childbirth, and related medical conditions.
20. 2022 – **PUMP Act:** Part of the Consolidated Appropriations Act of 2023; expands pumping and breastfeeding protections to nearly all workers.
21. 2025 – **Record Levels of Women in U.S. Government:** As of November 12, 2025, 126 women serve in the U.S. House of Representatives, 27 in the Senate, and 14 as governors, marking the highest levels of female representation in American history

Image 11.4
(Source: National Women's History Alliance, "Detailed Timeline")

B. Gender - continued

The second wave of feminism also saw the founding of the **National Organization for Women** in 1966, which mobilized activists to challenge employment discrimination, expand educational opportunities, and demand reproductive freedom. Leaders and community organizers likewise helped create grassroots institutions such as women's health clinics, rape crisis centers, child-care cooperatives, and shelters for survivors of domestic violence. By the late 1970s, women had entered professions traditionally held only by men, voted at higher rates, ran for office in greater numbers, and helped shift long-standing social norms (National Women's History Alliance, 1998).

Women also started seeing recognition in the court system. The Supreme Court first applied the **Equal Protection Clause** of the Fourteenth Amendment to strike down a law discriminating against women in *Reed v. Reed* (1971) when it held that an Idaho probate statute that preferred men over women as estate administrators was unconstitutional. The court only used rational basis review, but it did strike down a law that treated women unequally.

Two years later, in ***Frontiero v. Richardson*** (1973), the Court again relied on the **Equal Protection Clause** to invalidate a federal law that made it easier for male service members to claim their spouses as dependents for military benefits than female service members. The women won the case, but the Justices could not agree on the appropriate level of scrutiny to apply. Justice Brennan wrote a **plurality opinion,** meaning an opinion that received the largest number of votes but not a majority of them. Brennan argued that sex discrimination should receive **strict scrutiny.** Justices Powell, Burger, and Blackmun, filed a **concurring opinion,** meaning an opinion that agrees with the result but not the reasoning, and in doing so, they declined to adopt strict scrutiny. Instead they relied on the *Reed* case and stated that sex based distinctions often reflect arbitrary legislative choices. Justice Stewart filed a separate concurrence stating that the statute created unconstitutional discrimination. Justice Rehnquist **dissented**. The Court did not overrule Reed, but they failed to define a level of scrutiny for sex discrimination until three years later.

In ***Craig v. Boren*** (1976), the Supreme Court issued a majority opinion and struck down an Oklahoma law that allowed women to buy 3.2 percent beer at age 18 but required men to wait until age 21, ruling that the sex-based distinction violated the **Equal Protection Clause.** In doing so, the Court formally established **intermediate scrutiny**, a legal standard requiring the government to show that sex-based classifications must serve an important governmental objective and be substantially related to achieving that objective. The Court applied intermediate scrutiny again in 1982 when it held that a state-run nursing school could not exclude men solely because of their sex, ruling that such a policy violated the Equal Protection Clause of the 14th Amendment (Mississippi University for Women v. Hogan, 1982).

The Court again had to decide which level of scrutiny to apply when evaluating whether one of the nation's most prestigious military academies could restrict admission to men only. Please read the excerpt from *United States v. Virginia* (1996) below.

Landmark Case Spotlight:
***United States v. Virginia,* (1996)**
Case Excerpt (Not Full Case)
Click here for full text.

Justice Ginsburg delivered the opinion of the Court.

Founded in 1839, VMI (Virginia Military Institute) is today the sole single sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is produce "citizen soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of militar instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large se of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are milita generals, Members of Congress, and business executives. The school's alumni overwhelmingl perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per student endowmen of all undergraduate institutions in the Nation.

Neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders h made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

From its establishment in 1839 as one of the Nation's first state military colleges, VMI has remained financially supported by Virginia and "subject to the control of the [Virgin General Assembly'.

VMI today enrolls about 1,300 men as cadets. Its academic offerings in the liberal arts sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school,"to produce educa and honorable men, prepared for the varied work of civil life, imbued with love of learni confident in the functions and attitudes of leadership, possessing a high sense of public

service, advocates of the American democracy and free enterprise system, and ready as citizen soldiers to defend their country in time of national peril".(Va. 1991)

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for bo military and civilian life"; "[o]nly about 15% of VMI cadets enter career military servic VMI produces its "citizen soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatmen absence of privacy, minute regulation of behavior, and indoctrination in desirable values As one Commandant of Cadets described it, the adversative method "dissects the young student," and makes him aware of his "limits and capabilities," so that he knows "how far can go with his anger, . . . how much he can take under stress, . . . exactly what he can when he is physically exhausted."

VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its alumni are exceptionally close to the school." "[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI]." I 1990, prompted by a complaint filed with the Attorney General by a female high school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. Trial of the action consumed six days and involved an array of expert witnesses on each side.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women* v. *Hogan* was the closest guide. There, this Court underscored that a part seeking to uphold government action based on sex must establish an "exceedingly persuasiv justification" for the classification. To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of th objectives.

The District Court reasoned that education in "a single gender environment, be it male female," yields substantial benefits. VMI's school for men brought diversity to an otherw coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction " If single gender education for males ranks as an important governmental

objective, it becomes obvious, the District Court concluded, that the *only* means of achieving the objective "is to exclude women from the all male institution--VMI."

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not. . . advanced a state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." The appeals court greeted with skepticism Virginia's assertion that it offers single sex education at VMI as a facet of the State's overarching and undisputed policy to advance "autonomy and diversity." Furthermore, the appeals court observed, in urging "diversity" to justify an male VMI, the State had supplied "no explanation for the movement away from [single sex education] in Virginia by public colleges and universities." In short, the court conclude "[a] policy of diversity which aims to provide an array of educational opportunities, including single gender institutions, must do more than favor one gender."

…….The cross petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI--extraordinary opportunities for military training and civilian leadership development--deny to women "capable of all of the individual activities required of VMI cadets," 766F. Supp., at 141 the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation as Virginia's sole single sex public institution of higher education--offends the Constitution's equal protection principle, what is the remedial requirement?

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woma who complained that her State had denied her the equal protection of its laws. *Reed* v. *Re* 404 U.S. 71, 73 (holding unconstitutional Idaho Code prescription that, among " `several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females' "). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a l or official policy denies to women, simply because they are women, full citizenship statu -equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. In post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).

To summarize the Court's current directions for cases of official classification based

gender: Focusing on the differential treatment or denial of opportunity for which relief sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely the State. The State must show "at least that the [challenged] classification serves `important governmental objectives and that the discriminatory means employed' are `substantially related to the achievement of those objectives.' "

We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered Virginia--the Mary Baldwin VWIL program--does not cure the constitutional violation, *i.e.* it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on equal basis with men. Virginia describes the current absence of public single sex higher education for women as "an historical anomaly." But the historical record indicates actio more deliberate than anomalous.

In sum, we find no persuasive evidence in this record that VMI's male only admission policy "is in furtherance of a state policy of `diversity.' "A purpose genuinely to advan an array of educational options, as the Court of Appeals recognized, is not served by VMI historic and constant plan--a plan to "affor[d] a unique educational benefit only to male However "liberally" this plan serves the State's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

Women's successful entry into the federal military academies, and their participation i the Nation's military forces, indicate that Virginia's fears for the future of VMI may no be solidly grounded. The State's justification for excluding all women from "citizen soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," is essential to that objective. By this notably circular argument, the "straightforward"

test *Mississippi Univ. for Women* described, see 458 U. S., at 724-725, was bent and bowed

Virginia presented its remedial plan--maintain VMI as a male only college and create VWI as a separate program for women. The plan met District Court approval. The Fourth Circuit in turn, deferentially reviewed the State's proposal and decided that the two single sex programs directly served Virginia's reasserted purposes: single gender education, and "achieving the results of an adversative method in a military environment." Inspecting th VMI and VWIL educational programs to determine whether they "afford[ed] to both genders benefits comparable in substance, [if] not in form and detail,", the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation. The United States challenges this "remedial" ruling as pervasively misguided.

Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d] to" the violation,the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virgi described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character . . . and leadership development."

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, l Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military style residence and VWIL students need not live together throughout the 4 year program, eat meals together, or wear uniforms during the school day. VWIL students thus d not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." "[T]he most important aspects of VMI educational experience occur in the barracks," the District Court found, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, episodes and encounters lacking the "[p]hysical rigor, mental stress, . . . minut regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's

citizen soldier training. Kept away from the pressures, hazards, and psychological bondin characteristic of VMI's adversative training, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets. Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." The Task Force charged with developing the leadership program for women, dr from the staff and faculty at Mary Baldwin College, "determined that a military model and especially VMI's adversative method, would be wholly inappropriate for educating and training *most women*." The Commonwealth embraced the Task Force view, as did expert witnes who testified for Virginia.

As earlier stated, generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent a capacity place them outside the average description. Notably, Virginia never asserted tha VMI's method of education suits *most men*. It is also revealing that Virginia accounted fo its failure to make the VWIL experience "the entirely militaristic experience of VMI" on ground that VWIL "is planned for women who do not necessarily expect to pursue military careers."By that reasoning, VMI's "entirely militaristic" program would be inappropriate men in general or *as a group*, for "[o]nly about 15% of VMI cadets enter career military service."

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor ca the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.

Although Virginia has represented that it will provide equal financial support for in state VWIL students and VMI cadets, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, the difference between the two schools' financial reserves is pronounced Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 millio based on future commitments; VMI's current endowment, $131 million--the largest per stude endowment in the Nation--will gain $220 million.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in

military and civilian life. "[VMI] alumni are exceptionally close to the school," and tha closeness accounts, in part, for VMI's success in attracting applicants. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non graduate employers . . . interested in hiring VMI graduates," will be equally responsive her search for employment.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the Stat offered. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African Americans to the University of Texas Law School. In line with *Sweatt*, we rule her that Virginia has not shown substantial equality in the separate educational opportunitie the State supports at VWIL and VMI.

We have earlier described the deferential review in which the Court of Appeals engaged, brand of review inconsistent with the more exacting standard our precedent requires. Quot in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." Recognizing that it had extrac from our decisions a test yielding "little or no scrutiny of the effect of a classificati directed at [single gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, and proceeded to find that new test satisfied.

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertain[ed] the [then] relativ new idea that there must be no discrimination by sex in offering educational opportunity.

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige"--associated with its success in developing "citizen soldiers"--is unequaled. Virginia has closed this facility to its daughters and, instead, has devised f them a "parallel program," with a faculty less impressively credentialed and less well pa more limited course offerings, fewer opportunities for military training and for scientif

specialization. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing i the community, traditions and prestige." Women seeking and fit for a VMI quality educati cannot be offered anything less, under the State's obligation to afford them genuinely eq protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignore or excluded. VMI's story continued as our comprehension of "We the People" expanded. Ther is no reason to believe that the admission of women capable of all the activities require of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

It is so ordered. Justice Thomas took no part in the consideration or decision of this case.

In 1994, Congress had passed the **Violence Against Women Act** (VAWA) after years of advocacy by the **National Organization for Women.** It was the nation's first comprehensive federal law treating domestic violence, sexual assault, and stalking as serious crimes, rather than private family matters. It created funding for shelters and victim services, strengthened law enforcement training, and required states to honor protection orders across state lines. Yet in ***United States v. Morrison*** (2000), the Supreme Court struck down VAWA's civil rights remedy that allowed survivors of gender-motivated violence to sue their attackers in federal court for violating their civil rights, holding that Congress lacked authority under both the Commerce Clause and the Fourteenth Amendment. Although this ruling invalidated one part of VAWA, the law has been repeatedly reauthorized. Even without VAWA's civil rights remedy, survivors can still file civil lawsuits in state court under traditional state civil claims, such as assault, battery, or wrongful death. They may also bring federal civil rights lawsuits if the violence involves government actors (Jeelani Law Firm, 2025).

Congress has passed additional laws to protect crime victims, especially in areas where women are disproportionately affected. The **Trafficking Victims Protection Act** (TVPA) of 2000 is the first comprehensive federal law to combat human trafficking. It defines specific forms of sex and labor trafficking and establishes a national framework focused on prevention, protection, and prosecution (National Human Trafficking Hotline, 2025). Likewise, the **Survivors' Bill of Rights Act of 2016** creates key rights for sexual assault survivors in federal criminal cases, including free forensic exams, preservation of rape kits, and timely notification before evidence is destroyed (Survivors' Bill of Rights Act, 2016).

Further reforms reflected a growing focus on assaults that happen in the workplace. In 2017, this focus intensified after numerous women in Hollywood spoke out about sexual assault and harassment. The hashtag #**MeToo** became a viral cultural phenomenon when actress Alyssa Milano encouraged survivors to share "#**MeToo**" on social media in response to the Harvey Weinstein revelations, reviving a 2006 campaign started by activist Tarana Burke to support survivors of sexual violence. The movement marked a major turning point in national discussions about sexual harassment and assault. Some historians and political observers view this period as part of a broader new wave of feminist activism, often described as a **"third wave"** or the beginning of a renewed movement against gender-based violence (Burke, n.d.).

Congress soon enacted several reforms shaped directly by the #**MeToo** movement. The **"Harvey Weinstein Provision" of the Tax Cuts and Jobs Act** (2017) denies tax deductions for sexual harassment settlements covered by nondisclosure agreements. The **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022** allows survivors to pursue their claims in court rather than being forced into private arbitration, while the **Speak Out Act of 2022** limits the use of nondisclosure agreements that prevent survivors from speaking publicly about sexual assault or harassment (Kantor & Twohey, 2017).

Additional protections for women soon followed that were focused on ensuring appropriate and fair workplace conditions for pregnant and nursing employees. The **Pregnant Workers Fairness Act** (2022) requires employers with 15 or more employees to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, such as modified schedules, light duty, extra breaks, or the ability to sit or drink water. The **PUMP Act** (2022) expanded federal protections for breastfeeding employees by requiring nearly all employers to provide break time and a private, non-bathroom space for expressing breast milk. Together, these laws significantly strengthened federal workplace protections for pregnant and lactating employees (U.S. Department of Labor, 2023).

No major federal laws expanding women's rights have been enacted since 2022, other than congressional actions reauthorizing existing laws, and recent efforts to revive the ERA have failed. Even so, this does not mean there has been no recent progress. Women now hold the highest levels of political representation in American history. **As of November 12, 2025, 126 women serve in the U.S. House of Representatives, 27 in the Senate, and 14 as governors.**

These are the highest numbers of political participation by women ever recorded (Center for American Women and Politics, 2025).

Progress for women has never been linear, and the nation is now experiencing what many describe as a "War on DEI," referring in part to President Trump's executive orders directing federal agencies to cancel funding for any programs deemed related to "diversity" or "equity" and requiring grant recipients to certify that they do not engage in DEI activities. The phrase also captures a broader cultural shift because these executive orders have chilled speech, dismantled long-standing civil rights initiatives, and threatened nonprofits that serve marginalized communities. These developments have prompted significant litigation that alleges the administration is unlawfully attempting to roll back critical protections for Americans (Lawyers' Committee for Civil Rights Under Law, 2025).

C. Sexual Orientation

The acronym **"LGBTQIA+"** refers to lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual people, as well as other identities within the broader spectrum of sexual orientation and gender diversity. For clarity and consistency, further references to individuals and groups within this community will use the term "LGBT," which is a widely recognized, concise, and commonly accepted term among advocates and educators. As with many other marginalized groups, the legal, political, and social recognition of their rights has not been fast nor linear (GLAAD, n.d.).

The modern movement for LGBTQIA+ rights grew out of decades, and even centuries, of discrimination and violence. Throughout the history of the United States, LGBTQ people have faced police harassment, social stigma, criminal penalties, and workplace discrimination. One clear example of this treatment is that homosexuality was classified as a mental disorder by the American Psychiatric Association until 1973, forcing many to live in secrecy (National Geographic, 2023).

As a result, members of the LGBTQ community often sought out safe places to gather, such as house parties, social clubs, coffeehouses, bathhouses, drag balls, and arts communities, but one of the most important and popular safe spaces remained gay bars. Although these spaces offered refuge and community, they were often disrupted by police raids. On June 28, 1969 patrons of the **Stonewall Inn,** many of whom were people of color, unhoused youth, and transgender individuals, refused to comply with a routine police raid (National Geographic, 2023).

What followed was not actually a planned "riot" but a spontaneous, days-long rebellion, marked by crowds resisting arrests, shouting at officers, and pushing back against a system that had targeted them for years. The clashes energized LGBTQ people throughout New York City, convincing many that they could no longer return to silence. Within weeks, activists formed the **Gay Liberation Front** and embraced a more visible, confrontational approach to demanding civil rights. One year later, organizers commemorated the anniversary of Stonewall with **Christopher Street Liberation Day,** which was considered the very first **Pride March** (National Geographic, 2023).

Unfortunately, this momentum did not lead to victory the first time the Supreme Court addressed the rights of LGBTQ individuals. In ***Bowers v. Hardwick*** (1986) the Court upheld a Georgia law criminalizing same-sex sexual conduct. The Justices applied only rational basis review and decided the case under substantive due process, not Equal Protection. The court contended that there was no fundamental constitutional right to engage in same-sex intimacy and that the state's moral disapproval was a sufficient justification for the law.

