

CHAPTER 6

Civil Rights

OBJECTIVES

This chapter focuses on two of the most intense and protracted struggles for civil rights in recent times: that of African Americans and that of women. It also reviews the controversies that have appeared in regard to affirmative action and gay rights. After reading and reviewing the material in this chapter, the student should be able to do each of the following:

1. Contrast the experience of economic interest groups with that of African American groups in obtaining satisfaction for their interests from the government. Indicate why in most circumstances the African American civil rights movement involved interest group rather than client politics. Describe the strategies used by African American leaders and explain why the civil rights movement has become more conventional.
2. Summarize the legal struggles of African Americans to secure rights under the Fourteenth Amendment, and indicate how the Court construed that amendment in the civil rights cases. Discuss the NAACP strategy of litigation, and indicate why it was suited to the political circumstances. Summarize the rulings in *Brown v. Board of Education* and compare them with those in *Plessy v. Ferguson*.
3. Discuss the rationale used by the Supreme Court in ordering busing to achieve desegregation. Explain the apparent inconsistency between *Brown* and *Charlotte-Mecklenburg*. Indicate why these decisions are not inconsistent and explain why the courts chose busing as an equitable remedy to *de jure* segregation.
4. Trace the campaign launched by African Americans for civil rights laws. Discuss the conflict between the agenda-setting and the coalition-building aspects of the movement. Demonstrate how civil rights advocates overcame resistance in Congress.
5. Describe the differences between the African American civil rights movement and the women's movement. Indicate the various standards used by the courts in interpreting the Fourteenth Amendment, and explain how these standards differ depending on whether African Americans or women are involved.
6. Explain why the Equal Rights Amendment was not ratified, despite strong congressional and popular support. Discuss the changing agenda of the women's movement.
7. Explain what is meant by "affirmative action," and discuss how the ideals of equality of opportunity and equality of result play roles in the debate surrounding affirmative action.
8. What is meant by "gay rights"? Discuss the role of the states in the gay rights movement. Explain the difference between gay marriage and civil unions.

OVERVIEW

Through action in the courts and in the Congress, the African American civil rights movement profoundly changed the nature of African Americans' political participation. In particular, southern African Americans entered the political system, establishing an effective array of interest groups. Another decisive move was to mobilize northern opinion on behalf of this civil rights movement. Northerners initially viewed civil rights as an unfair contest between southern whites and southern African Americans; that perception changed when court rulings and legislative decisions applied to the

north as well as the south. Then, there was northern opposition to court-ordered busing and affirmative action programs.

By the time this northern reaction emerged, though, the legal and political system had undergone significant change. It was difficult, if not impossible, to limit the application of civil rights laws to the south or to use legislative means to alter federal court decisions. Courts can accomplish little without strong political allies, as revealed by the massive resistance to the early school desegregation decisions. However, they can accomplish a great deal, even in the face of adverse public opinion, when they have organized allies, as was seen in their ability to withstand anti-busing efforts.

The women's movement has somewhat paralleled the organizational and tactical aspects of the African American civil rights movement. There was a significant difference, however. The women's movement sought to repeal or reverse laws and court rulings that, sometimes, were allegedly designed to protect (rather than to subjugate) them. The conflict between protection and liberty was sufficiently strong that it defeated efforts to ratify the Equal Rights Amendment.

Abortion and affirmative action are among the most divisive civil rights issues in United States politics. From 1973 to 1989, the Supreme Court seemed committed to giving constitutional protection to all abortions within the first trimester, with some regulation allowed thereafter. Since 1989, however, the Court has approved various state restrictions on all abortions.

There has been a similar shift in the Court's view of affirmative action. Though it still approves some quota plans, it now insists that they pass strict scrutiny. This has the effect of ensuring that quotas are instituted only to correct a proven history of discrimination, that they place the burden of proof on the party alleging discrimination, and that they be limited to hirings and not extended to layoffs. Congress has modified some of these rulings through legislation.

The gay rights movement has proceeded along a rather different course than the struggle for African American civil rights or the women's movement. The gay rights movement has largely proceeded on a state-by-state basis, with mixed results. States may not ban same-sex sexual relations, but they do not have to recognize gay marriages conducted in other states. Just as the country is divided on whether gay men and women should have the same rights as their heterosexual counterparts, so policy is divided as well.

CHAPTER OUTLINE WITH KEYED-IN RESOURCES

- I. What are civil rights?
 - A. Group is denied access to facilities, opportunities, or services available to other groups.
 - B. Issue is whether differences in treatment are reasonable.
 1. Some differential treatment is reasonable: for example, progressive taxation
 2. Some differential treatment is not reasonable: for example, classifications by race or ethnicity (suspect classifications) are subject to especially strict scrutiny
- II. The Black Predicament
 - A. Many whites felt deeply threatened by African American integration and political action
 1. Sense of threat was particularly strong in places where African Americans were a majority (i.e., Deep South)
 2. In the North, African American gains often appeared to be at the expense of lower-income whites
 3. Change was even more difficult because African Americans were not able to vote in many areas and often lacked the resources for effective political organizing
 - B. Racism produced some appalling actions
 1. Approximately 3,600 blacks were lynched; this shocked some whites, but little was done
 2. Even in states where blacks voted, popular attitudes did not allow them to buy homes or take jobs on an equal basis with whites

3. Popular opinion was strongly against school integration and integration of public transportation
- C. Progress depended on at least one of two things
 1. Finding more white allies
 2. Shifting to policy-making arenas where whites had less of an advantage
- D. Civil rights movement did both
 1. Broadened base by publicizing the denial to African Americans of essential, widely accepted liberties
 2. Moved their legal and political struggle from Congress to the federal courts
- III. The campaign in the courts (THEME A: CIVIL RIGHTS AND THE COURTS)
 - A. Ambiguities in the Fourteenth Amendment
 1. Broad interpretation: the Constitution is color blind, so no differential treatment is acceptable
 2. Narrow interpretation: equal legal rights, but African Americans and whites could otherwise be treated differently
 3. Supreme Court adopted narrow view in *Plessy v. Ferguson* (1896)
 - B. “Separate but equal”
 1. NAACP campaign relied on courts—litigation didn’t require broad coalitions or changing public opinion
 2. NAACP strategy went through a series of stages:
 - a) Persuade the Supreme Court to declare unconstitutional the laws creating schools that were separate but obviously unequal
 - b) Then persuade the Supreme Court to declare unconstitutional the laws creating schools that were separate but not so obviously unequal
 - c) Then have the Supreme Court rule that separate schools are inherently unequal and therefore unconstitutional
 - C. Can separate schools be equal?
 1. Step 1: obvious inequalities, addressed in 1938–1948 cases
 - a) *Lloyd Gaines* (law school, Missouri)
 - b) *Ada Lois Sipuel* (University of Oklahoma Law School)
 2. Step 2: deciding that separation creates inequality in less obvious cases
 - a) *Heman Sweatt* (University of Texas Law School)
 - b) *George McLaurin* (University of Oklahoma Ph.D. program)
 3. Step 3: declaring that separation is inherently unequal—*Brown v. Board of Education* (neighborhood schools, Topeka, Kansas)
 4. *Brown v. Board of Education* (1954)
 - a) Unanimous Supreme Court opinion overturned *Plessy*
 - b) Implementing the decision
 - (1) Class action suit that applied to all similarly situated African-American children
 - (2) Local federal district courts were to implement the decisions
 - (3) “All deliberate speed” met great resistance
 - (4) Southern Manifesto condemned *Brown* as “abuse of judicial power”
 - (5) Collapse of resistance did not occur until the 1970s
 - c) The rationale for the decision
 - (1) Segregation detrimental, creating sense of inferiority in African American students
 - (2) Relied on social science because the Fourteenth Amendment was not necessarily intended to abolish segregated schools and the Court sought a unanimous opinion
 - d) Desegregation versus integration—what does each require?
 - (1) *De jure* (South) and *de facto* (North) segregation
 - (2) 1968 rejection of “freedom of choice” plan because it did not produce a unitary, nonracial system of education