A decade later, the Court shifted its analysis when deciding ***Romer v. Evans*** (1996). In that case, Colorado voters adopted an amendment to their state constitution that banned the state legislature and local governments from passing any laws that would protect those in the LGBT community. The Court used a form of rational basis review and explained that the amendment failed even this lowest level of scrutiny because it singled out one group for unequal treatment without any legitimate government reason. For the first time, the Supreme Court ruled in favor of gay rights by holding that a law targeting LGBT people violated the Equal Protection Clause.

That same year, Congress passed the **Defense of Marriage Act** (DOMA, 1996), a federal law that defined marriage as between one man and one woman and denied federal recognition of any same-sex marriage. As a result, same-sex couples were excluded from federal marital benefits for over twenty years. These benefits included tax advantages, Social Security payments, immigration sponsorship, and probate rights. Although DOMA was later struck down by the Supreme Court, it significantly limited legal protections for LGBTQ couples for decades, demonstrating that the policies of Congress and the Court are not always aligned (DOMA, 1996).

In 2003, two cases offered hope after the setback of DOMA. In ***Lawrence v. Texas*** (2003), the Supreme Court overturned ***Bowers v. Hardwick***, striking down **sodomy** laws nationwide and affirming the right to private, consensual same-sex intimacy. Later that year, the Massachusetts Supreme Judicial Court recognized a state constitutional right to marry in ***Goodridge v. Department of Public Health*** (Mass. 2003), holding that the Massachusetts Constitution's Equal Protection guarantee required the state to permit same-sex marriage. This ruling applied only within Massachusetts, but it served as an example of expanding LGBT rights.

A decade later, in ***United States v. Windsor*** (2013), the Supreme Court struck down part of the Defense of Marriage Act, which had barred the federal government from recognizing same-sex marriages. The Court held that Section 3 of DOMA violated the Fifth Amendment's guarantees of due process and equal protection, explaining that the section imposed stigma and unequal treatment without a legitimate government reason. The Court ruled that once a same-sex couple was validly married under a state's law, the federal government had to treat them the same as any other married couple and provide full federal benefits.

The momentum from *Windsor* continued into 2015, when the Supreme Court decided ***Obergefell v. Hodges.*** This case arose from challenges brought by same-sex couples who were denied marriage licenses or recognition of their marriages. The Court ruled that denying marriage equality violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. As a result, same-sex couples were guaranteed the fundamental right to marry under the Fourteenth Amendment, and all 50 states were required to license and recognize such marriages. Recent efforts in 2025 to overturn *Obergefell* have been unsuccessful.

The recognition of same-sex marriage did not automatically resolve all issues related to same-sex relationships. In ***Masterpiece Cakeshop v. Colorado Civil Rights Commission*** (2018), the Supreme Court ruled in favor of a baker who refused to design a custom wedding cake for a same-sex couple, holding that the Commission violated his Free Exercise rights by displaying hostility toward his religious beliefs during the administrative process. The Court issued a narrow ruling focused on the Commission's biased statements and inconsistent treatment. The Court also noted that the baker had offered to sell the couple other baked goods, rather than a custom-made creation. As a result, the decision left broader questions about religious objections and anti-discrimination laws unresolved, although in a later decision the Court ruled that a web designer could refuse to create wedding websites for same-sex couples, if the refusal was based on First Amendment protections *(303 Creative LLC v. Elenis,* 2023).

The Court next had to consider how federal law applies to transgender individuals. Aimee Stephens, a transgender woman who worked at a funeral home in Michigan, was fired after informing her employer that she would begin presenting as female at work. Her lawsuit became one of the key cases the Supreme Court reviewed as part of the consolidated ***Bostock v. Clayton County*** (2020) suit. The Court ruled that firing a person simply for being transgender violates Title VII of the Civil Rights Act. The Court also explained that such discrimination is specifically prohibited by the statute's "because of sex" language. This ruling confirmed that federal employment law protects transgender workers from discrimination, and companion cases decided at the same time extended the same protection to gay and lesbian employees.

As with the rights of women, progress for LGBTQ individuals has not been consistent. The previously mentioned "War on DEI" has caused many Americans working in government agencies, public organizations, and educational

institutions to curtail their speech out of fear of losing federal funding or facing legal consequences. Civil rights initiatives have been dismantled, and nonprofits that support LGBTQ communities have had funding cut or have engaging in "proactive compliance" by refraining from political speech. These developments have prompted significant litigation by civil rights and advocacy groups (Lawyers' Committee for Civil Rights Under Law, 2025).

D. Age

Prior to the 1960s, age discrimination was not widely discussed or treated as a civil rights issue by Congress or the courts. As a result, age discrimination in public programs, education, employment, and health care went largely unregulated. This began to change near the end of the decade, when mounting evidence of age discrimination and citizen advocacy pressured Congress to pass legislation.

The **Age Discrimination in Employment Act (ADEA)** was passed in 1967, and it prohibits employers from discriminating against workers who are 40 years of age or older in hiring, firing, raises, promotions, job assignments, training, benefits, and any other terms or conditions of employment. The law only applies to employers with 20 or more employees, including private employers, state and local governments, employment agencies, and labor organizations. The ADEA also restricts mandatory retirement in most occupations and makes it unlawful for employers to publish job ads or use hiring practices that limit opportunities based on age (U.S. Department of Labor, n.d.).

Likewise, the **Age Discrimination Act of 1975** prohibits age discrimination in any program or activity receiving federal financial assistance, extending protections far beyond employment to areas such as education, health care, and public services. This includes public schools, hospitals, housing programs, social service agencies, and state agencies that use federal funds. These protections ensure that individuals of any age are treated fairly when accessing federally funded services such as Medicare-supported clinics, Head Start programs, public universities, and community health centers (Age Discrimination Act of 1975, 42 U.S.C. § 6101).

After Congress passed these laws, the Supreme Court decided ***Massachusetts Board of Retirement v. Murgia*** (1976). In the *Murgia* case, the Court upheld a state law requiring police officers to retire at age 50, ruling that age is not a protected or "suspect" classification under the Constitution. The Court applied only rational basis review and concluded that the state had a legitimate interest in maintaining a physically fit police force. The decision made clear that while Congress could create strong statutory protections for older workers, the Constitution itself offers far more limited safeguards against age discrimination.

Although the Supreme Court declined to apply heightened scrutiny to age discrimination, Congress continued to strengthen federal safeguards against age-based discrimination. The **Older Workers Benefit Protection Act of 1990 (OWBPA)** amended the ADEA to prohibit employers from denying or reducing benefits for older workers based on age. The Act also regulated how employers may obtain waivers of age-discrimination claims during layoffs or severance agreements. The law required that any waiver be knowing, voluntary, and in writing, and that employees be given sufficient time to review the agreement. Employees were also given the opportunity to revoke such waivers if they changed their minds (Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f)).

In later years, the Supreme Court clarified that the ADEA protects older workers, not younger ones. In ***General Dynamics Land Systems, Inc. v. Cline*** (2004), the Court held that so-called "reverse age discrimination" claims, in which younger employees argue that they were treated less favorably than older employees, are not covered by the ADEA. In that case, the plaintiff was too young to qualify for full retiree health benefits, and the Court explained that the ADEA was enacted specifically to address discrimination against older workers.

Currently, older workers continue to face discrimination through debates over mandatory retirement and the actions of employers attempting to fit within the *Murgia* exception. Many job seekers also encounter age bias in the hiring process, including automated filtering by applicant-tracking systems and AI tools that may screen out older

applicants. A 2022–2024 AARP research study found that age discrimination remains widespread among workers age 50 and older, with nearly two-thirds reporting that older employees face bias and many stating that they were denied jobs or asked improper age-related questions during hiring. Overall, the study shows strong public support for strengthening age-discrimination protections (Choi-Allum, 2024).

E. Disability

Prior to the 1970s, disability rights in the United States were limited, and laws protecting the disabled were shaped by assumptions that disabilities required treatment or charity, rather than legal protections. People with disabilities were often segregated in institutions, excluded from schools and workplaces, and even barred from public spaces in certain instances. Early federal programs focused solely on vocational rehabilitation for veterans, not on prohibiting discrimination or ensuring equal access. Inspired by the broader civil rights movements of the 1960s, disability activists began pushing lawmakers to make disability as a matter of equal rights, laying the groundwork for the first federal law to ban disability discrimination (Pelka, 2012).

Please refer to the chart below for a summary of the major federal disability laws and landmark Supreme Court cases that have shaped disability rights.

Major Disability Laws and Cases

1. **Rehabilitation Act of 1973, Section 504 (1973)** – The first federal civil rights law protecting people with disabilities, Section 504 prohibits discrimination in any program receiving federal financial assistance and laid the groundwork for the ADA (Rehabilitation Act of 1973, 29 U.S.C. § 794). *Section 504 was later strengthened by the 1998 amendments to Section 508 and the 2017 Section 508 Refresh, which expanded accessibility requirements to federal websites, digital documents, software, and electronic communication systems.*

2. **Developmental Disabilities Assistance and Bill of Rights Act (DD Act) (1975)** – Provides federal support for individuals with developmental disabilities, affirms their rights to appropriate treatment and services, and establishes state Developmental Disabilities Councils and Protection & Advocacy systems (Developmental Disabilities Assistance and Bill of Rights Act of 1975, Pub. L. 94-103).

3. **Education for All Handicapped Children Act (EHA) (1975)** – Guarantees children with disabilities a free appropriate public education (FAPE) in the least restrictive environment (LRE) and requires individualized education programs (IEPs). Later renamed IDEA (Education for All Handicapped Children Act of 1975, Pub. L. 94-142).

4. **Air Carrier Access Act (ACAA) (1986)** – Prohibits discrimination against passengers with disabilities in air travel and requires airlines to provide accommodations, assistance, and accessible services (Air Carrier Access Act of 1986, 49 U.S.C. § 41705).

5. **Protection & Advocacy for Individuals with Mental Illness Act (PAIMI) (1986)** – Expands Protection & Advocacy agencies' authority to investigate abuse or neglect of individuals with mental illness, including access to facilities and records (Protection and Advocacy for Individuals with Mental Illness Act of 1986, Pub. L. 99-319).

6. **Americans with Disabilities Act (ADA) (1990)** – Comprehensive civil rights law prohibiting disability discrimination in multiple areas of public life: Title I (employment), Title II (state and local government services), Title III (public accommodations), Title IV (telecommunications), and Title V (miscellaneous provisions) (Americans with Disabilities Act of 1990, Pub. L. 101-336).

7. **Individuals with Disabilities Education Act (IDEA) (1990)** – Renames and expands the earlier EHA, adding assistive technology, transition services, and autism as a disability category, while reaffirming the right to FAPE in the least restrictive environment (Individuals with Disabilities Education Act of 1990, Pub. L. 101-476). *The IDEA was further updated through the Individuals with Disabilities Education Improvement Act of 2004, which expanded access to accessible instructional materials, strengthened transition services, and improved accountability for student outcomes.*

8. **Protection & Advocacy for Assistive Technology Act (PAAT) (1994)** – Authorizes Protection & Advocacy agencies to assist individuals in securing assistive technology devices and services needed for education, employment, and independent living (Protection and Advocacy for Assistive Technology Act of 1994, Pub. L. 103-218). *PAAT's implementation has continued to evolve through updates to the Accessible Instructional Materials (AIM) and NIMAS standards, ensuring that students with print disabilities receive accessible digital textbooks and instructional materials.*

9. **Olmstead v. L.C. (1999)** – The Supreme Court rules that unnecessary institutionalization violates the ADA's integration mandate, requiring states to provide services in the most integrated setting appropriate (*Olmstead v. L.C.*,

527 U.S. 581 (1999)).

10. **Tennessee v. Lane (2004)** – The Supreme Court upholds Congress's authority to apply Title II of the ADA to state courts, requiring states to provide accommodations to ensure individuals with disabilities have access to fundamental rights such as court proceedings (*Tennessee v. Lane*, 541 U.S. 509 (2004)).

11. **ADA Amendments Act (ADAAA) (2008)** – Broadens the definition of "disability" after prior Supreme Court decisions had narrowed it, making it easier for individuals to qualify for ADA protections (ADA Amendments Act of 2008, Pub. L. 110-325).

12. **21st Century Communications and Video Accessibility Act (CVAA) (2010) –** A modern federal disability law that expands accessibility requirements to smartphones, online video, digital communication services, and streaming devices. The CVAA requires captioning of online video, accessible user interfaces, audio description for emergency alerts, and built-in or compatible accessibility features for advanced communications technology (21st Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260).

13. **Every Student Succeeds Act (ESSA) (2015)** – A federal education law that includes important accessibility mandates for students with disabilities. ESSA requires that educational assessments, digital learning platforms, and instructional materials be accessible, and reinforces the obligation of states and districts to provide accessible formats for students who need them (Every Student Succeeds Act of 2015, Pub. L. 114-95).

14. ***Tharpe v. Osseo Area Schools* (2025)** – A unanimous Supreme Court decision holding that students with disabilities do not need to prove "bad faith" or "gross misjudgment" to sue schools under the ADA, Section 504, or related laws. Instead, they must meet the same standard of proof as other discrimination plaintiffs, making it easier for families to obtain compensatory damages when schools fail to provide legally required accommodations (Decided June 12, 2025, U.S. Supreme Court).

Image 11.5
(Original Work, Heidi Getchell-Bastien)

E. Disability-continued

Currently disability rights advocates are concerned about federal actions that threaten programs for children with disabilities. Proposed changes to SSI eligibility could make it harder for families to qualify for benefits. Staffing cuts at the Department of Education weaken the oversight capabilities for enforcing the Individuals with Disabilities Education Act at a time when more children than ever are being diagnosed as neurodivergent. Reductions to Medicaid and CHIP also jeopardize school-based health services that many students rely on. Together, these shifts in policy reduce stability for families and limit their childrens' access to essential therapies, equipment, and services (Bolt & Klam, 2025).

F. Other Protected Classifications

When it comes to protected classes, some might wonder if being economically disadvantaged makes one a member of a protected class. It does not. Under federal civil rights laws, protected classes include race, color, national origin, sex, religion, disability, age, genetic information, and, in some contexts, citizenship status. **Socioeconomic status or poverty is not a protected class.** The Supreme Court has repeatedly held that poverty does not qualify as a suspect or quasi-suspect classification under the Equal Protection Clause. As a result, laws affecting low-income individuals receive only rational basis review, a principle affirmed in *San Antonio Independent School District v. Rodriguez* (1973) and *Harris v. McRae* (1980).

Likewise, some wonder if **intersectionality** is a protected class. Intersectionality refers to how multiple identities, like race, gender, disability, or immigration status, overlap to create distinct forms of discrimination or disadvantage. Although intersectionality itself is not a protected class under federal civil rights law, courts recognize that discrimination can occur at the intersection of multiple protected characteristics. **As a result, individuals may bring "intersectional discrimination" claims when the combined effect of protected identities leads to unequal treatment,** as recognized in *Jefferies v. Harris County Community Action Ass'n* (5th Cir. 1980) and *Lam v. University of Hawai'i* (9th Cir. 1994).

The concept of intersectionality became more widely understood in the 1990s, as scholars, writers, and cultural critics such as **bell hooks** helped popularize the idea that systems of inequality are interconnected and cannot be understood in isolation. hooks, who intentionally wrote her name in lowercase to shift attention away from herself and toward her ideas, argued that race, gender, class, and power operate together to shape lived experiences, particularly for Black women. Although she was not directly involved in Supreme Court litigation, her work helped shape broader public and academic understanding of concepts that later informed discussions of intersectional discrimination in law (hooks, 1984). Interest in her writing surged during the racial justice movements of 2020, when her book ***All About Love: New Visions*** entered *The New York Times* bestseller list more than twenty years after its original publication (Burke, 2021).

In addition to race, national origin, and other identity-based protections, federal civil rights law also provides protections based on religion. Many disputes involving religious discrimination, however, are analyzed under the First Amendment and whether government action violates the Free Exercise Clause. In ***Employment Division v. Smith*** (1990), the Supreme Court ruled that laws applying equally to everyone do not have to include exemptions for religious practices. Congress responded with the Religious Freedom Restoration Act (RFRA) in 1993, which restored heightened scrutiny for federal actions that burden religious practice.

In ***Burwell v. Hobby Lobby Stores, Inc.*** (2014), the Court ruled that closely held corporations may claim religious exemptions under the RFRA. The case involved a family-owned business that objected on religious grounds to providing certain contraceptive coverage under the Affordable Care Act. The Court held that enforcing the mandate would substantially burden the owners' religious exercise and was not the least restrictive means of serving the

government's interest.

Other groups are not considered protected classes under federal civil rights law but still receive legal protections. The **Genetic Information Nondiscrimination Act** (GINA, 2008) prohibits discrimination based on genetic information, and federal and state employment laws protect individuals based on **veteran or military status.** Similarly, **political affiliation** and **marital status** are not federally protected classes, but many states include them in their civil rights statutes.

Conclusion

As noted at the end of Chapter Ten, the history of civil rights in the United States has never followed a linear path. Women, members of the LGBT community, people with disabilities, individuals over the age of 50, and others in protected classes have all struggled to have their rights recognized, much like African Americans have. While the forms and sources of unequal treatment differ among these communities, examining each group's experiences helps strengthen understanding of civil rights and shared strategies for collective action. The struggle for equal treatment is never static and always requires continued vigilance and engagement.

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Chapter Twelve

Chapter Outline

A. Overview

B. Procreation and Contraception

C. Abortion Laws and Cases Before 2022

D. *Dobbs v. Jackson* and Current Abortion Laws

A. Overview

In colonial America, women had minimal control over their reproductive health. They typically gave birth to an average of six to seven children over their lifetimes, though family size varied widely depending on race, legal status, region, and income, and not all infants survived to adulthood. It is not surprising, then, that Indigenous women, enslaved African women, and women in settler communities used herbal remedies and other non-surgical methods in attempts to control fertility, prevent pregnancy, and manage their menstrual cycles. These methods drew on cultural traditions and shared community knowledge reflecting the absence of formal reproductive healthcare. Because birth control methods often failed, women also used a variety of techniques to end pregnancies, some of which carried significant health risks (Demos, 1970; Planned Parenthood Action Fund, n.d.).

These risky practices took place within a legal system that treated early pregnancy differently than how it is treated today. **From medieval times through the early 1800s, English common law treated abortion before "quickening", the stage when a woman first feels fetal movement, as legal**. This standard carried over into the American colonies. Then, during the second half of the 1800s, states began passing laws that restricted or prohibited abortion. Historians believe these laws were created because the medical profession was becoming more authoritative, and cultural and religious beliefs were changing. Additionally, women had very limited rights. **By 1910, nearly every state in the union had passed laws banning abortion at all stages of pregnancy** (Planned Parenthood Action Fund, n.d.).

This historical background provides context for the laws and cases in this chapter that pertain to reproductive rights. This chapter will start by analyzing early decisions regarding procreation and contraception. Then, it will examine regulations regarding abortion. Before doing so, it is helpful to clarify the meaning of the phrase **"right to privacy"**, a phrase used in dozens of Supreme Court cases.

When most people think about the phrase "**right to privacy**", they think about the right to live free from government intrusion and overreach, especially in situations where citizens interact with law enforcement. However, the term is also frequently used in court cases to describe rights that have nothing to do with police officers or criminal investigations. **Over the past fifty years, courts have also used the term "right to privacy" to describe the ability to make personal decisions about reproductive health without government interference, although the current Supreme Court no longer recognizes this right at the federal level. This chapter examines how we arrived at this point and highlights other factors that have shaped laws on procreation and contraception.**

B. Procreation and Contraception

A century ago, courts did not recognize the right to privacy (as it pertains to reproductive rights) at all, a fact demonstrated by the Supreme Court's ruling in ***Buck v. Bell***. Carrie Buck was born in 1906 in Charlottesville, Virginia. Shortly after her birth, she was put into a foster home because her mother, Emma Buck, had been committed to the Virginia State Colony for Epileptics and Feebleminded. Emma had been labeled "morally unfit" because she lived in poverty, had several children with different men, and was accused of prostitution. In her foster

home, Carrie Buck attended public school for five years, performed as an average student, and reached the sixth grade. She was removed from school when her foster parents decided to keep her home to help with housework (Smith, 2020).

When Carrie was 17, she was placed in the same institution as her mother after being raped by her foster brother and getting pregnant. Instead of investigating the assault or protecting her, local officials claimed that her pregnancy showed she was "immoral" and "feebleminded". During this period, many states supported **eugenics**, a movement rooted in the belief that society could be improved by preventing people with hereditary defects from having children (Lombardo, 2008).



Imge 12.1

Carrie Buck (left) at the Virginia State Colony for Epileptics and Feebleminded along with her birth mother Emma Buck.

Taken by A.H. Estabrook before the *Buck v. Bell* trial in Virginia, 1924

Dr. Albert Priddy, superintendent of the Virginia State Colony, pushed Carrie Buck's case through the Virginia trial court system, openly stating that his goal was to "test the validity" of the state's sterilization law. The trial court upheld the statute and authorized her sterilization. The Virginia Supreme Court affirmed that ruling, and the case eventually reached the United States Supreme Court (Smith, 2020).

In 1927, the United States Supreme Court upheld the rulings of the lower courts when it issued its decision in ***Buck v. Bell***. Justice Oliver Wendell Holmes Jr. accepted the state's characterization of Carrie Buck and her family and wrote the infamous line, ***"Three generations of imbeciles are enough."*** The decision provided legal support for forced sterilization programs nationwide and contributed to tens of thousands of people being sterilized without their consent. Carrie Buck was sterilized shortly after the Supreme Court's ruling (Lombardo, 2008).

Buck v. Bell has never been formally overturned, but it was seriously weakened by ***Skinner v. Oklahoma*** (1942). In *Skinner*, the Court struck down a statute that allowed the sterilization of habitual criminal offenders who repeatedly committed larceny, robbery, and burglary. The statute did not apply to those who violated other laws. The Court explained that the Oklahoma statute violated the Equal Protection Clause. They argued that the ability to have children is a fundamental right and the government should not be able to sterilize one group of individuals while leaving another group exempt. Some scholars have criticized the Supreme Court for imposing constitutional limits on sterilization only when the policy disproportionately affected men, noting that earlier laws targeting women remained unchallenged. **Regardless, the principles in the *Skinner* decision sharply conflict with the reasoning in *Buck v. Bell*, leaving the earlier case widely discredited and viewed as one of the most harmful rulings in Supreme Court history** (Lombardo, 2008).

Debates over sterilization and eugenics were not the only controversies about morality and its intersection with the law in the early twentieth century. Across the country, state legislatures were enacting statutes aimed at prohibiting or restricting activities viewed as morally harmful, including prostitution, gambling, and the sale of alcohol. These laws later became known as **vice laws**. Reformers who sought to eliminate such behaviors pushed for some of the strictest regulations on human conduct in United States history. In the late 1800s, former U.S. postal inspector **Anthony Comstock** advocated for strict laws banning the mailing of obscene materials, efforts that led to the federal **Comstock Act of 1873**, which prohibited sending items related to contraception and abortion through the mail (Supreme Court Historical Society, n.d.).

Many states passed their own versions of the Comstock Act. In 1879, Connecticut enacted one of the strictest laws in the country, making it a crime not only to sell or distribute birth control, but even to use it. Advocates for reproductive health challenged the Connecticut statute multiple times, but the Supreme Court dismissed these cases for lack of standing in 1943 and again in 1961, leaving the law in place (*Griswold v. Connecticut,* 1965).

Hours after the Court's second dismissal in 1961, Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut, announced her plan to directly challenge the statute. Within months, she and Dr. C. Lee Buxton opened a birth control clinic in deliberate violation of the law to prompt enforcement and create a test case that could be brought before the Supreme Court. A Connecticut resident filed a complaint against the clinic the day after it opened, triggering a police investigation. Griswold and Buxton were arrested on November 10, 1961, convicted shortly afterward, and their convictions were affirmed by the Connecticut Supreme Court before the case proceeded to the United States Supreme Court.

On June 7, 1965, the Supreme Court issued a 7–2 decision in *Griswold v. Connecticut*. It ruled in favor of Griswold, striking down Connecticut's ban on the use of contraception by married couples. Justice William O. Douglas, writing for the majority, acknowledged that the Constitution does not expressly mention a right to privacy, yet he argued that certain constitutional guarantees imply one. To explain this concept, he wrote, "***The foregoing cases***

suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The decision drew on precedent cases involving freedom of association, protections against unreasonable searches, and the Due Process Clause. Douglas concluded that these constitutional **"zones of privacy"** encompass the private and intimate decisions of married couples regarding contraception. **In 1972, the Court extended access to contraception to unmarried couples and relied heavily on Griswold in the decision** (*Griswold v. Connecticut, 1965; Eisenstadt v. Baird, 1972).*

In the decades following the *Griswold* decision, federal policies gradually expanded access to contraception. **Title X of the Public Health Service Act** was created in 1970 to fund voluntary family planning programs nationwide. Changes to Medicaid regulations throughout the 1980s and 1990s allowed states to use eligibility waivers to provide family planning services to more people. These developments, combined with greater demands for government-funded health coverage, eventually led to the passage of the **Affordable Care Act (ACA)** in 2010, which required most employer-sponsored health plans to cover contraceptive services (Britt, Meyer & Day, 2025).

Later legal changes undercut these expansions to the availability of contraception. In ***Burwell v. Hobby Lobby Stores, Inc.*** (2014), the Supreme Court ruled that closely held that corporations, which are small private companies not traded on the public stock market, may claim a religious exemption from providing contraceptive coverage required under the ACA. In 2017, President Trump issued **Executive Order 13798** directing federal agencies to broaden such religious exemptions.

In response, federal agencies issued interim and then final rules that changed how the ACA's contraceptive mandate was implemented by significantly expanding both religious and moral exemptions for employers who objected to providing contraceptive coverage. Although the Biden administration later reversed these regulatory changes, the Supreme Court's decision in ***Little Sisters of the Poor v. Pennsylvania*** (2020) upheld the federal agencies' power to create these broad exemptions. The Court ruled that the agencies had acted within their lawful discretion when creating expansive religious and moral exemptions to the contraceptive coverage requirement (2018 Final Rules; Kessler, 2018).

C. Abortion Laws and Cases Before 2022

As mentioned in the introduction to this chapter, early American law generally treated abortion before "quickening," the stage when a woman first feels fetal movement, as legal. Over the course of the 1800s, however, cultural, medical, and social changes led states to begin criminalizing the practice. By 1910, nearly every state in the nation had enacted laws banning abortion at all stages of pregnancy, except when a woman's life was at risk. What had once been a common and largely uncontroversial practice had become heavily restricted across the United States (Planned Parenthood Action Fund, n.d.).

Starting in the 1960s and early 1970s, several states started to change their laws in response to grassroots reform movements among physicians, legal scholars, and women's rights advocates who pushed for reevaluating the criminal bans. This resulted in a patchwork of state statutes across the nation that ranged from total bans on terminating pregnancy to abortion on demand. This inconsistency in reproductive health laws set the stage for the Supreme Court's decision in ***Roe v. Wade*** (1973).

Before getting into the facts of the *Roe* case, it is important to understand the political context surrounding it. In the early 1970s, political alignments around abortion laws were very different. Most organized opposition to abortion came from the political left, while many conservative Protestants, including evangelicals, supported loosening abortion laws because of their belief in limited government and religious liberty. In modern times, conservative leaders and activists have unified around opposing abortion, while liberals have increasingly unified around abortion rights as part of a broader movement for women's equality, bodily autonomy, and reproductive freedom. This shift mirrors a broader pattern of American political realignment, similar to how the parties'

positions on slavery and civil rights changed over time due to the major parties gradually reorganizing around new coalitions, regional interests, and social issues. This context is important for understanding the ***Roe*** case itself as well as more recent abortion cases (Williams, 2016).

In 1969, **Jane Roe**, whose real name was **Norma McCorvey**, became pregnant with her third child. At that time, she lived in Texas, where abortion was legal only when necessary to save the mother's life. She wanted the abortion because she was in a difficult financial situation and had already placed two children for adoption. Sarah Weddington and Linda Coffee, two local attorneys, agreed to represent her because they had been looking for a way to challenge Texas's abortion ban through a carefully selected test case. They ultimately chose Norma McCorvey as their plaintiff because she was pregnant and willing to challenge the law, which gave them the standing they needed to move the lawsuit forward. The attorneys filed a lawsuit on McCorvey's behalf in the U.S. District Court for the Northern District of Texas, which ruled in her favor (Britannica, 2026).

Although the three-judge District Court ruled that Texas's abortion law was unconstitutional, it did not issue an injunction, meaning the law technically remained in effect. Under federal law at that time that governed three-judge district courts, the State of Texas was permitted to appeal the decision directly to the U.S. Supreme Court to defend its statute. The Court heard the case through this expedited process, bypassing the Circuit Court of Appeals. Even with an expedited path, the Court delayed moving forward with Roe until it first decided two cases, one clarifying that federal courts may intervene in ongoing state criminal prosecutions in limited circumstances and another holding that the phrase "health of the mother" was not unconstitutionally vague (Younger v. Harris, 1971; United States v. Vuitch, 1971).

Only after resolving those issues, and addressing reluctance among the justices about who should draft such a politically controversial abortion opinion, did the Court finally move forward and schedule oral arguments for ***Roe v. Wade***. The first oral argument in the case occurred on December 13, 1971. Sarah Weddington began by presenting constitutional reasons to strike down Texas's abortion law, not realizing that the justices were primarily focused on jurisdictional issues. As a result, she spent much of her time addressing procedural questions rather than the broader constitutional issues, which meant that the justices did not hear some of the plaintiff's strongest substantive arguments. During this same argument, Texas's attorney, Jay Floyd, opened by saying, "It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word." The remark was poorly received and created an awkward dynamic that was not conducive to serious legal analysis (Goluboff, 2010).

Due to changes in the membership of the Supreme Court, both parties were given another opportunity to present their cases. At a second oral argument, which was scheduled for October 11, 1972, the jurisdictional issues were largely resolved, and the justices focused more directly on the core issues of privacy, substantive due process, and the extent of state power to regulate abortion. At this reargument, a new attorney, Texas Assistant Attorney General Robert Flowers, replaced Floyd and presented a more serious defense of the state law. Norma McCorvey did not attend either oral argument (Britannica, 2026).

On January 22, 1973, the Supreme Court handed down its decision in *Roe v. Wade*. McCorvey's daughter, whom she had placed for adoption, was already 2 1/2 years old at this time. Even though McCorvey was no longer pregnant and the case was technically moot by the time it reached the Supreme Court, the justices agreed to hear it under the ***"capable of repetition, yet evading review"*** doctrine. The Court ruled 7–2 in favor of McCorvey, holding that women in the United States had a fundamental right to choose an abortion without excessive government interference and striking down Texas's abortion ban as unconstitutional.

Justice Harry Blackmun authored the majority opinion, grounding the decision in the constitutional "**right to privacy,**" which the Court said was implied in earlier cases such as ***Griswold v. Connecticut***. As Blackmun explained, ***"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, the Court has***

recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution... found at least in the roots of the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."

The Court created the **trimester framework** to balance a woman's right to privacy with the state's interests in health and prenatal life. In the first trimester (0–12 weeks), states could not restrict abortion beyond basic medical requirements. In the second trimester (13–24 weeks), states could regulate abortion procedures to protect the mother's health. By the third trimester (25+ weeks), once the fetus was viable, states could prohibit abortion entirely except when needed to protect the woman's life or health.

Three justices wrote concurring opinions. Justice Potter Stewart agreed with the ruling but emphasized that the decision should have been based on **substantive due process**, which is the doctrine that the Due Process Clause protects certain fundamental rights beyond procedural fairness. Justice William O. Douglas supported the outcome, but he argued that the right to abortion should be grounded in the Ninth Amendment, which states that the people retain rights not specifically listed in the Constitution. Chief Justice Warren Burger stated that the decision did not create "abortion on demand" , and stressed that states could still require reasonable medical safeguards. In dissent, Justice Byron White accused the Court of creating a new constitutional right without historical basis and argued that abortion policy should be left to the states. Justice William Rehnquist's dissent criticized the majority's use of substantive due process, and insisted that the framers of the Fourteenth Amendment did not intend to limit states' authority to regulate abortion.

The decision generated considerable controversy. Abortion-rights groups praised *Roe* as a victory for women's autonomy, while the Catholic Church and emerging pro-life organizations condemned it as morally and constitutionally wrong. Some abortion-rights supporters criticized the ruling's reliance on the right to privacy and argued that a stronger constitutional foundation would have made it less vulnerable to reversal. **Opponents quickly mobilized, organizing protests and pursuing state laws aimed at restricting abortion.** Additionally, the **Hyde Amendment** was enacted in 1976 as a rider to the federal appropriations bill that funds Medicaid; the amendment prohibited the use of federal Medicaid dollars for nearly all abortions (Center for Reproductive Rights, n.d.).

In the years following *Roe*, many states attempted to limit its impact by passing laws designed to restrict access to abortion. One common approach involved repeated efforts by state legislatures to enact parental involvement requirements for minors. In ***Bellotti v. Baird*** (1979), the Supreme Court held that states may require parental consent for a minor seeking an abortion as long as they also provide a **judicial bypass**, which is a confidential and expedited court hearing that allows a judge to authorize the abortion instead of parents if the judge determines the minor is mature enough to make the decision independently or if the procedure is deemed to be in the minor's best interests. The Court later upheld a similar law to that in ***Bellotti*** that required parental notification in addition to a judicial bypass. In practice, parental-involvement laws and the judicial bypass process impose delays, uncertainty, and fear of exposure, which have a chilling effect on minors' ability to access abortion care (Ohio v. Akron Center for Reproductive Health, 1990; Joyce, Kaestner, & Ward, 2019).

More restrictions on abortion followed the adoption of parental-involvement laws. In 1984, the federal government adopted the **Mexico City Policy**, which was created and implemented by President Ronald Reagan. This presidential directive is also known as the **"Global Gag Rule"** and requires foreign nongovernmental organizations that receive U.S. global health funding to agree not to provide, promote, or counsel about abortion, even with their own funds. In ***Rust v. Sullivan*** (1991), the Supreme Court upheld a similar domestic policy that restricted abortion counseling within Title X family-planning programs. The Title X restriction was later revoked by President Biden in 2021; however, the Mexico City Policy was reinstated by President Trump through a presidential memorandum signed in

January 2025 (Human Rights Watch, 2018).