- (3) *Charlotte-Mecklenburg* (1971) set guidelines for subsequent school integration cases
 - (a) Plaintiff must show school system’s intent to discriminate
 - (b) Continued existence of segregated schools in district with history of segregation creates presumption of intent to discriminate
 - (c) Remedies may include racial quotas, redrawn district lines, and court-ordered busing
 - (d) Not every school needs to reflect the composition of the district as a whole
- (4) Inter-city busing could be authorized only if both the city and the suburbs had practiced segregation
- (5) Importance of intent was that the Supreme Court will not constantly redraw district lines or bus routes
 - (a) White flight may create single race schools.
 - (b) Integrated schools are usually found in integrated neighborhoods and quality school systems
- (6) Busing remained controversial
 - (a) Presidents Nixon, Ford, Reagan opposed busing.
 - (b) Congress unable to pass meaningful legislation; issue had died by late 1980s
- (7) 1992 decision allows busing to end if segregation was caused solely by segregated housing patterns

IV. The campaign in Congress for civil rights legislation

- A. Get issues on the political agenda by mobilizing opinion by dramatic events
 - 1. Sit-ins and freedom rides, voter registration efforts
 - 2. Martin Luther King, Jr., Rosa Parks—Montgomery bus boycott
 - 3. From nonviolent civil disobedience to the “long, hot summers” of racial violence (1964–1968)
- B. Mixed results
 - 1. Agenda-setting success
 - 2. Coalition-building setbacks since demonstrations and riots were seen as law-breaking by many whites
- C. Legislative politics
 - 1. Opponents had strong defensive positions
 - a) Senate Judiciary Committee controlled by southern Democrats
 - b) House Rules Committee controlled by Howard Smith (Virginia)
 - c) Senate filibuster threat
 - d) President Kennedy reluctant to submit strong civil rights legislation
 - 2. Four developments broke this deadlock
 - a) Public opinion changed regarding school integration and access to public facilities
 - b) Violent reactions of segregationists received extensive coverage by the media
 - c) Kennedy assassination
 - d) 1964 Democratic landslide allowed northern Democrats to prevail in Congress
 - 3. Five bills pass, 1957–1968
 - a) 1957, 1960, 1965: voting rights laws
 - b) 1968: housing discrimination law
 - c) 1964 civil rights bill: the high point—employment, public accommodations, voting, schools
 - 4. Since 1960s, mood of Congress has shifted and is now supportive of civil rights legislation
 - 5. Change in congressional response reflects both dramatic rise in African American voting and change in white elite opinion
- D. Racial profiling

1. Definition: the condition in which law enforcement authorities are more likely to stop and question a person because of their race or ethnicity (e.g., “driving while black”)
 - a) Opponents: racial profiling is inherently discriminatory and should never be done
 - b) Alternative perspective: may be that members of some groups are more likely to break the law; stopping innocent people may lead to higher levels of public safety
 - c) Terrorist attacks of 9/11 further heightened the debate and the stakes
 2. Currently have insufficient data to understand how police make their judgments, so that those judgments will balance safety and rights
- V. Women and equal rights (THEME B: WOMEN AND EQUAL RIGHTS)
- A. Seneca Falls Convention (1848): beginning of the women’s rights movement; leaders demanded the right to vote
 1. Several states (particularly in the West) granted women the franchise
 2. The 19th Amendment—passed in 1920—made clear that no one could be denied the right to vote on the basis of sex
 - B. Great change took place during WWII: large-scale female employment in non-traditional jobs in the defense industry
 - C. In the 1970s, Supreme Court began to review gender-based classifications and had to determine what standards to employ
 1. Reasonableness standard versus strict scrutiny
 2. Court chooses a blend—more than reasonable but not as much as strict scrutiny
 3. Gender-based differences have been prohibited by the courts in regard to these issues
 - a) Age of adulthood
 - b) Drinking age
 - c) Arbitrary employee height-weight requirements
 - d) Mandatory pregnancy leaves
 - e) Little League exclusion
 - f) Business and professional associations
 - g) Retirement benefits
 - h) Salaries for high school coaches of girls and boys
 4. Gender-based differences allowed by courts
 - a) Statutory rape
 - b) All-boy/all-girl public schools
 - c) Widows’ property tax exemption
 - d) Delayed promotions in Navy
 5. V.M.I. (Virginia Military Institute) case came close to imposing strict scrutiny test
 - D. The draft
 1. *Rostker v. Goldberg* (1981): Congress may require men but not women to register for the draft
 2. Secretary of defense in 1993 allowed women in air and sea combat positions, but not on ground combat positions
 - E. Sexual harassment
 1. Two forms:
 - a) Quid pro quo rule: sexual favors required as a condition for holding a job or for promotion; employers are strictly liable
 - b) Hostile environment: creating a setting in which harassment impairs a person’s ability to work, employers liable if they were negligent
 2. Supreme Court position continues to evolve and standards are not yet clearly articulated
 - a) Determined that school system not liable for conduct of teacher who seduced a student because the student did not report the actions
 - b) A city was liable for sexually hostile work environment even though employee did not report this to superiors