In addition to parental-involvement laws and policies restricting abortion counseling, some states experimented with other forms of regulation. Pennsylvania amended its abortion law, the **Pennsylvania Abortion Control Act of 1982**, in 1988 and 1989. The new provisions required patients to give informed consent and imposed a 24-hour waiting period between receiving information and undergoing an abortion procedure. The provisions also required minors to obtain the consent of one parent, with a judicial-bypass option available. Lastly, a new provision required married women to certify they had notified their husbands of their intention to terminate the pregnancy.

In response to these new provisions, a group consisting of five abortion clinics and several physicians who provided abortion services filed suit against the state in the U.S. District Court for the Eastern District of Pennsylvania in 1990. In ***Planned Parenthood v. Casey***, the District Court held that all of the challenged provisions were unconstitutional and issued a permanent injunction preventing their enforcement. The Court of Appeals for the Third Circuit affirmed the ruling in part and reversed in part, upholding all of the regulations except for the husband-notification requirement.

In 1992, ***Planned Parenthood v. Casey*** reached the Supreme Court, marking the first major reconsideration of abortion rights since *Roe v. Wade*. In a plurality opinion, the Court reaffirmed *Roe*'s central holding that women have a constitutional right to choose abortion before viability. However, the Court upheld all of Pennsylvania's regulations except the spousal-notification requirement.

The Court also made two major changes to *Roe*'s framework. First, it abandoned the strict trimester system and instead emphasized **viability**, defined as the stage at which a fetus can survive outside the womb with medical assistance. Second, it replaced *Roe*'s strict-scrutiny standard with the **undue burden test**, under which a regulation is unconstitutional if its purpose or effect is to place a substantial obstacle in the path of a woman seeking a pre-viability abortion. The opinion also included a significant discussion of ***stare decisis***, which is the practice of following precedent cases and explains why the Court chose to uphold the core tenets of the *Roe* case. Many legal commentators noted that the shift to a viability-based standard reflected advances in medical technology that made the trimester framework less workable.

In the late 1990s, states began passing **"partial birth abortion"** bans, and even the name of these laws generated significant controversy. The term "partial birth abortion" first appeared in congressional legislation and was quickly adopted by anti-abortion advocates, even though it is not a recognized medical term. Proponents of these laws argue that "partial birth abortion" describes a procedure in which a doctor deliberately and intentionally delivers a living fetus partly outside the woman's body, either the fetal head or the trunk past the navel, for the purpose of performing an act that will end the fetus's life. Reproductive rights advocates counter that the phrase is a politically constructed label used to describe a rare second-trimester medical procedure known to physicians as **intact dilation and extraction**, which is sometimes used when the fetus has severe abnormalities, such as anencephaly, fatal chromosomal disorders, or profound structural anomalies. It may also be used when necessary to protect the woman's health in cases of severe infection, hemorrhaging, preeclampsia, or other life-threatening complications. Medical groups note that intact dilation and extraction is the safest option in many cases. Research suggest that fewer than one percent of abortions involve this procedure, making it extremely rare (Tanne, 2007).

In the late 1990s, Nebraska and other states enacted laws banning so-called partial birth abortions. In ***Stenberg v. Carhart*** (2000), the Supreme Court struck down Nebraska's law because it was overly broad, unconstitutionally vague, lacked a health exception for the woman, and threatened doctors with criminal penalties for performing standard second-trimester procedures. Congress then passed the **Partial-Birth Abortion Ban Act of 2003**, which included an exception only to save the woman's life, not to protect her health. In ***Gonzales v. Carhart*** (2007), the Supreme Court upheld the federal ban.

Subsequent restrictions on abortion focused on regulating the medical providers and facilities that performed the procedures. In ***Whole Woman's Health v. Hellerstedt*** (2016), the Supreme Court struck down two Texas laws. One required abortion providers to obtain admitting privileges at a nearby hospital, and the other required clinics to meet the standards of ambulatory surgical centers. The Court held that both restrictions created an undue burden on women because they offered no medical benefit while severely reducing access to abortion care. The Justices also emphasized that courts must evaluate the real evidence of a law's benefits and burdens rather than simply accept lawmakers' claims. Four years later, in ***June Medical Services v. Russo*** (2020), the Court invalidated a nearly identical Louisiana admitting-privileges requirement, concluding that it would have the same unconstitutional effect of closing most of the state's clinics without improving patient safety.

D. Dobbs v. Jackson and the Current State of Abortion Laws

Most Americans know that *Dobbs v. Jackson Women's Health Organization* (2022) overturned both *Roe v. Wade* and *Planned Parenthood v. Casey*. It held that the Constitution does not contain a federal right to abortion or a general right to privacy, and it left all abortion regulation to the individual states. Before reading the excerpt of the ***Dobbs*** opinion below, it is important to understand what led to it. Otherwise, the decision may seem counterintuitive due to the common perception that Justices who have a conservative approach are firmly committed to *stare decisis* and that Justices who have a liberal approach are more willing to overturn precedent. However, the reality of Supreme Court jurisprudence is more complex than it seems. **The *Dobbs* decision makes far more sense once shifts in Supreme Court membership and strategic political efforts to overturn *Roe* are viewed together.**

A good starting point is 2005, when **Chief Justice John Roberts** joined the Supreme Court. For many years, the Roberts Court had a 5–4 conservative majority. Justice Anthony Kennedy, although conservative, had joined the controlling plurality in ***Casey*** and was widely viewed as a likely vote to preserve the constitutional right to abortion. Other conservatives included Justices Samuel Alito and Clarence Thomas, the latter of whom openly rejected the doctrine of **substantive due process** as a "legal fiction." Chief Justice Roberts also leaned conservative but was known for strongly valuing *stare decisis* and the Court's institutional legitimacy (The Politics Teacher, n.d.).

At the same time, political developments in other branches of government affected the future of abortion rights. During the Obama presidency, conservative legal groups, like the **Alliance Defending Freedom (ADF)** and the **Federalist Society**, began coordinating with Christian conservative lawmakers to pass increasingly restrictive state abortion laws designed as "test cases" to challenge *Roe* and *Casey*. In 2016, Senate Republicans, led by Majority Leader Mitch McConnell, blocked President Obama from filling the vacancy created by Justice Antonin Scalia's death.

These efforts at test cases continued during the Trump administration. Meanwhile, on April 6, 2017, Senate Republicans expanded the **"nuclear option"**, a procedural rule eliminating the filibuster for judicial nominations, so that Supreme Court nominees could be confirmed by a simple majority, rather than 60 votes. This allowed President Trump to appoint Justice Neil Gorsuch. In 2018, Justice Kennedy retired and was replaced by Justice Brett Kavanaugh, who had criticized *Casey*, but had also suggested he respected precedent during his nomination hearings. In 2020, Justice Amy Coney Barrett, a staunch opponent to abortion, replaced Justice Ruth Bader Ginsburg, giving the Court a 6–3 conservative supermajority and its strongest opportunity in decades to revisit *Roe* and *Casey*. At the time *Dobbs* was decided, the liberal bloc consisted of Justices Sonia Sotomayor, Elena Kagan, and (after oral argument) Ketanji Brown Jackson (The Politics Teacher, n.d.).

By 2017, Mississippi had become the focus of these coordinated antiabortion efforts because it only had a single remaining abortion clinic, the Jackson Women's Health Organization, which performed abortions up to 16 weeks. In March 2018, Mississippi enacted the **Gestational Age Act**, banning abortions after 15 weeks except in cases of medical emergency or severe fetal abnormality. The Act included no exceptions for rape or incest (Oberman &

Lehmann, 2023).

Within a day of the Act's passage, Jackson Women's Health sued to block the 15-week ban, and in 2018 a federal district court issued an injunction, finding that viability occurs at 23–24 weeks and that the state offered no valid justification for banning abortions earlier than that. The district court also rejected Mississippi's fetal-pain evidence as inadmissible based on issues pertaining to scientific reliability. The Fifth Circuit affirmed this ruling in 2019 and again in 2020 when it struck down Mississippi's separate 6-week "heartbeat" law for the same reason, which was that states cannot ban abortion before viability *(Jackson Women's Health Org. v. Dobbs, 2019; Jackson Women's Health Org. v. Dobbs, 2020)*.

The state of Mississippi appealed to the Supreme Court in June 2020. Its petition, filed by Mississippi Attorney General Lynn Fitch, argued that the viability standard was inflexible and outdated and that states have a compelling interest in protecting fetal life from the beginning of pregnancy. Jackson Women's Health argued that viability had been a clear, workable rule for 50 years and that Mississippi's ban was unconstitutional "by any measure."

The Supreme Court considered the petition at more than a dozen conferences, far more than usual, and granted review on May 17, 2021. After that, the case was briefed over several months, and oral arguments were heard on December 1, 2021. **The case then moved through the Court's lengthy internal drafting and revision process before the final decision was issued on June 24, 2022.** *(Jackson Women's Health Org. v. Dobbs, 2019; Jackson Women's Health Org. v. Dobbs, 2020)*.

Landmark Case Spotlight:
Dobbs v. Jackson Women's Health Organization *(2022)*
Case Excerpt (Not Full Case)
Click here for full text.

Justice Alito delivered the opinion of the Court:

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided ***Roe v. Wade***. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point in which a fetus was thought to achieve "viability," i.e., the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life," it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend Roe's reasoning.

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.

Eventually, in ***Planned Parenthood v. Casey***, the Court revisited *Roe* . . . . The opinion concluded that stare decisis, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong.

Casey threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an 'undue burden' on a woman's right to have an abortion. . . . The three Justices who authored the controlling opinion "call[ed] for the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stage of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so.

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. . . . We discuss [substantive due process] in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. . . . Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus **not subject to the "heightened scrutiny"** that applies to such classifications. . . . The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." . . . And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. . . .

With this new theory addressed, we turn to Casey's bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. . . . We begin by considering the critical question of whether the Constitution, properly understood, confers a right to obtain an abortion. . . .The Constitution makes no express reference to a right to obtain an abortion, and

therefore those who claim that it protects such a right much show that the right is somehow implicit in the constitutional text. . . . In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what the Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been reluctant to recognize rights that are not mentioned in the Constitution. . . . Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to an abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow. . . .

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. . . .

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973 . . . .

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey* . . . .

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance . . . .

[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion . . . .

We do not pretend to know how our political system or society will respond to today's

decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled . . . .

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard. . . . Under our precedents, rational-basis review is the appropriate standard for such challenges. . . .

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

Excerpt: Concurrence, Justice Brett Kavanaugh

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests of protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

The issue before this Court . . . is not the policy or morality of abortion. The issue before the Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. . . . On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address. . . .

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. . . . But the parties' arguments have raised other related questions, and I address some of them here.

First, is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* . . . , *Eisenstadt v. Baird* . . . , *Loving v. Virginia* . . . , and *Obergefell v. Hodges* . . . . **I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.**

***Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto Clause*.**

Excerpt: Concurrence, Justice Clarence Thomas

I write separately to emphasize a . . . more fundamental reason why there is no abortion right guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely requires executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. . . . [**T]he Due Process Clause at most guarantees process. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided." . . .**

[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* [v. *Connecticut*], *Lawrence* [v. *Texas*], and *Obergefell* [v. *Hodges*]. Because any substantive due process decision is "demonstrably erroneous" . . . , we have a duty to "correct the error" established in those precedents . . . . After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

Substantive due process exalts judges at the expense of the People from whom they derive their authority. . . . In practice, the Court's approach for identifying those fundamental rights unquestionably involves policymaking rather than neutral legal analysis. The Court divines new rights in line with its own, extraconstitutional value preferences and nullifies state laws that do not align with the judicially created rights.

Substantive due process . . . has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Excerpt: Concurring in the Judgment, Chief Justice John Roberts

I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further— certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well be-yond the point at which it is considered "late" to discover a pregnancy… I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: **If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.** Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is

unnecessary to decide the case before us. . . .

Here, there is a clear path to deciding this case correctly without overruling Roe all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. . . .

The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case. . .

Excerpt: Joint Dissent, Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor

For half a century, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. . . . O]ne result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." . . . But no longer. **As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions.**

A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. **Others—those without money or childcare or the ability to take time off from work—will not be so fortunate.** Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. . . . In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. . . .

They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions. . . .

The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals. Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent. . . .

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. . . . But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. . . . **If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. . . . Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule.** So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example ***Obergefell*** used a few years ago. The Court there confronted a claim . . . that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. . . . And the Court specifically rejected that view. In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant of interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in ***Loving v. Virginia*** read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons stare decisis, a principle central to the rule of law. [In previous cases overturning precedent,] the Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. . . . None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total

abortion bans. It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. **And finally, it undermines the Court's legitimacy. . . .**

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

D. Dobbs v. Jackson and the Current State of Abortion Laws - continued

After the *Dobbs* decision, access to contraception and abortion worsened across many states. Although President Biden issued **Executive Order 14076** directing federal agencies to protect access to abortion medication, expand access to contraception, and ensure hospitals comply with federal emergency care requirements, federal agencies cannot override state laws that restrict reproductive health care. (Exec. Order No. 14076, 2022; Guttmacher Institute, 2023).

Many Planned Parenthood clinics, which are major providers of contraception nationwide, closed as states restricted abortion services and withdrew funding, while deep cuts to Title X and Medicaid further reduced access to contraceptive care. In ***Medina v. Planned Parenthood South Atlantic*** (2025), the Supreme Court held that Medicaid recipients cannot sue states for excluding Planned Parenthood from Medicaid programs, effectively giving states broad authority to maintain these funding cuts. More than seventy clinics have closed nationwide since *Dobbs*. At the same time, growing parental-consent requirements, newly expanded "conscience" laws allowing providers to refuse reproductive services based on personal beliefs, and documented cases of pharmacists declining to dispense contraception have further restricted access to birth control (Tuerkheimer, 2025). Although the Supreme Court unanimously rejected an effort to sharply limit access to the abortion medication mifepristone, access to reproductive care overall continues to erode (*FDA v. Alliance for Hippocratic Medicine*, 2024).

As expected, numerous states passed more restrictive abortion laws after the *Dobbs* decision. Please see Image 12.2 below for details. In addition to changes to state laws, on January 31, 2025, Executive Order 14182 reaffirmed the **Hyde Amendment's** restrictions on federal funding for elective abortions (The White House, 2025).

The **Gender Equity Policy Institute's** 2025 analysis of CDC data underscores how these new laws have affected maternal health. They found that mothers living in abortion-ban states are nearly twice as likely to die during pregnancy or childbirth as mothers in states that protect access to reproductive care, and that Black mothers in states that have abortion bans face a risk 3.3 times higher than white mothers. Based on a 2025 Gender Equity Policy Institute analysis of CDC maternal mortality data, Texas experienced a 56% rise in maternal mortality in the first full year of its ban, while states that support abortion rights saw a 21% decline (Gender Equity Policy Institute, 2025).

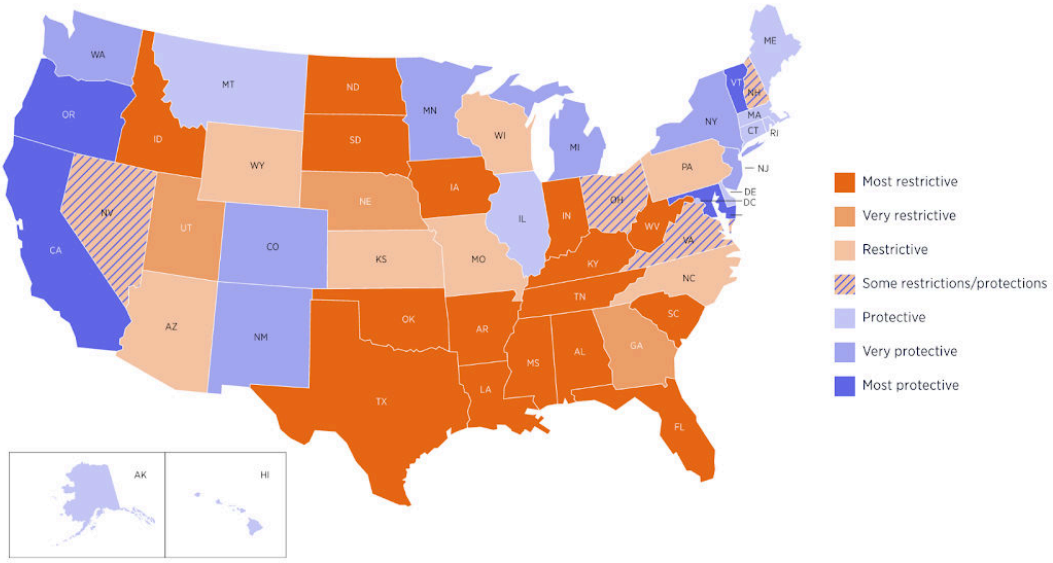


Image 12.2
Abortion Laws by State
Guttmacher Institute
Click here for live link.

Conclusion

Congress, the President, the Supreme Court, and state legislatures have continuously shaped the laws governing our ability to make personal decisions about procreation, contraception, and pregnancy. Understanding how these laws evolved both before and after *Dobbs* helps students see how each branch of government influences civil rights and what changes have expanded or limited reproductive freedom. This knowledge also highlights the continuing work needed to protect and honor civil rights and liberties in this area.

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Chapter Thirteen

Voting Rights

Chapter Outline

A. Overview & Electoral Dynamics

B. Voting & Constitutional Foundations

C. Expansion & Barriers

D. Redistricting & Gerrymandering

E. Money & Influence in Elections

A. Overview & Electoral Dynamics

This chapter will examine the constitutional foundations of voting rights, the expansion of those rights to groups previously excluded, the barriers that continue to limit access to voting, the rules governing redistricting, the prevalence of gerrymandering, and the influence of dark money in elections. Before examining these topics, it is useful to consider two often overlooked and related factors in discussions about voting rights: the role of nonvoters and the impact of the Electoral College. **Concerns about voter participation and the structure of the Electoral College shape access to political power and provide important context for the rest of this chapter.**

Many Americans do not exercise their right to vote. In the 2024 presidential election, only 64% of eligible adults of voting age cast a ballot. In the 1996 presidential election, the turnout was just under 50%. Between 1932–2024, voter participation rates for presidential elections have fluctuated between 49.8% and 63.5%. Turnout for state and local elections is often lower. Depending on the state or municipality, 10–40% of eligible voters participate on election day, depending on the year. **Although analyzing voter turnout rates is an entirely separate field of study than civil rights, acknowledging that many people do not vote reveals a disconnect between the government and its citizens.** This disconnect results in many eligible voters having no input into the policies that govern our nation. The implications of these findings on civil rights are the subject of ongoing scholarly research and will be briefly examined at the end of this chapter (Pew Research Center, 2000; Pew Research Center, 2025).

Public perceptions of the Electoral College can influence whether people decide to vote. Many people who choose not to cast a ballot on election day feel their individual vote doesn't matter. The President of the United States is not chosen by popular vote. Instead the Electoral College system assigns each state a specific number of electoral votes based on how many members it has in the House of Representatives and the Senate, and the candidate who wins the majority of the popular vote in each state is awarded all of that state's electoral votes. Whichever candidate receives a total of 270 or more nationwide out of 538 electoral votes wins the presidency. (Brennan Center for Justice, 2023) Five elections have produced a winner of the Electoral College who lost the national popular vote (University of Florida Election Lab, 2024). **Because millions of votes for the losing candidate in each state do not contribute to the national total, many people feel their vote does not matter** (CIRCLE, 2023).

Electoral College Map

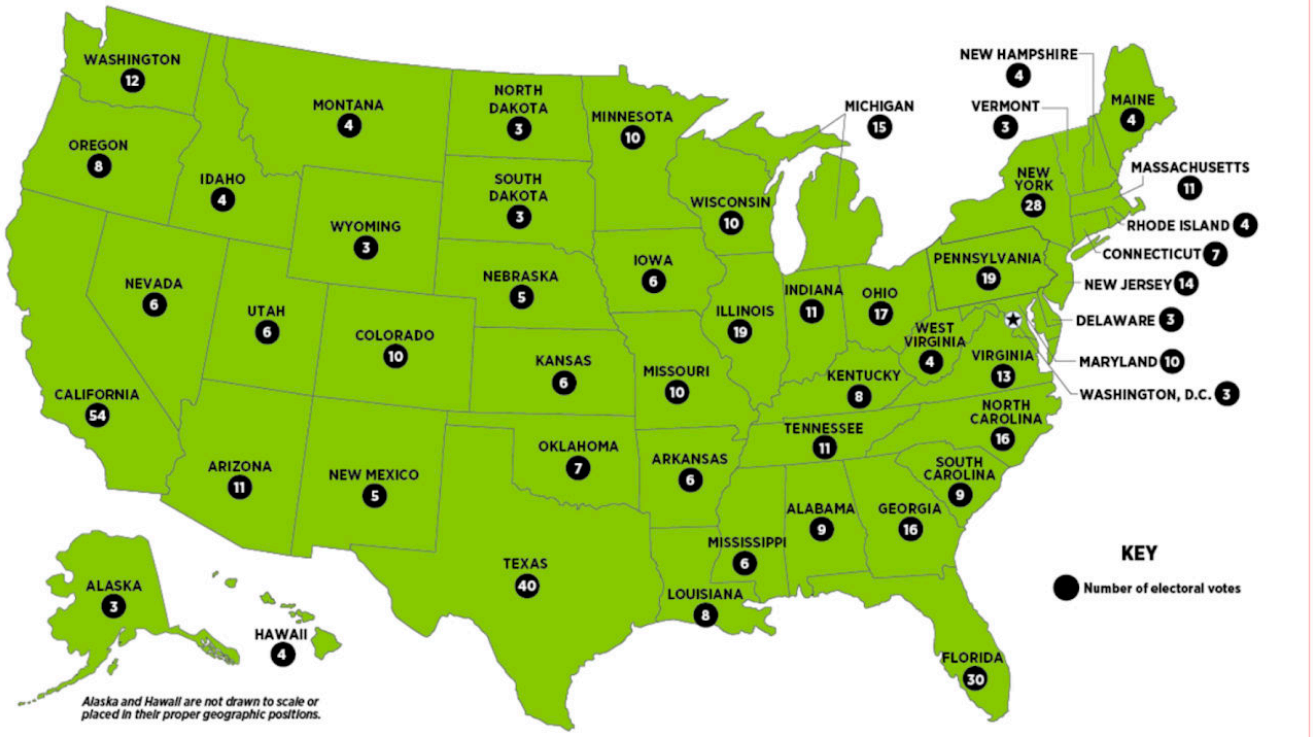


Image 13.1
(Scholastic, n.d.)

The Congressional District Method.

Two states use a distinctive method of allocating their electoral votes. Under their state laws, **Maine and Nebraska** use the **Congressional District Method**. This means they award two of their electoral votes to the candidate who wins the statewide popular vote and allocate their remaining electoral votes based on the winners of each congressional district. In the 2024 presidential election, Maine awarded 1 electoral vote to Trump and 3 to Harris, and Nebraska awarded 4 to Trump and 1 to Harris. These are the only two states that deviate from the winner-take-all method used by the rest of the nation.

Image 13.2
(FairVote, n.d.).

Results of the 2024 Election

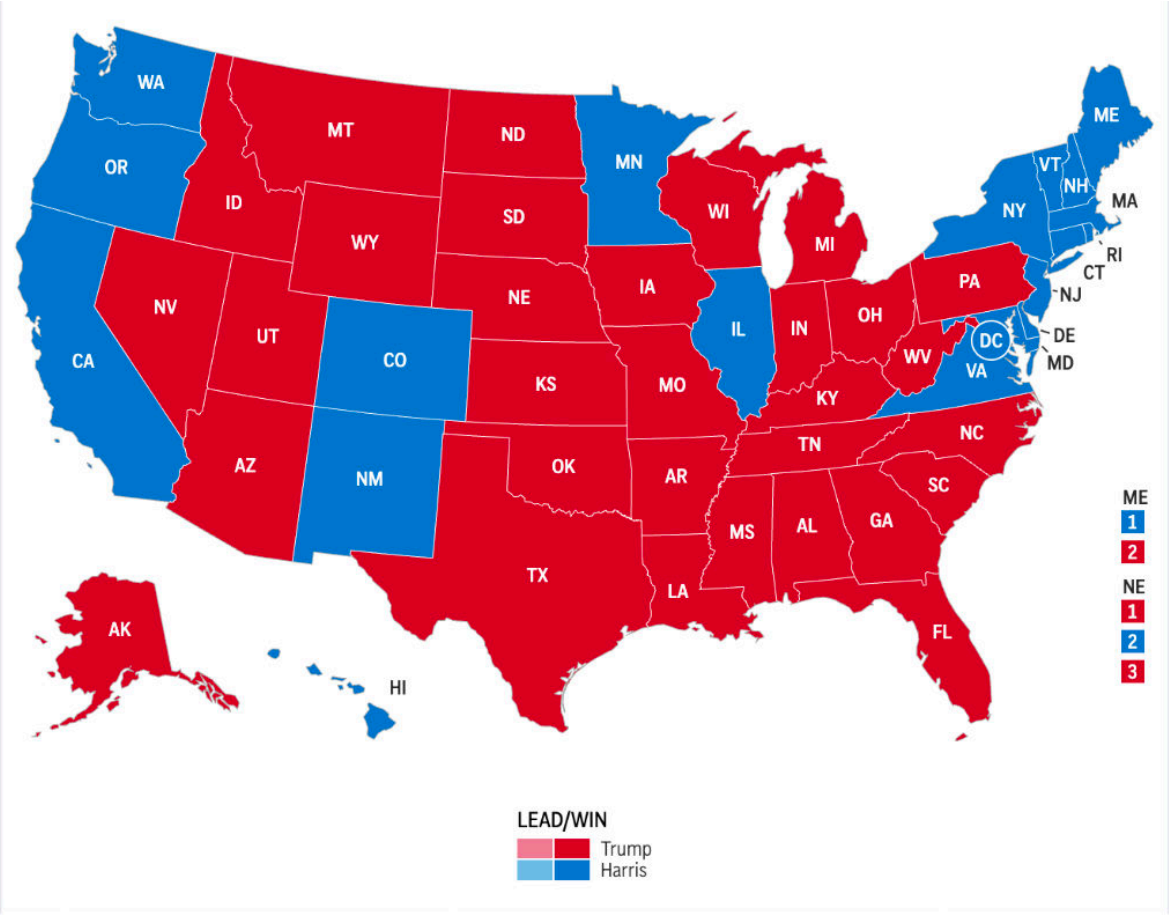


Image 13.3
(270toWin, n.d.)

A. Overview & Electoral Dynamics - continued

Feeling cynical about whether one's vote matters under the Electoral College is understandable, but this perspective overlooks several important points:

- **First**, even under the Electoral College, some presidential elections have been decided by extremely small margins. For example, the outcome of the 2000 Bush–Gore election came down to counting a few hundred votes in Florida, as discussed later in this chapter. Additionally, data from the 2024 presidential election shows that the outcome of that election would have been different if Democratic voters had turned out in numbers similar to Republican voters. (CIRCLE, 2023)
- **Second,** the popular vote still matters because it reflects the political preferences of voters. Elected and appointed officials use data from the popular vote to shape policy decisions. The data also influences public debate. Even though the Electoral College decides the winner, the popular vote affects the perception of political legitimacy and how leaders interpret their mandate. (Fleischmann, 2024)
- **Third**, this deterministic mindset can become a self-fulfilling prophecy. If people assume their vote does not count and stay home, their preferred candidate and policies become less likely to succeed. This effect is even stronger when voters believe none of the candidates represent their views, which can discourage more suitable candidates from running for office. (Frank, 2015)
- **Fourth,** there is a growing movement to reform or even eliminate the Electoral College altogether. Many Americans support independent candidates, who are unlikely to win under the current system. Yet, this movement cannot succeed if people disengage from voting altogether and remove themselves from the decision-making process. (Pew Research, 2024)
- **Fifth,** not all elections are for the President of the United States. Municipal and state elections are decided directly by the popular vote and shape many of the important day-to-day issues that affect people's lives. (Nonprofit VOTE, 2025)

This chapter will examine the topics typically covered in a civil rights discussion of voting rights. **However, as you read about these issues, keep in mind that concerns about voting rates and the effects of the Electoral College matter because they shape who has a meaningful voice in our political system.**

B. Constitutional Foundations

As in earlier chapters, each provision is presented first in *italicized* original text. A plain-English explanation follows in bold.

Article I § 2 of the United States Constitution says, *"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."* **This means that qualified and registered voters elect their representatives in the House of Representatives every two years.**

Article I § 4 is known as the Elections Clause, which says, *"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."* **This means that state governments control the administration and procedures of congressional elections, but the federal government retains the ultimate authority to change or replace those regulations.** The Supreme Court confirmed this balance of authority in ***Moore v. Harper*** (2023). In that case, the Court rejected the **Independent State Legislature Theory,**

which claimed that state legislatures have exclusive and unchecked power to set rules for federal elections without being limited by state constitutions or reviewed by state courts. By rejecting this theory, the Court clarified the interpretation of §4 and prevented state legislatures from gaining sweeping control over federal election rules.

Article II, § 1 states in part, "*Each State shall appoint… a Number of Electors, equal to the whole Number of Senators and Representatives… but no Senator or Representative… shall be appointed an Elector,"* and *"The Electors shall meet in their respective States, and vote by Ballot for two Persons… The Person having the greatest Number of Votes shall be the President, if such Number be a Majority…."* **This language outlines the original Electoral College procedure, where electors used to cast two votes, resulting in one candidate becoming President and the runner-up becoming Vice President.**

Section 1 was later superseded in 1804 by the Twelfth Amendment, which provides in part, "*The Electors shall meet in their respective states and vote by ballot for President and Vice-President… they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President."* **This amendment established our modern Electoral College system, explained in the introduction to the chapter, in which voters cast a single ballot for a presidential ticket.** The electors chosen by each state's voters meet in December in their state capitals to cast separate ballots for President and Vice President. These electors cannot be current members of the House or Senate. They are pledged to vote for the candidates who won the popular vote in their state. After casting their separate ballots, the electors send their certified results to Congress. These results are then formally opened and counted during a joint session of Congress in early January, completing the constitutional certification of the presidential election.

Beyond the Twelfth Amendment, several other constitutional amendments specifically define and protect voting rights, and the Supreme Court has clarified their scope and enforcement:

- **Section 1 of the Fourteenth Amendment says,***"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. No State shall make or enforce any law which shall abridge the* ***privileges or immunities*** *of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the* ***equal protection*** *of the laws….The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."* **The Equal Protection Clause and the Privileges & Immunities Clause have provided the constitutional foundation for major civil rights legislation, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965, as well as for later Supreme Court rulings that struck down discriminatory voting laws.**
- **The Fifteenth Amendment states**, *"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude…. The Congress shall have power to enforce this article by appropriate legislation."* **This amendment recognized the right of formerly enslaved adult males to vote and also provided the foundation for major civil rights legislation.**
- **The Seventeenth Amendment reads in part, "***The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."* **This amendment fundamentally expanded voting rights by shifting the power to elect U.S. Senators from state legislatures directly to the people.** Before 1913, ordinary citizens did not vote directly for their Senators because state legislatures selected them.
- **The Nineteenth Amendment provides**, *"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."* **This amendment secured women's suffrage nationwide.** In ***Leser v. Garnett*** (1922), opponents argued that the amendment had not been ratified in a valid manner and should not bind the states. The Supreme Court rejected this argument and upheld the amendment's validity, confirming that women could

not be denied the right to vote.

- **The Twenty-Fourth Amendment states,** *"The right of citizens of the United States to vote... shall not be denied or abridged by reason of failure to pay any poll tax or other tax."* **This amendment abolished poll taxes in federal elections, removing a significant economic barrier to voting.**
- **The Twenty-Sixth Amendment guarantees that,** *"The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged... on account of age."* **This amendment lowered the voting age from 21 to 18.** The catalyst for passing this amendment came from ***Oregon v. Mitchell*** (1970), in which the Supreme Court struck down as unconstitutional the portion of the Voting Rights Act that required all states to lower the voting age to 18. That decision prompted the rapid ratification of the Twenty-Sixth Amendment within one year.

C. Who Can Vote? Expansion & Barriers

The passage of the Reconstruction Amendments after the Civil War was intended to provide equal rights for all citizens, including voting rights. This goal was undermined by **Black Codes** in the Southern states, which were laws that restricted the freedoms, movement, and labor of newly freed African Americans. **In response to widespread violence and voter suppression, Congress passed three enforcement laws.** The ***Enforcement Act of 1870*** made it a federal crime to interfere with someone's right to vote and prohibited intimidation, threats, or discriminatory election practices. The ***Enforcement Act of 1871*** expanded oversight by the federal government by allowing U.S. marshals and authorized supervisors to monitor congressional elections. The ***Ku Klux Klan Act of 1871*** targeted white supremacist groups by making it a federal offense to conspire to deny the constitutional rights of others and authorized the use of federal troops when local authorities failed to act (Teaching American History, n.d.).

When Reconstruction ended, these three enforcement laws were no longer effective at preventing efforts to roll back protections for Black Americans. Federal power was greatly reduced when federal troops left the South. At the same time, the Supreme Court limited the enforcement of these acts, and Southern states regained control over their election laws. Additionally, the political will of the nation did not prioritize stopping racial violence. **The result was that Black Codes were replaced with Jim Crow laws, which enforced racial segregation in nearly all areas of life and used literacy tests, poll taxes, and grandfather clauses to disenfranchise Black voters.** The Civil Rights Act of 1957 was supposed to eliminate these barriers and promote voting rights, but it provided only limited protection due to lack of enforcement power (National Geographic Society, n.d.).

When the **Civil Rights Act of 1964** was passed, it was a victory for civil rights advocates because it prohibited discrimination in public accommodations, education, federally funded programs, and employment. It had enforcement power under the **Commerce Clause** of Article I, § 8, Clause 3 of the U.S. Constitution. Title I of the Act briefly addressed voting rights by prohibiting the unequal application of voter registration requirements. However, it did not eliminate major barriers such as literacy tests or poll taxes (Miller Center, n.d.).

The need for additional legislation to eliminate voting barriers was brought to the attention of the American public ten months after the Civil Rights Act was passed. In ***Harman v. Forssenius*** (1965), the Supreme Court struck down a Virginia law that had created an "escape clause", allowing voters to avoid paying a poll tax if they filed a certificate of residence six months before an election. The Court struck down the law and made clear that states cannot impose substitute requirements that hinder voters who refuse to pay a poll tax.