- c) Female employee who was not promoted after rejecting sexual advances of her boss could recover financial damages from the firm
- F. Privacy and Sex
1. Regulating sexual matters traditionally a state function, under the exercise of the police powers
 - a) States traditionally decided whether and under what circumstances abortion could be obtained
 - b) New York allowed abortions during first 24 weeks of pregnancy; Texas banned abortion except when mother's life was threatened
 2. In 1965, Supreme Court held that states could not prevent sale of contraceptives because that violated the *zone of privacy*
 - a) Privacy not explicitly mentioned in Constitution
 - b) Privacy inferred from various provisions in Bill of Rights
 3. 1973: *Roe v. Wade*
 - a) Struck down Texas ban on abortion and all similar state laws
 - b) Woman's freedom to choose is protected by the Fourteenth Amendment
 - (1) First trimester: no regulations
 - (2) Second trimester: no ban but regulations to protect health of woman
 - (3) Third trimester: abortion ban is possible
 - c) Critics claimed life begins at conception.
 - (1) Fetus is a person entitled to equal protection guaranteed by Fourteenth Amendment
 - (2) Right-to-life, pro-life position
 - d) Supporters said no one can know when life begins—right to choose, pro-choice position
 - e) Constitutional amendments to overturn *Roe* did not pass Congress.
 - f) Hyde amendment (1976): no federal funds for abortion except when woman's life endangered
 4. 1973–1989: Supreme Court withstood attacks on *Roe v. Wade*.
 5. *Webster* (1989): Court upheld some restrictions on abortions.
 6. *Casey* decision (1992) does not overturn *Roe* but permits more restrictions: 24-hour wait, parental consent, pamphlets about alternatives
 7. Struggle over abortion law has recently involved public demonstrations and violence
 - a) Courts must balance the right to protest and the clinic's right to function
 - b) Court has upheld orders that forbid acts of physical obstruction and that provide a buffer zone of 15 feet around clinic entrances

VI. Affirmative action

A. Equality of results

1. Racism and sexism can be overcome only by taking them into account in designing remedies
2. Equal rights not enough; people need benefits
3. Affirmative action—preferential hiring practices—should be used in hiring
4. Women should be given material necessities, such as free daycare, that will help them enter the workforce
5. Position generally justified in the name of diversity or multiculturalism

B. Equality of opportunities

1. Reverse discrimination occurs when race or sex is used as a basis for preferential treatment
2. Laws should be color blind and sex neutral
3. Government should only eliminate barriers
4. Supporters tend to be conservative, favoring traditional family arrangement

C. Issue has been fought out in the courts

1. No clear direction in Court decisions
2. Court is deeply divided—affected by conservative Reagan appointees
3. Law is complex and confusing
 - a) *Bakke* (1978): numerical minority quotas are not permissible, but race could be considered
 - b) However, court upheld federal rule that set aside 10% of all federal construction contracts for minority-owned firms (1980)
 - c) In 1989, Court overturned Virginia law that set aside 30% of construction contracts for minority firms
 - d) In 1990, Court upheld federal rule that gave preference to minority-owned firms in awarding broadcast licenses
4. Emerging standards for quotas and preference systems
 - a) Quota system subjected to strict scrutiny—must be a compelling state interest to justify quotas
 - b) Must correct an actual pattern of discrimination
 - c) Must identify actual practices that discriminate
 - d) Federal quotas will be given deference because the Constitution gives Congress greater power to correct the effects of racial discrimination
 - e) Voluntary preference systems may be easier to justify
 - f) Not likely to apply to persons who get laid off
5. Compensatory action (helping minorities catch up) versus preferential treatment (giving minorities preference, applying quotas)
 - a) Public supports compensatory action but not preferential treatment
 - b) In line with United States political culture
 - (1) Support for individualism
 - (2) Support for the needy
 - c) *Adarand Constructors v. Peña* (1995)—any racial classification is subject to strict scrutiny
 - d) *Gratz v. Bollinger* (2003)—overturned University of Michigan admissions policy that gave “bonus points” to Black, Hispanic and Native American applicants to the undergraduate program
 - e) *Grutter v. Bollinger* (2003) upheld University of Michigan Law School admissions policy that used race as a “plus factor” but not as part of a numerical quota