Three months after the ***Harman*** decision, Congress passed the **Voting Rights Act of 1965,** which banned discriminatory voting practices such as literacy tests and other methods used to disenfranchise Black voters. It also required federal "preclearance" for changes to voting laws in states and localities with long histories of racial suppression, ensuring that discriminatory rules could not be implemented without federal approval. This law dramatically expanded Black voter registration and is widely considered one of the most effective pieces of civil

rights legislation in U.S. history (NAACP, n.d.).

Subsequently, the Supreme Court issued a series of decisions that upheld the constitutionality and enforcement mechanisms of the Voting Rights Act. In ***South Carolina v. Katzenbac*h (**1966), the Supreme Court held that the Fifteenth Amendment authorized Congress to enact the Voting Rights Act, upheld the Act's ban on literacy tests, and explained that the Fifteenth Amendment's enforcement clause gave Congress the power to prevent racial discrimination in voting. In ***Katzenbach v. Morgan*** (1966), the Court held that Congress could use its enforcement power under the Fourteenth Amendment to enforce § 4(e) of the Act , which banned literacy tests as a qualification to vote. In ***Harper v. Virginia Board of Elections*** (1966), the Court ruled that state laws imposing poll taxes violated the Equal Protection Clause and held that the Twenty-Fourth Amendment extends to the states through the Equal Protection Clause, making all poll taxes unconstitutional.



Aug. 6, 1965, Washington, DC. President Lyndon Johnson signing the Voting Rights Act, as Rev. Dr. Martin Luther King, Jr. looks on.

Image 13.4
(Houldin, 2015)

Summary of the Relevant Parts of the Original Voting Rights Act (VRA) of 1965

- **§ 2** - Prohibits any state or local government from using voting regulations, statutes, ordinances, or practices that deny or abridge the right to vote on account of race or color. **This section remains in full force and effect in 2025.**
- **§ 3** – Allows federal courts to place a state or municipal jurisdiction under special oversight when plaintiffs prove that it intentionally discriminated against voters on the basis of race. This is known as the **"bail-in"** or **"pocket trigger"** provision of the VRA. When a court invokes this provision, it may require the jurisdiction to obtain federal preclearance before changing any voting laws, to suspend discriminatory tests or procedures, or to appoint federal observers. **Although *Shelby County v. Holder* (2013) eliminated automatic preclearance by striking down the § 4 coverage formula, § 3 still permits courts to impose preclearance on a case-by-case basis.**
- **§ 4** – Reaffirms the nationwide ban on literacy tests, explains what counts as a "test or device," and protects voters who attended non-English U.S. schools from English-literacy requirements. It also created the coverage formula that identified states and counties with histories of discriminatory voting practices. **The *Shelby County* decision struck down the coverage formula, rendering both the formula and the process for jurisdictions to exit coverage inoperative. However, earlier Supreme Court rulings upholding the nationwide ban on literacy tests remain intact.**
- **§ 5** – This section required certain states and localities to get federal approval, called preclearance, before changing their voting laws. After the *Shelby* decision, § 5 can no longer be enforced because the Court struck down the § 4 formula that determined which places were subject to preclearance. **Congress could restore § 5 by enacting a new, constitutionally valid formula, but it has not approved one as of 2025.**
- **§ 10** – Authorizes the Attorney General to challenge any voting rule or requirement that functions as a poll tax. Although this section remains part of the VRA, its practical purpose ended after the decision in *Harper v. Virginia Board of Elections* (1966), which held all poll taxes unconstitutional. **This section remains in full force and effect in 2025.**
- **§ 11** – Makes it a federal crime to deny someone the right to cast a ballot or refuse to count a qualified voter's ballot. It also bans the intimidation of voters or engaging in actions intended to threaten or coerce them. Additionally, it criminalizes false registration, illegal voting, and paying for votes. **This section remains in full force and effect in 2025.**
- **§ 12** –Imposes fines and imprisonment for violating key provisions of the VRA, altering ballots, interfering with examiner duties, or conspiring to discriminate. It also allows the Attorney General to seek court orders to immediately stop discriminatory practices. **This section remains in full force and effect in 2025.**

Image 13.5
(Original Work, Getchell-Bastien)

Additional cases clarified voting rights in scenarios unrelated to racial discrimination. In ***Richardson v. Ramirez*** (1974), the Supreme Court ruled that California did not violate the Equal Protection Clause by disenfranchising convicted felons who had completed their sentences and paroles. **The Court held that states may constitutionally ban individuals with felony convictions from voting.** In ***Symm v. United States*** (1979), the Court invalidated a Texas requirement that only college students had to complete a special residency questionnaire before registering to vote. **The Court determined that imposing extra requirements on young voters created an undue burden.**

Later years saw federal lawmakers working to increase participation and standardize election procedures across states. The **National Voter Registration Act of 1993**, often called the **"Motor Voter Act,"** required states to offer voter registration at the Department of Motor Vehicles, state public assistance agencies, and through standardized mail-in forms. It also established specific requirements for purging voter rolls, which includes sending proper notices to voters, observing required waiting periods before purging voters from lists, avoiding discriminatory practices during the purging process, and maintaining accurate registration records. The **Help America Vote Act of 2002 (HAVA)** was passed to improve the accuracy and security of elections by requiring the replacement of outdated voting machines, the creation of statewide voter registration databases, the establishment of provisional voting requirements, and setting minimum standards for the administration and oversight of elections (Naifeh, n.d.).

In 2000, the Supreme Court once again applied the Equal Protection Clause to a voting controversy, this time involving the disputed results of the presidential election. In ***Bush v. Gore*** (2000), the results of the election between George W. Bush and Al Gore was so close that the outcome in Florida would decide the winner of the Electoral College. The Florida Supreme Court had ordered a statewide hand recount of disputed ballots due to concerns about **"hanging chads**," which were incompletely punched paper ballots that made it difficult to tell a voter's intent. The Supreme Court of the United States halted the recount after being petitioned to do so by Bush. The Court concluded that different counties were using different methods to determine voter intent, resulting in what they determined to be unequal treatment of voters in violation of the Equal Protection Clause. This 5–4 decision left Bush in the lead and effectively determined the outcome of the election, making him the winner. One media consortium concluded that under the recount standards ordered by the Florida Supreme Court, Bush would have won by 598 votes, while other recount standards suggested Gore should have won. Although widely criticized as partisan, the ruling's impact was narrow because the Court stated that its decision was limited to the specific circumstances of that case (Gregg, 2025).

While ***Bush v. Gore*** focused on equal treatment in how ballots are evaluated, a later case addressed the need for voters to have stable election rules. ***Purcell v. Gonzalez*** (2006) established that courts should avoid making abrupt changes to voting rules or election laws shortly before an election. The Court reasoned that late judicial interventions could confuse voters, burden election officials, and hinder the orderly administration of elections. This idea became known as the **"Purcell Principle,"** which is now frequently cited by courts to justify leaving contested election rules in place when an election is rapidly approaching, even if those rules are still being challenged on constitutional grounds.

Two years after the ***Purcell*** decision, Democrat Barack Obama was elected President of the United States. The midterm elections after his election followed a familiar trend. In American politics, the president's party often loses seats in midterm elections because voters use these contests to either show concerns about the current administration or to shift the balance of power. As a result, the opposing party, the Republicans, gained significant ground in both Congress and state legislatures. Beginning around 2010, Republican-led states began enacting new voting restrictions. State legislatures quickly passed laws that made voting more difficult. These measures are often described as forms of **voter suppression**, which are policies that make it harder for eligible citizens to register, cast a ballot, or have their vote counted (Economic Policy Institute, n.d..)

One example of the new voting regulations was the rise of strict **Voter ID Laws**, which require voters to present specific types of government-issued photo identification at the polls. Although these laws aim to reduce voter fraud, research indicates they can disproportionately affect low-income voters, students, and older adults, who may lack the required documents, access to ID-issuing agencies, or the funds to pay for the ID. States also conducted large-scale purges of voter rolls, sometimes removing eligible voters through controversial methods. Additionally, many states closed or consolidated polling places, often in predominantly Black, Latino, or rural areas. This resulted in longer lines and reduced access to in-person voting (Economic Policy Institute, n.d.).

In ***Crawford v. Marion County Election Board*** (2008), the Supreme Court upheld Indiana's law requiring voters to present government-issued photo identification at the polls. The Court found that the law applied the same requirement to all voters, that it was administered in an "even-handed" fashion, that it was a permissible way to protect election integrity, and that the burdens it imposed were not overwhelmingly severe or unjustified. In ***Husted v. A. Philip Randolph Institute*** (2018), the Supreme Court upheld a process in Ohio that removed voters who did not vote for two years, failed to respond to a confirmation notice, and then did not vote for an additional four years. In both cases, the Supreme Court determined that the states' voting regulations were permissible under federal law and did not violate the Constitution.

Debates over federal oversight of elections reached a critical moment in *Shelby County v. Holder* (2013).

Landmark Case Spotlight:
Shelby County v. Holder (2013)
Case Excerpt (Not Full Case)
Click here for full text.

Chief Justice Roberts delivered the opinion of the Court.

The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting — a drastic departure from basic principles of federalism. And §4 of the Act applied that requirement only to some States — an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v.nKatzenbach* 1966).

As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, §4(a). Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.

By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide." Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs."

I - A

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." The current version forbids any "standard, practice, or procedure" that "results in

a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Both the Federal Government and individuals have sued to enforce §2. Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election.. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. A covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D. C., seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court ruled against the county and upheld the Act.

The Court of Appeals for the D. C. Circuit affirmed. In assessing §5, the D. C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful §2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, §5 preclearance suits involving covered jurisdictions, and the deterrent effect of §5. After extensive analysis of the record, the court accepted Congress's conclusion that §2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that §5 was therefore still necessary.

Turning to §4, the D. C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question.". But the court looked to data comparing the number of successful §2 suits

in the different parts of the country. Coupling that evidence with the deterrent effect of §5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster.

Judge Williams dissented. He found "no positive correlation between inclusion in §4(b)'s coverage formula and low black registration or turnout." Rather, to the extent there was any correlation, it actually went the other way: "condemnation under §4(b) is a marker of higher black registration and turnout." Judge Williams also found that "[c]overed jurisdictions have far more black officeholders as a proportion of the black population than do uncovered ones.". As to the evidence of successful §2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions.". He also noted that two covered jurisdictions —Arizona and Alaska — had not had any successful reported §2 suit brought against them during the entire 24 years covered by the data. Judge Williams would have held the coverage formula of §4(b) "irrational" and unconstitutional. We granted certiorari.

II

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." More specifically, " the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." Of course, the Federal Government retains significant control over federal elections.

Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States. Katzenbach rejected the notion that the principle operated as a bar on differential treatment outside that context. At the same time, as we made clear in Northwest Austin, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

.....despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation."

B

Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. At the time, the coverage formula — the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average."

We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." We therefore concluded that "the coverage formula [was] rational in both practice and theory." It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement.. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant."

C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is

now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.

Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. The preclearance statistics are also illuminating. In the first decade after enactment of §5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.

There is no doubt that these improvements are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African-American voters. On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African-American enfranchisement. Today both of those towns are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in §5 or narrowed the scope of the coverage formula in §4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. Congress also expanded the prohibitions in §5. We had previously interpreted §5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups.

In 2006, Congress amended §5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, see 42 U. S. C. §1973c(c), even though we had stated that such broadening of §5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality," In addition, Congress expanded §5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any

citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice."In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved. We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another."Nothing has happened since to alleviate this troubling concern about the current application of §5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down. Under this theory, however, §5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior. The provisions of §5 apply only to those jurisdictions singled out by §4. We now consider whether that coverage formula is constitutional in light of current conditions.

III -A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." Katzenbach, 383 U. S., at 330. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." The coverage formula met that test in 1965, but no longer does so. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and then came up with criteria to describe them. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that Katzenbach sanctioned such an approach, but the analysis in Katzenbach was quite different. Katzenbach reasoned that the coverage formula was rational because the "formula . . . was relevant to the problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." Here, by contrast, the Government's reverse- engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets.

By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh §2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965,

and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

D

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed. It is so ordered.

Since *Shelby County v. Holder* was decided, researchers have documented shutdowns of polling locations, an increase in voter ID laws, and changes in voter participation, particularly in states that had previously been subject to federal oversight. A study by the Leadership Conference Education Fund found that former § 5 jurisdictions closed 1,688 polling places between 2012 and 2018, and that by the 2018 midterm election there were 1,173 fewer polling places in these jurisdictions compared to 2014. Texas saw 750 closures, Arizona 320, and Georgia 214, with some Georgia counties eliminating more than 80 percent of their sites. These reductions disproportionately affected communities with higher shares of Black, Latino, and rural voters (The Leadership Conference Education Fund, 2019).

Additionally, many formerly preclearance states implemented voting restrictions that had previously been blocked, beginning with strict photo ID laws in states such as Texas, Mississippi, Alabama, Virginia, and North Carolina. After the 2020 presidential election, seven former §5 states adopted new limits on mail voting, drop boxes, and voter-roll maintenance practices (Voting Rights Lab, 2023).

Studies conducted by the Brennan Center show that the racial turnout gap has widened nationwide since the decision, increasing at roughly twice the rate in former preclearance states. By 2022, the white–Black turnout gap in former preclearance jurisdictions was about five percentage points higher than it likely would have been under pre-Shelby protections (Crayton, 2024; Morris & Grange, 2024).

Although *Shelby County v. Holder* eliminated the VRA's preclearance system and contributed to reduced access to voting in many former § 5 states, § 2 of the Voting Rights Act remained fully intact, and **a 2021 Supreme Court decision introduced new challenges for proving violations of §2.** In *Brnovich v. Democratic National Committee* (2021), the Democratic National Committee challenged two Arizona voting laws that it argued created barriers to voting for minority communities. The first was Arizona's "out of precinct" rule, which discards an entire ballot if it is cast in the wrong precinct, even when most races on the ballot were eligible for that voter. The second was H.B. 2023, a 2016 statute that made it a criminal offense for most individuals or organizations to collect and return another person's early ballot, with ballot assistance disproportionately used by Native American, Latino, and Black voters who often face greater logistical barriers to returning ballots on their own.

In a 6–3 decision, the U.S. Supreme Court rejected these claims. Justice Alito held that neither policy imposed burdens beyond the usual burdens of voting, and he also concluded that any racial disparities in their impact were small in absolute terms. He further emphasized that Arizona had legitimate state interests such as preventing fraud and ensuring orderly election administration. Although the Court declined to create a definitive test for all § 2 cases, it outlined general guideposts that signaled a more limited interpretation of when disparate impacts on minority voters amount to a legal violation. **Because *Brnovich* narrowed the practical standards for proving discrimination under §2, many scholars and civil rights groups view the decision as another significant restriction on the Voting Rights Act.**

D. Redistricting & Gerrymandering

The United States Constitution requires a nationwide census every ten years to determine how many people live in each state. After the census, **reapportionment** occurs, which is the process of reallocating the 435 positions in the U.S. House of Representatives among the states based on population changes. Once these positions are reassigned, each state redraws its congressional and legislative district boundaries through **redistricting** in order to keep districts equal in population and maintain fair representation (U.S. Census Bureau, n.d..)

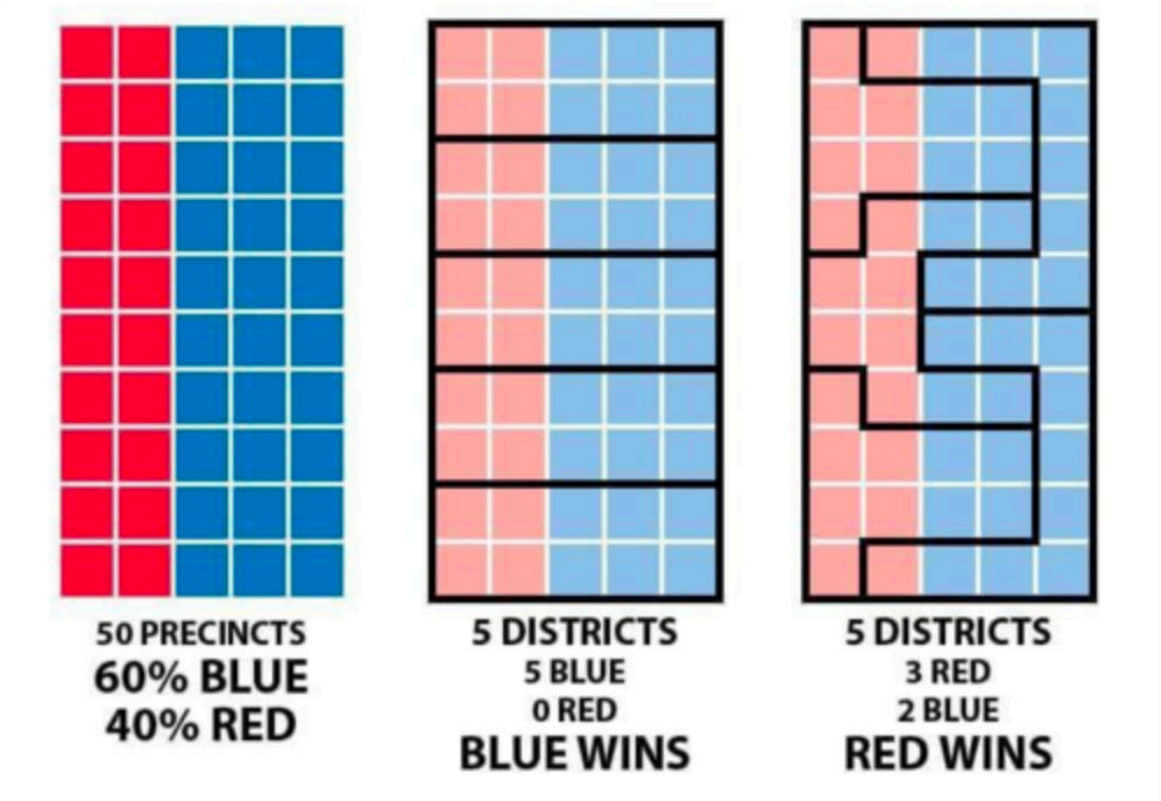
Historically, the redistricting process has been prone to political manipulation, a vulnerability that continues in

modern elections. One outcome of this manipulation is **gerrymandering**, the intentional drawing of electoral district boundaries to benefit a particular party, group, or socioeconomic class. The term "gerrymandering" is a **portmanteau,** which is a blended word formed by combining parts of two different words. The term originates from an 1812 event in which Elbridge Gerry, the Massachusetts governor and later Vice President of the United States, approved the creation of a district in the Boston area that was highly irregular in shape and resembled a salamander. An 1812 political cartoon shown below mocked the shape of this district and the political manipulation behind it. The word **gerrymandering** is still used today to describe this practice and carries a negative connotation (Library of Congress, 2024).



The political cartoon that gave birth to the term "Gerrymandering." Artist: Elkanah Tisdale. Rare Book and Special Collections Division.

Image 13.6
The original "Gerry-mander" cartoon drawn by Elkanah Tisdale and published in the *Boston Gazette* in 1812.
(Library of Congress, 2024)



By adjusting the boundaries of electoral districts, political parties can gain votes and influence election outcomes dramatically. In this example, though the district is 60 percent blue, a redrawing of the boundaries results in the majority of the districts being controlled by red (far right).
Image: Steven Nass/Wikimedia

Image 13.7

D. Redistricting & Gerrymandering- continued

Traditionally, the Supreme Court refused to hear challenges to legislative redistricting because it determined that these disputes were nonjusticiable political questions, meaning issues the Court believed were unsuitable for judicial review because they were tasks the elected branches of government should handle. In ***Colegrove v. Green*** (1946), the Court held that federal courts could not intervene in malapportioned districts because redistricting was a **"political question"** left to Congress and the states, cautioning that the judiciary should not "enter this political thicket." Under this doctrine, even extreme population disparities between districts were immune from judicial review.

This changed when the Court decided ***Gomillion v. Lightfoot*** (1960). In that case, the city of Tuskegee, Alabama, redrew its boundaries from a simple square into a strange shape with 28 sides that removed nearly every Black voter from the city limits. Black residents argued that this boundary manipulation violated the Fifteenth Amendment by intentionally disenfranchising them. Although Alabama tried to rely on the *Colegrove* case, the Supreme Court unanimously rejected that argument, explaining that the political question doctrine does not shield state action that blatantly violates constitutional rights. **The Court held that states may not use redistricting to dilute or eliminate the voting power of racial groups, making racial gerrymandering constitutionally impermissible.**

After *Gomillion* banned racially based gerrymandering, the Supreme Court expanded the ability of federal courts to get involved in redistricting disputes. In ***Baker v. Carr*** (1962), the Court held that redistricting claims brought under the Fourteenth Amendment's Equal Protection Clause are justiciable. The case arose after Tennessee failed to redraw its legislative districts for more than sixty years, despite dramatic population shifts. The Court's ruling opened the door for federal courts to review and strike down redistricting claims alleged to be unfair, even if they did not involve racial discrimination.

The authority of federal courts to hear redistricting cases involving Equal Protection violations helped shape the modern standards for how districts must be drawn. In ***Reynolds v. Sims*** (1964), the Court examined Alabama's districting scheme for their state legislature, where one district had 41 times as many eligible voters as another, severely diluting the voting power of residents in more populated areas. The Court ruled that states must make "honest and good-faith efforts" to achieve nearly equal district populations. This decision cemented the **"one person, one vote"** principle as a cornerstone of modern redistricting law. The Supreme Court held that the Equal Protection Clause requires substantially equal legislative representation for all citizens because **"legislators represent people, not places,"** and weighting votes differently based on residency is unconstitutional. *Wesberry v. Sanders,* decided the same year, held that the one person, one vote principle also applies to federal congressional districts.

The finer details of the one person, one vote rule were clarified in later cases where citizens claimed that states were engaging in **vote dilution**, a districting practice that weakens minority voting power by manipulating how voters are distributed across districts. Vote dilution can occur through **cracking**, which happens when minority voters are split across several districts so they cannot form a majority anywhere, or through **packing**, which concentrates minority voters into a single district at disproportionately high levels, limiting their influence in surrounding districts (UCLA Latino Policy & Politics Initiative [LPPI], n.d.).

In ***Thornburg v. Gingles*** (1986), the Supreme Court addressed allegations of vote dilution in a situation that many scholars would describe today as cracking. Black citizens of North Carolina challenged the state's use of multimember legislative districts, arguing that this arrangement dispersed Black voters across several districts in ways that prevented them from electing representatives of their choice. The Court interpreted § 2 of the Voting

Rights Act to prohibit districting plans that *result* in minority voters having less opportunity to elect their preferred candidates, even without proof of purposeful discrimination. The Court also established a t**hree-part test** requiring plaintiffs alleging racial vote dilution to show 1) that the minority group is sufficiently large and geographically compact to form a district, 2) that it is politically cohesive, and 3) that the majority votes as a bloc in ways that usually defeat the minority's preferred candidates. The Court held that § 2 bans districting schemes that produce discriminatory results under the "totality of the circumstances," and that plans meeting the *Gingles* preconditions may violate the statute even without intentional discrimination. A recent decision, *Allen v. Milligan* (2023), reaffirmed the Gingles framework and relied on it to strike down Alabama's congressional map for diluting Black voting strength.

In the early 1990s, the Court had to shift away from vote-dilution claims and return to analyzing Equal Protection challenges to race-based districting, similar to the claim raised in the *Gomillion* case. In ***Shaw v. Reno*** (1993) the Court addressed a challenge to North Carolina's creation of a **majority–minority district**, which is a district where minority voters make up more than half of the population. The district was drawn in an extremely irregular shape that indicated race was the predominant factor in its design. White voters, represented by the North Carolina Attorney General, argued that sorting citizens by race in drawing district lines violated the Equal Protection Clause, even when the goal was to enhance minority representation. **The Supreme Court held that such race-based districting must survive strict scrutiny, establishing the rule that legislators may not use race as the dominant factor in redistricting unless the plan is narrowly tailored to meet a compelling governmental interest.** The case was remanded back to a lower court, which then rejected the plan.

In ***Miller v. Johnson*** (1995), the Court used the strict scrutiny framework identified in *Shaw* to analyze several of Georgia's proposed redistricting plans. The state's population was 27 percent African American but formed a majority in only one of its eleven congressional districts. Georgia's General Assembly drew the Eleventh District as a new majority-Black district to address this issue. However, the district lacked any coherent geographic structure and was described as a "geographic monstrosity" because it stretched roughly 260 miles from Atlanta to the Atlantic Ocean. White voters brought an Equal Protection challenge, arguing that the district had been drawn predominantly because of race. Justice Kennedy, writing for the majority, declared the district unconstitutional under the Equal Protection Clause, reaffirming the principles established in *Shaw v. Reno* (1993). The Court emphasized that a reapportionment plan may be "so highly irregular and bizarre in shape that it rationally cannot be understood as anything other than an effort to segregate voters based on race," and clarified that such race-based districting must survive strict scrutiny.

The Court applied this strict-scrutiny standard in ***Cooper v. Harris*** (2017), striking down two North Carolina congressional districts after concluding that race, rather than politics, had predominated when design them. The evidence showed that legislators, believing they were complying with the Voting Rights Act, intentionally increased the Black voting-age population in both contested districts to above 50 percent, even though such a racial threshold was not legally required. The Court held that the Act did not mandate creating majority-Black districts under those circumstances. The decision reinforced the *Shaw* and *Miller* framework and clarified how courts evaluate redistricting plans where racial and partisan motives overlap.

Building on the themes of race and intent in redistricting, the Court next considered a similar dispute out of Texas. ***Abbott v. Perez*** (2018) involved a challenge to Texas's redistricting plans after minority groups argued that several districts were drawn with discriminatory intent. The Supreme Court upheld nearly all of the challenged districts, emphasizing that legislatures are entitled to a strong presumption of good faith when drawing maps. The Court held that plaintiffs bear the burden of proving intentional discrimination and that evidence of past discrimination does not automatically invalidate later maps. Only one district was struck down, and the Court made clear that allegations of racial gerrymandering or discriminatory intent require specific, district-by-district proof rather than broad assumptions about legislative motive **This approach reflects a more deferential stance toward state**

legislatures than in *Cooper*, illustrating that while strict scrutiny applies when race predominates, courts will not assume racial predominance without clear evidence.

Not all claims of unfairness in redistricting can be heard by federal courts, including the Supreme Court, because purely political gerrymandering is not reviewable in the federal system. In ***Rucho v. Common Cause*** (2019), the North Carolina legislature adopted new redistricting maps in 2016 that were drawn to secure a strong partisan advantage for Republicans, who publicly stated their goal of creating ten Republican districts and three Democratic districts. These maps were immediately challenged in federal court by several Democratic groups. The district court repeatedly struck the maps down as unconstitutional, but when the case was appealed to the Supreme Court, the Court temporarily allowed their use in the 2018 midterm elections because the election was too close to change the maps without causing major disruption, a principle known as the "**Purcell Principle.**" After the 2018 midterm elections, the Court ruled that **partisan gerrymandering** claims raise **political questions** that federal courts cannot resolve. As a result, federal courts may not police partisan gerrymandering, leaving these disputes to state courts, state constitutions, and state legislatures unless Congress enacts new federal standards.

More recently, the Supreme Court has had to examine whether a redistricting plan constituted racial gerrymandering or partisan gerrymandering, as well as the evidentiary standard for making that distinction. In ***Alexander v. South Carolina State Conference of the NAACP*** (2024), South Carolina's Republican-controlled legislature adopted a new congressional map that moved tens of thousands of Black voters into another district, effectively turning the district into a safe Republican seat. The South Carolina chapter of the NAACP sued, and the U.S. District Court for the District of South Carolina concluded that the contested district was an unconstitutional racial gerrymander. The legislators appealed directly to the Supreme Court, arguing that the map constituted partisan gerrymandering, which is permissible according to the *Rucho* case. Justice Samuel Alito, writing for the majority, overturned the lower court's finding and ruled that the plaintiffs had not met the evidentiary burden needed to prove racial gerrymandering or vote dilution. He also clarified the evidentiary standards for such claims: **When plaintiffs allege racial gerrymandering, they must show that race was the predominant factor in drawing district lines, meaning that racial considerations outweighed and displaced traditional, race-neutral criteria.** Justice Alito's opinion also contended that, because partisanship and race often correlate, it is difficult to distinguish whether mapmakers acted for political reasons or racial ones, requiring courts to begin with a presumption that legislatures acted in good faith. The Court concluded that the plaintiffs presented only weak circumstantial evidence for their claims and failed to provide an alternative map showing that South Carolina could have met its political objectives with significantly less racial imbalance.

The questions raised in *Alexander* resurfaced almost immediately in another state, this time in Texas. In ***Texas State Conference of the NAACP v. Texas*** (2025), the United States District Court for the Western District of Texas ruled that Texas's new congressional map for the 2026 elections was likely drawn with discriminatory intent and unlawfully diluted the voting power of Black and Hispanic voters. The case was filed by the Texas State Conference of the NAACP, the League of United Latin American Citizens (LULAC), and several individual voters who argued that the map intentionally weakened minority voting strength in violation of the Constitution and the Voting Rights Act. **Texas appealed, and on December 4, 2025, the Supreme Court granted the state's emergency request for a stay, allowing Texas to use the challenged map while the appeal proceeds.** Justice Samuel Alito, writing for the majority, stated that Texas was likely to succeed on the merits because the district court committed "serious errors," including failing to honor the presumption of legislative good faith and failing to draw an adverse inference against the plaintiffs for not producing an alternative map capable of achieving Texas's partisan goals without relying on race. The Court also emphasized that changing the map so close to the 2026 election risked voter confusion and violated the **Purcell Principle**, which cautions courts against altering election rules shortly before an election. As a result, the challenged map will remain in place for now, and the Supreme Court will consider the case on appeal.

Meanwhile, the dissent criticized the majority for overturning an extensive factual record based on only a brief review. The appeal is now fully docketed at the Supreme Court, where the justices will decide the case on the merits during the current Term.

E. Money & Influence in Elections

Campaign finance laws are important because they are designed to prevent wealthy individuals, corporations, and special-interest groups from exerting an unfair influence over elections or "buying" access to public officials. These rules aim to promote fairness, transparency, and public trust by ensuring that elected representatives are accountable to voters rather than major donors (FEC, n.d.).

As early as 1901, concerns about undue corporate influence in federal elections led Congress to begin regulating campaign money, culminating in the **Tillman Act of 1907**, the first federal law to ban corporations from making direct financial contributions to federal candidates. The law prohibited national banks and federally chartered corporations from donating to any campaign for federal office, marking the beginning of federal efforts to separate corporate treasury funds from electoral politics (Library of Congress, n.d.).

As campaign finance regulation evolved throughout the twentieth century, Congress enacted the **Federal Election Campaign Act of 1971**, later strengthened by sweeping amendments in 1974, 1976, and 1979 that created contribution limits, expanded disclosure requirements, and established the Federal Election Commission. As a result of these reforms, modern campaign finance laws came to distinguish among several different types of political spending. One important rule is that ender federal law, candidates and political committees must disclose the identities of individual donors who contribute more than $200 in an election cycle, including their occupation and employer (FEC, n.d.).

Once the basic disclosure rules are established, campaign finance law classifies political contributions into different categories, each governed by its own rules. **Hard money** refers to contributions given directly to a candidate's campaign. These contributions are subject to strict limits, such as the current cap of $3,500 per election from an individual to a federal candidate and $5,000 per year from a multi-candidate **Political Action Committee**, which is an organization formed by interest groups, unions, corporations, or individuals to raise and contribute money within these legal limits. **Soft money**, by contrast, consists of funds raised by political parties for general "party-building" activities, such as voter registration or get-out-the-vote drives. These contributions historically had no federal dollar limits, although they could not be used to support a specific federal candidate. A third category, **independent spending**, includes money spent by individuals or groups to advocate for or against a candidate without coordinating with the candidate or their campaign. For example, an individual could spend $50,000 to print and mail flyers saying "Support Senator Williams on Election Day," as long as the effort was planned and carried out independently. Independent expenditures are not subject to contribution limits, but they must be reported to the Federal Election Commission (FEC, n.d.).

These reforms set the stage for the Supreme Court's first major campaign finance case, ***Buckley v. Valeo*** (1976). This case arose after Congress adopted sweeping post-Watergate amendments to the Federal Election Campaign Act, reforms prompted by the Watergate scandal, in which illegal donations and secret funds were used to influence the 1972 presidential election. Challengers to these reforms argued that these new limits violated the First Amendment. The Court responded by upholding limits on direct contributions to candidates, finding that such caps help prevent corruption, but it struck down limits on independent expenditures, candidate self-funding, and total campaign spending because those rules directly restricted how the political speech of individuals and campaigns. *Buckley* therefore established the key distinction that contributions may be limited, but political expenditures generally may not. The Court also ruled that several Federal Election Commission officials had been unconstitutionally appointed, and because they exercised significant federal authority, they had to be appointed by the President and confirmed

by the Senate, requiring Congress to restructure the agency.

After the FEC was restructured, Congress continued refining campaign finance laws in the decades that followed. The **Bipartisan Campaign Reform Act (BCRA) of 2002** addressed two major concerns in federal campaign finance law: soft money and issue advocacy. Before 2002, national political parties routinely raised unlimited "soft money" contributions, which were supposed to be used for party-building activities but in practice often supported federal election efforts. B**CRA prohibited national party committees, federal candidates, and federal officeholders from soliciting or receiving soft money in connection with federal elections.** The law also restricted corporate and union spending on certain "issue advertisements," defined as ads that name a clearly identified federal candidate within 30 days of a primary or 60 days of a general election. These provisions aimed to close major loopholes that had allowed large, unregulated spending to influence federal campaigns. In *McConnell v. FEC* (2003), the Supreme Court upheld most of BCRA's restrictions, concluding that Congress could constitutionally ban soft money and regulate certain forms of election-related advertising to prevent corruption, while striking down only a few narrower provisions such as the ban on contributions by minors. However, the durability of BCRA's remaining restrictions was soon tested, leading to one of the most consequential campaign finance decisions in modern history, *Citizens United v. FEC* (2010).

Excerpt from the Article: ***Citizens United, Explained***

by Daniel I. Weiner

Director of Elections & Government for the Brennan Center for Justice

Click here for full article.

The Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission* is a controversial decision that reversed century-old campaign finance restrictions and enabled corporations and other outside groups to spend unlimited money on elections.....