VII. Gays and the Constitution

A. Court historically willing to allow states to determine homosexual rights

1. *Bowers v. Hardwick* (1986): Georgia allowed to ban homosexual sexual activity

2. Right to privacy designed to protect “family, marriage or procreation”
- B. *Romer v. Evans* (1996): Colorado voters had adopted state constitutional amendment making it illegal to protect persons based on gay, lesbian or bisexual orientation
 1. Supreme Court struck down Colorado amendment
 2. Colorado amendment violated equal protection clause
- C. *Lawrence v. Texas* (2003): Texas law banned sexual conduct between persons of same sex
 1. Supreme Court overturned law
 2. Used same language it had used in cases involving contraception and abortion
- D. Gay marriage
 1. Massachusetts Supreme Judicial Court decided (2003) that gays and lesbians must be allowed to marry in the state
 - a) Massachusetts legislature passed bill to reverse decision
 - b) Legislature must vote again on the matter for it to become state constitutional amendment; may not take effect until 2006
 2. Mayor of San Francisco also issuing gay/lesbian marriage licenses in defiance of state law
 3. Nationally, voters generally opposed to same-sex marriage but would allow “civil unions”
 4. Under 1996 Defense of Marriage Act, no state has to give legal status to same-sex marriage performed in another state
- E. Private groups (e.g., Boy Scouts of America) still allowed to exclude homosexuals from membership

WEB RESOURCES

American Civil Liberties Union (ACLU): <http://www.aclu.org/>

American Memory, The Library of Congress: <http://memory.loc.gov/>

Center for the American Women and Politics: <http://www.cawp.rutgers.edu/>

Civil Rights—Civil Liberties Law Review, Harvard Law School: http://www.law.harvard.edu/Studorgs/crcl_lawreview

The Civil Rights Project, Harvard University: <http://www.law.harvard.edu/groups/civilrights/resources.html>

Historic Places of the Civil Rights Movement: <http://www.cr.nps.gov/nr/travel/civilrights>

Human Rights Campaign: <http://www.hrc.org/>

Log Cabin Republicans (gay Republican party group): <http://www.logcabin.org/>

National Association for the Advancement of Colored People (NAACP): <http://www.naacp.org/>

National Gay and Lesbian Task Force: <http://www.nglftf.org/>

U.N. High Commission Human Rights, Women’s Rights: <http://www.unhchr.ch/women>

U.S. Commission on Civil Rights: <http://www.usccr.gov/home.htm>

U.S. Department of Justice: <http://www.usdoj.gov/>

RESEARCH AND DISCUSSION TOPICS

When would you litigate? Ask students to develop a comprehensive strategy for effecting a change in the law, assessing how and when they would lobby each branch of the government. At what point would they turn to the court? Under what circumstances would they prefer to conduct a test case? to submit an *amicus curiae* brief? How does their strategy update and improve upon the strategy of the NAACP, which successfully eliminated the formal and informal legal protections of segregation.

How would you rewrite the opinion? Perhaps the most famous civil rights ruling is the unanimous Court opinion in *Brown v. Board of Education*. Still, the determination to issue a unanimous opinion forced a series of compromises in the Court’s statement. Ask students to revise the *Brown* opinion, justifying their changes with reference to the law and to civil rights history. What changes do they believe are the most important? Why? Could those changes have been made at the time the opinion was issued? Should the Court have issued a majority opinion, supported by one or more concurring opinions?

What are the rights of citizens? of legal aliens? of “illegal” aliens? The “How Things Work” box in the text sets out the rights of aliens, which can be contrasted with the rights of citizens and of “illegal” (or undocumented) aliens. Ask students whether they agree with these distinctions among the people who live in this country and who pay taxes in support of its government. What are the obligations of the United States government to its citizens and to its non-citizens? Do students believe that these obligations are different in wartime and in peacetime? Why?