What was *Citizens United* about? *Citizens United* arose in 2007 when a conservative nonprofit organization challenged campaign finance rules that stopped it from promoting and airing a film criticizing then presidential candidate Hillary Clinton.
The Supreme Court eventually decided 5–4 that Citizens United was within its First Amendment rights to spend its money disseminating the film. ....[T]he Court took the opportunity to entirely strike down century-old prohibitions on corporate "independent" spending — money that doesn't go directly to a candidate or party. This applied to labor unions as well. Lower courts applying the ruling extended it to invalidate almost all fundraising and spending restrictions for groups that purport to be separate from candidates, many of which are today known as "super PACs."

What was the rationale for the ruling? Justice Anthony Kennedy wrote for the narrow majority that limits on independent spending from corporations and other outside groups equate to limiting their speech and thus violate the First Amendment. This ruling doubled down on a 1976 decision, *Buckley v. Valeo,* which was the first case to say that campaign expenditures, or money spent to influence voters, was a type of "speech" and that the only permissible justification for most limits on money in politics was to prevent outright bribery, or as the Court's opinion called it, "quid pro quo corruption."

The justices who decided *Citizens United* held that independent spending could not pose a substantial risk of corruption on the erroneous assumption that the money wouldn't be under the control of any single candidate or party. They also assumed that existing transparency rules would require all the new spending they were permitting to be fully transparent, allowing voters to appropriately evaluate the messages targeting them.....

How has *Citizens United* changed elections in the United States? The ruling has ushered in massive increases in political spending from outside groups, dramatically expanding the already outsized political influence of ultra-wealthy donors, corporations, and special interest groups. In the immediate aftermath of *Citizens United*, analysts focused much of their attention on how the Supreme Court designated corporate spending on elections as free speech. **But perhaps the most significant outcomes of *Citizens United* have been the creation of super PACs, which empower the wealthiest donors, and the expansion of dark money through shadowy nonprofits that don't disclose their donors....**

What are PACs and super PACs? Political action committees, known as PACs, are organizations that raise and spend money for campaigns, or whose major purpose is to support or oppose political candidates or ballot initiatives. Traditional PACs are permitted to donate directly to a candidate's official campaign, but they are also subject to contribution limits, both in terms of what they can receive from individuals and what they can give to candidates. For example, PACs are only permitted to contribute up to $5,000 per year to a candidate per election.

In the 2010 case *Speechnow.org v. FEC*, however, a federal appeals court ruled — applying logic from *Citizens United* — that outside groups could accept unlimited contributions from both individual donors and corporations as long as the groups don't give directly to candidates. Labeled "super PACs," these outside groups were still permitted to spend money on independently produced ads and on other communications that promote or attack specific candidates.

In other words, super PACs are not bound by spending limits on what they can collect or spend. Additionally, super PACs are required to disclose their donors, but those donors can include dark money groups, which make the original source of the donations unclear. And while super PACs are technically prohibited from working directly with candidates, weak rules that are supposed to enforce this separation have often proven ineffective.

Super PAC money, which largely comes from a small group of the very wealthiest donors, started influencing elections almost immediately after *Citizens United*. From 2010 to 2022, super PACs spent approximately $6.4 billion on federal elections. In the 2024 election, they set a record of at least $2.7 billion. Super PAC money has largely eclipsed donations by small donors (people giving $200 or less), despite funds from small donors growing.

For example, in the 2022 midterms, just 21 of the biggest donor families contributed $783 million and billionaires provided 15 percent of all federal election financing — most of which went to super PACs supporting congressional campaigns. These donors easily outspent the total given by the millions of small donors giving to House and Senate candidates that cycle.

What is dark money? Dark money is election spending where the source is secret. *Citizens United* contributed to a major jump in this type of spending, which often comes from nonprofits that are not required to disclose their donors..... Dark money expenditures increased from less than $5 million in 2006 to more than $1 billion in the 2024 presidential elections alone. Because dark money groups need only to report spending for certain activities, such as independent expenditures and electioneering communications, much of their spending has become increasingly difficult to track. Notably, these groups are not required to disclose donations to super PACs — which is where the majority of their spending now goes — or their spending for many types of campaign advertising, including most online ads.

Finally, because they can hide the identities of their donors, dark money groups also provide a way for foreign countries to hide their activity from American voters and law enforcement agencies. This increases the vulnerability of U.S. elections to international interference.....

Over the long-term, *Citizens United* would have to be overturned by a constitutional amendment or the Supreme Court. In the meantime, there are policies that can combat the dominance of big money in politics and the lack of transparency...

Further, candidates can be offered alternative means to fund their campaigns without relying on big donors and super PACs. The most effective way to do that is public campaign financing, specifically small donor matching, in which small private contributions are amplified using public funds...Notably, overwhelming majorities of Americans across party lines have consistently expressed disapproval of *Citizens United*. At least 22 states and hundreds of cities have already voted to support a constitutional amendment to overturn it. And national polls routinely show that reducing the influence of money in politics is a top policy priority for Americans, a finding consistent across demographics including race, age, and political party affiliation.

E. Money & Influence in Elections-continued

The influence of *Citizens United* quickly shaped another major case in the D.C. Circuit. In *SpeechNow.org v. FEC* (D.C. Cir. 2010), the court held that groups engaging solely in independent expenditures cannot be subject to contribution limits because, under the reasoning of *Citizens United*, independent spending does not corrupt candidates. The court concluded that individuals may give unlimited amounts to political committees that make only independent expenditures. This ruling, when combined with *Citizens United*, created what are now known as Super PACs, which may raise unlimited funds from individuals, corporations, nonprofits, and unions as long as they do not coordinate their spending with candidates or campaigns. Although *SpeechNow* was not a Supreme Court decision, the FEC accepted it as a nationwide rule, making it one of the most consequential campaign finance rulings of the modern era.

The Court soon confronted another challenge to federal campaign finance limits in *McCutcheon v. FEC* (2014). In that case, the Supreme Court struck down the federal aggregate contribution limits, which had capped the total amount an individual could donate across all federal candidates, party committees, and PACs during a two-year election cycle. The Court explained that although Congress may limit how much a person can give to any single candidate to prevent corruption, it cannot restrict how many candidates or committees a person chooses to support, because such limits burden political participation without meaningfully preventing quid pro quo corruption. As a result of the decision, individuals may now give the maximum base-level contribution to as many candidates and political committees as they wish, significantly expanding the potential influence of high-dollar donors.

Conclusion

When studying voting rights, it's important to understand the constitutional foundations for voting as well as the major court cases that have expanded or restricted these rights. Being knowledgeable about civil rights and U.S. history requires us to acknowledge both past and present inequities and to recognize the patterns that lead to them. Redistricting and gerrymandering remain significant concerns, especially in an era of heightened partisanship and increased litigation over racial gerrymandering. Since *Citizens United*, some of the most heated public debates have centered on the influence of money in elections, and these concerns cut across party lines.

Because of these challenges, many Americans feel disconnected from the political system and choose not to participate at all, particularly younger voters. Although youth nonparticipation is often attributed to apathy, research shows the reality is far more nuanced. According to a CIRCLE report, many young people did not vote in 2024 because of structural and practical barriers, including lack of time, insufficient information to feel confident about voting, logistical challenges related to being away at college, registration or absentee ballot problems, and personal or financial hardships. Among those who did not vote, 24 percent disliked the candidates, 20 percent believed voting was unimportant, 17 percent were too busy or faced scheduling conflicts, and 14 percent reported lacking enough information. Overall, the findings show that lower youth turnout stems from inequitable access and systemic challenges, as well as frustration with institutional features like the Electoral College, rather than a lack of interest (CIRCLE, 2025). These findings should prompt Americans to reflect on why the people who will live the longest with the consequences of today's policies often have the least political engagement, and how we can build a system in which elected officials truly represent people of all ages and incomes.

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Chapter Fourteen

Emerging Rights and Challenges

A. Overview

B. Emerging Rights and Challenges: The Constitutional Right to Safe Climate

C. Conclusion

A. Overview

This OER explored the structure of the U.S. government, the constitutional foundations of civil rights and liberties, Supreme Court doctrine, individual rights, protections against discrimination, and contemporary civil rights issues. This last chapter will briefly explore an emerging right. **It is my goal to use Chapter Fourteen to highlight a different timely topic each semester.** I welcome suggestions for topics to include in future editions. Please email your ideas to hgetchellbastien@massbay.edu.

B. Emerging Rights and Challenges: The Constitutional Right to Safe Climate

For decades, environmental advocates and civil rights organizations around the world have pursued legal action against corporations whose practices contribute to pollution, greenhouse gas emissions, and climate change. State and federal governments have been sued as well for their failure to adequately regulate or address these harms. **Before examining emerging legal challenges, it is important to understand the scope of the environmental damage facing the planet** (Politico, 2025).

Research over the past several decades shows that common industrial practices jeopardize access to clean air, water, soil, and food. This is largely due to the widespread burning of fossil fuels for energy production in industry, manufacturing, and transportation. Coal-fired power plants and waste incinerators release harmful contaminants such as mercury, arsenic, and lead, while also emitting carbon dioxide and methane, the primary greenhouse gases responsible for global warming. Deforestation makes these effects worse because trees absorb carbon dioxide, and their removal allows more carbon to accumulate in the atmosphere. This results in rising temperatures, stronger storms, prolonged droughts, increased flooding, a rising sea level, and increased air pollution. These conditions contribute to illness, cancer, poverty, and displacement caused by extreme weather events. Several studies also show that air pollution is disproportionately concentrated in low-income and urban communities. As a result, numerous human rights organizations view climate change as a civil rights issue because its consequences impact the health and safety of marginalized populations to a greater extent than other groups (American Civil Liberties Union, 2021; United Nations, n.d.)

Despite the consensus in the scientific community about climate change, some government officials, public figures, and leaders of corporations claim that climate change is exaggerated or nonexistent. They frequently attribute any observed changes to the environment to natural environmental cycles, short-term weather variations, a lack of scientific agreement, or other anomalies. A common argument of climate change deniers is to point to isolated cold weather events to refute "global warming," which shows they misunderstand the term "climate change." Another argument is that climate change has always occurred naturally, and/or that plants, animals, and humans will easily adapt. Climate scientists have consistently rejected these claims, explaining that climate refers to long-term trends rather than short-term weather variations, while pointing to data that the current rate of warming is unprecedented and driven by human activity (Rainforest Alliance, 2022).

Despite these competing arguments, environmental advocates and civil rights organizations have pursued legal remedies for decades. One such remedy is **toxic tort litigation**, an area of law that allows individuals and communities to sue companies whose pollutants or hazardous substances have caused physical injury, environmental damage, or long-term health risks. These cases often involve exposure to industrial chemicals, contaminated water, or air pollution. ***Anderson v. Cryovac, Inc***. (1988) is widely regarded as one of the earliest and most influential modern toxic tort cases, establishing that corporations may be held liable for contaminating a community's drinking water even when plaintiffs face significant challenges in proving direct causation. In some circumstances, plaintiffs have also sued governmental entities for failing to regulate or respond adequately to known environmental hazards. For example, in ***Massachusetts v. Environmental Protection Agency*** *(2007)*, states successfully challenged the federal government's failure to regulate greenhouse gas emissions, and the Supreme Court held that the EPA had authority under the Clean Air Act to address climate-related harms.

Although other case law remedies are available, environmental protection in the United States is primarily governed by statutes such as the **Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**. These laws regulate pollution, protect public health and natural resources, and provide mechanisms for enforcement and cleanup (EPA, 2023).

However, toxic tort cases and environmental litigation remain among the most complex and difficult forms of civil litigation. Plaintiffs must usually prove a **causal connection**, meaning a scientifically supported link between exposure to a particular substance and a specific injury or illness. This burden often requires sophisticated scientific evidence and costly expert testimony. Differing legal standards across jurisdictions, combined with the extensive legal resources available to large corporations, make these cases extremely expensive, time-consuming, and uncertain, even when serious harm has occurred (Bell Legal Group, 2025).

This is why a wide range of organizations in the United States and within the United Nations view a safe climate as a human right. They work to address climate change through research, regulation, advocacy, international negotiation, and community-based environmental justice initiatives. Environmental groups, scientists, youth movements, and diplomatic teams have urged governments and corporations to take stronger action. These efforts are often limited at the international level because the United Nations lacks direct enforcement authority, and political systems in many countries, including the United States, remain heavily influenced by corporate interests. As a result, sustained advocacy, regulatory reform, and consumer actions, such as boycotts, remain central to achieving meaningful climate progress (Human Rights Watch, 2024).

More recently, a new type of legal strategy has emerged that frames climate harm as a constitutional issue. In ***Juliana v. United States*** (2015), twenty-one plaintiffs who were between the ages of 8 and 19 filed suit against the federal government. They argued that the government knowingly promoted fossil fuel use despite understanding its climate impacts, thereby violating their Fifth Amendment due process rights to life, liberty, and property. They also claimed that the government breached a public trust–type duty to protect essential natural resources, particularly the atmosphere, for present and future generations. The case was dismissed on standing and separation-of-powers grounds, and the Supreme Court of the United States declined to hear the case. However, the trial court and circuit court engaged substantially with the constitutional arguments, and the case inspired later lawsuits based on climate harm (May, 2024).

In ***Held v. Montana,*** sixteen Montana youth, ranging in age from 2 to 18, sued the state, arguing that Montana's policies promoting fossil fuel development violated their constitutional right to a "clean and healthful environment." The plaintiffs specifically challenged provisions of the Montana Environmental Policy Act that barred state agencies from considering greenhouse gas emissions when approving energy projects. After a full trial in 2023 a Montana district court ruled in favor of the youth plaintiffs holding that these statutory limits

were unconstitutional because they prevented the state from fulfilling its constitutional duty to protect environmental rights. The state appealed the decision, and Montana Attorney General Austin Knudsen's office characterized the lawsuit as a "taxpayer-funded publicity stunt," calling the ruling "absurd." Montana's Supreme Court heard oral arguments on July 10, 2024, and on December 18, 2024, it affirmed the lower court's decision. Although the ruling is not binding on other states, it is widely viewed as a major victory for state-level climate litigation and a strong model for environmental claims brought under state constitutions that explicitly protect environmental rights (Gelles & Baker, 2023).

Two years later, some of the youth plaintiffs from *Juliana v. United States* and *Held v. Montana* joined with the nonprofit organization Our Children's Trust and other advocates in the ***Lighthiser v. Trump*** case. In *Lighthiser*, twenty-two youth plaintiffs filed suit in the U.S. District Court for the District of Montana challenging a series of executive orders issued by President Trump that expanded fossil fuel production, accelerated energy development on federal lands, weakened environmental review requirements, and limited the consideration of climate change in federal decision-making. The plaintiffs argued that these executive actions would increase greenhouse gas emissions and intensify climate-related harms, thereby violating their Fifth Amendment substantive due process rights to life and liberty. They also alleged that the president exceeded constitutional authority by undermining existing environmental protections and restricting the use of climate science in federal policy. The district court dismissed the case on jurisdictional and separation-of-powers grounds, and the Supreme Court declined to hear it. Although the outcome was a legal loss, Karen Zraick, a climate law reporter for The New York Times, noted that the judge's opinion acknowledged climate change as a children's health emergency, a finding legal experts say could influence how future climate lawsuits are framed, and that the ruling also offered unusually detailed guidance on how plaintiffs might better structure climate claims to address standing and separation-of-powers barriers. As a result, the decision is widely seen as a strategic step forward rather than a complete defeat (Zraick, 2025)

Zraick's optimism is shared by scholars and legal practitioners across the environmental law community. Writing for the American Bar Association, James Robert May explains that although neither U.S. federal law nor international law explicitly recognizes a standalone human right to a healthy climate, courts around the world are increasingly grappling with climate claims framed in terms of human rights, dignity, and intergenerational equity. He points to Montana's constitutional guarantee of a clean and healthful environment in Held v. Montana as an example of how advocates may find greater success by continuing climate advocacy at the state court level rather than in federal courts (May, 2024).

Similarly, Sophia Tidler, writing in the Pace Environmental Law Review, argues that constitutional climate litigation is evolving rather than failing and contends that future progress lies in grounding climate protections within existing constitutional principles, including due process, property rights, and the Constitution's concern for posterity. Drawing on dissents in *Juliana v. United States* and legal developments in other countires, Tidler maintains that courts need not invent new rights but can interpret long-standing constitutional commitments to safeguard a life-sustaining environment for future generations. Taken together, these perspectives support Zraick's assessment that even dismissed federal cases and isolated state-level victories contribute meaningfully to climate litigation strategies by clarifying which legal approaches are more viable, identifying appropriate forums, and shaping the direction of future climate advocacy (Tidler, 2024).

C. Conclusion

The constitutional right to safe climate is an emerging area of law. Although it is not fully recognized in American courts, climate advocacy is likely to gain more momentum in the future. A potential barrier to progress is the current political climate in the United States, which consider to be in a state of crisis. Regardless of one's

political stance, advocacy is essential to changing the status quo. Although it is an American trait to prioritize individual rights, addressing our collective responsibilities is also necessary before anything will change. Our climate will continue to deteriorate regardless of whether governments or corporations acknowledge the harm being done, so the public needs to put pressure on elected officials and businesses to change current practices. Future generations will look back and judge how Americans during this time period responded to the climate crisis and ongoing civil rights violations. Ultimately, it is up to us, individually and collectively, to care enough to change things.

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