What is a “civil union” and how is that different from a “marriage”? Several states (including Vermont, Massachusetts, Connecticut and California) have enacted statutes that allow gay men and women to enter into a “civil union,” which would confer approximately 400 rights granted to married couples, but would not include approximately 1,000 other benefits granted to heterosexual married couples. The benefits that are not conferred upon homosexual civil unions include federal government recognition (e.g., for tax purposes), recognition as a legal union outside of the state in which the union was performed, and subjectivity to divorce and child support laws. Many citizens do not object to gay “civil unions,” but do object to gay “marriage”—arguing that marriage sounds religious, even though thousands of civil (government) marriage ceremonies are performed in this country every year. Should gay couples (male and female) be allowed to marry? Why? What precedent and/or legal basis is there for allowing marriage? For forbidding it? For creating civil unions?

IMPORTANT TERMS

* affirmative action	Programs designed to increase minority participation in some institutions (business, school, labor union, or government agency) by taking positive steps to appoint more minority-group members.
* civil disobedience	Opposing a law one considers unjust by peacefully disobeying it and accepting the resultant punishment.
* civil rights	The rights of people to be treated without unreasonable or unconstitutional differences.
* de facto segregation	Racial segregation that occurs in schools, not as a result of the law, but as a result of patterns of residential settlement.
* de jure segregation	Racial segregation that is required by law.
* equality of opportunity	Giving people an equal chance to succeed.
* equality of result	Making certain that people achieve the same result.
* Jim Crow	A slang expression for the laws and practices that kept African Americans in segregated or subordinated positions.
* police powers	Authority of state governments to secure the safety, comfort, health and morals of their citizens.
* reverse discrimination	Using race or sex to give preferential treatment to some people.
* separate but equal	The doctrine established in <i>Plessy v. Ferguson</i> (1896) that African Americans could constitutionally be kept in separate but equal facilities.
* strict scrutiny	A Supreme Court test to see if a law denies equal protection because it does not serve a compelling state interest and is not narrowly tailored to achieve that goal.
* suspect classifications	Classifications of people on the basis of their race or ethnicity.

THEME A: CIVIL RIGHTS AND THE COURTS

Instructor Resources

Erna Appelt and Monica Jarosch, *Combating Racial Discrimination*. New York: New York University, 2000.

Judith A. Baer, *Women in American Law: The Struggle Toward Equality from the New Deal to the Present*. Holmes & Meier Publishers, Inc., 2002.

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Howard Ball, *The Bakke Case: Race, Education, and Affirmative Action*. Lawrence, KS: University Press of Kansas, 2000.

Taylor Branch, *Pillar of Fire, America in the King Years, 1963-1965*. New York: Simon and Schuster, 1998.

Patricia Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Rights Movement*. Boulder, CO: Westview Press, 2000.

Judith Lynn Failer, *Who Qualifies for Rights: Homelessness, Mental Illness, and Civil Commitment*. Ithaca: Cornell University Press, 2002.

Jorge J. E. Garcia and Pablo De Greiff, eds., *Hispanics/Latinos in the United States: Ethnicity, Race, and Rights*. Routledge, 2000.

Michael R. Gardner, *Harry Truman and Civil Rights: Moral Courage and Political Risks*. Southern Illinois Press, 2002.

Evan Gerstmann, *Same Sex Marriage and the Constitution*. New York: Cambridge University Press, 2003.

Evelyn Nakano Glenn, *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor*. Cambridge, MA: Harvard University Press, 2002.

Leslie J. Harris and Lee E. Teitelbaum, *Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts*. Aspen Publishers, 2002.

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Steven Kasher and Myrlie Evers-Williams, *The Civil Rights Movement: A Photographic History, 1954-68*. Abbeville Press, 2000.

Andrew Koppelman, *The Gay Rights Question in Contemporary American Law*. Chicago: University of Chicago Press, 2002.

Shane Phelan, *Sexual Strangers: Gays, Lesbians, and the Dilemmas of Citizenship*. Philadelphia, PA: Temple University Press, 2001.

David A.J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies*. Chicago: University of Chicago Press, 1999.

Christine Sistare, Larry May, and Leslie Francis, eds., *Groups and Group Rights*. Lawrence, KS: University Press of Kansas, 2000.

Reies Lopez Tijerina, *They Called Me "King Tiger," My Struggle for the Land and Our Rights*. Arte Publico Press, 2000.

C. Vann Woodward, *The Strange Career of Jim Crow*. New York: Oxford University Press, 1974.

Summary

There have been a number of civil rights movements in the United States and the work of these movements continues through grassroots mobilization and through interest-group lobbying. The Instructor References above provide a sampling of works on the African American, women, Latino, and gay-rights movements. Perhaps the most studied of the civil rights movements, to date, is the African American civil rights movement of the mid-twentieth century.

This civil rights campaign was based on the equal protection clause of the Fourteenth Amendment, which says that a state cannot “deny to any person within its jurisdiction the equal protection of the laws.” The members of Congress who drafted and passed this amendment were rather vague about exactly what it meant. The Supreme Court, in *Plessy v. Ferguson*, upheld racial segregation with the *separate but equal* doctrine.

The NAACP, founded in 1909, began a long, concerted campaign to coax the Court to move gradually toward requiring integration. The first victories of this movement came in the courts—African Americans lacked the vote in many areas of the nation and, further, were outnumbered by whites who opposed racial integration. The first phase, during the years 1935 through 1950, involved getting the Court actually to require that separate African-American schools be equal. Phase II, in the famous *Brown* case, involved persuading the Court to overturn the separate-but-equal doctrine. In *Brown*, the Court held that separate is inherently unequal, because segregation “has a detrimental effect upon the colored children” by generating “a feeling of inferiority as to their status in the community,” which may “affect their hearts and minds in a way unlikely ever to be undone.” Phase III involved persuading the Court to reject the separate-but-equal doctrine entirely. It required overcoming massive resistance in the South. In 1964, ten years after *Brown*, only about 2 percent of the African American pupils in the eleven states of the Old Confederacy were attending schools with whites. However, persistence on the part of the federal courts and a softening of southern attitudes (helped by an increase in African American voting) produced an end to effective resistance. By 1970 the dual system was a thing of the past.

Phase IV involved an effort to create racial balance, as opposed to mere nondiscrimination. This produced the highly controversial policy of busing and brought the issue to the North, where most segregation is *de facto* (the result of residential segregation) as opposed to the *de jure* (legally enforced) segregation in the South. That courts called for busing may seem paradoxical, because busing requires that state and local governments use race as the determinant of school assignment, whereas the *Brown* decision held, in effect, that they could not use race in such a way. For the Court, racial balance is not, in itself, a constitutionally required outcome, but rather a remedy for past discrimination. Thus the Court has required busing to achieve a “unitary school system” and eliminate “all vestiges of state-imposed segregation.” As a practical matter, the presence or absence of discrimination is difficult to ascertain, whereas the percentages of African Americans and whites in schools (or in other places) is easily observed. Judges and administrators tend, therefore, toward percentage quotas.

The judicial effort at imposing integration on the country has gradually changed. In two decisions in successive years, the Supreme Court condoned a method by which school systems could gracefully exit from busing. The first case, *Board of Education of Oklahoma City v. Dowell* (1991), involved an attempt to reintroduce neighborhood schools for kindergarten through fourth grade to relieve the travel burden on young children, a change that left the basic student profile in 15 of 58 elementary schools as single race. The Court upheld the plan, ruling that federal supervision of local schools was always designed as a temporary measure. At some point, according to Chief Justice William Rehnquist, democratic process at the local level must be restored. A desegregation decree could be dissolved after a “reasonable period,” despite never attaining the goal of complete integration, if everything “practicable” was done to eliminate past discrimination.

The term “practicable” failed to provide sufficient guidance to lower courts. When exactly does busing cease to function as a “practicable” solution? The Supreme Court outlined a more workable standard in *Freeman v. Pitts* (1992). DeKalb County, Georgia, suffered from a school system with massive skews in racial balance at individual institutions. Fifty percent of the system’s African American students were

attending public schools with 90 percent or more minority enrollment while, within the same district, 27 percent of white students were attending schools with 90 percent or more white enrollment. The school system sought to exonerate itself of discriminatory intent by blaming the segregation on demographic factors.

The Supreme Court unanimously concluded that the existing segregation was not caused by the school system. Although DeKalb County had maintained a dual school system in the past, the county had made a “good faith” effort to compensate for this discrimination by complying with previous court decrees. “Once racial imbalance due to the *de jure* violation has been remedied,” Justice Anthony Kennedy wrote, “the school district is under no duty to remedy imbalance that is caused by demographic factors.” A school system in current compliance with the law cannot logically be required to correct anything.

The significance of the *Freeman* decision is that the Supreme Court articulated a standard for suspending busing that most school systems are probably capable of realizing. Unless a school board has been derelict for the past twenty years, most—but not all—should have made a “good faith” effort to reform by now, especially since noncompliance would have been punished by a federal court injunction long ago.

It would seem that the controversy over busing to achieve racial integration is legally exhausted. Nonetheless, public classrooms in the United States have not been changed much. According to a study by the Harvard Project on School Desegregation, the number of African American children in 1992 attending majority African American institutions was the highest since 1968, 67 percent compared to 77 percent. The Supreme Court may have silenced the controversy but not the problem.

Instructor’s Note: This Theme works well with the box entitled *Key Provisions of Major Civil Rights Cases*; the three *How Things Work* boxes: *Becoming a Citizen*, *The Rights of Aliens*, and *The Rights of the Disabled*; and the *What Would You Do?* exercise about state funding for African-American colleges.

Discussion Questions

1. What exactly did the Fourteenth Amendment guarantee to African Americans?
2. How could the Supreme Court rule that segregation was constitutional?
3. What was the Court's argument in overruling *Plessy*? Suppose it could be proved that segregation did not have a detrimental effect on African American children. Would this require that the Court—in the interests of logical consistency—rule differently in *Brown*?
4. How did the Court move from (a) interpreting the Fourteenth Amendment to mean that African Americans cannot be relegated to particular schools because of their race to (b) requiring that a particular racial balance must exist in schools? Why was it important that the first busing cases to come to the Court were from southern states that had practiced *de jure* segregation?
5. Debate the Court's rulings on busing. Is this an issue that involves constitutional interpretation? Or does it involve the Court in policy-making better handled by a legislature or bureaucratic agency?
6. What similarities and differences can you discern between the African American civil rights movement and that for women? Latinos? Gays and lesbians? Are these differences primarily historical, cultural, or legal? How do those differences affect the remedies necessary to protect these individuals' civil rights?

THEME B: WOMEN AND EQUAL RIGHTS

Instructor Resources

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Nitza Berkovitch, *From Motherhood to Citizenship: Women's Rights and International Organizations*. Baltimore, MD: Johns Hopkins University Press, 2002.

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Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues*. Berkeley: University of California Press, 1988.

Deborah Homsher, *Women & Guns: Politics and the Culture of Firearms in America*, expanded ed. Armonk, NY: M.E. Sharpe, 2001.

Joanna Kerr et al., eds., *The Future of Women's Rights: Global Visions and Strategies*. London: Zed Books, 2005.

Joni Lovenduski, *Feminism and Politics*. Dartmouth Publishing Company, 2000.

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Gwendolyn Mink, *Hostile Environment: The Political Betrayal of Sexually Harassed Women*. Ithaca, NY: Cornell University Press, 2000.

Antonia Pantoja, *Memoir of a Visionary: Antonia Pantoja*. San Francisco: Arte Publico Press, 2002.

Sheila Radford-Hill, *Further to Fly: Black Women and the Politics of Empowerment*. Minneapolis: University of Minnesota Press, 2000.

Phillippa Strum, *Women in the Barracks: The VMI Case and Equal Rights*. Lawrence, KS: University Press of Kansas, 2002.

Christina Wolbrecht, *The Politics of Women's Rights*. Princeton, NJ: Princeton University Press, 2000.

Summary

The movement to expand the rights of women has paralleled the African-American movement in many ways. However, laws treating women differently have traditionally claimed to protect them.

Congress has passed laws requiring equal pay for equal work and prohibiting discrimination in employment and in educational programs. The Supreme Court, too, moved in a feminist direction by requiring, in 1971, that any law that classifies people on the basis of sex “must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” This test is less rigorous than that applied to racial classifications that are “inherently suspect.” The Court has overturned some laws that treat the sexes differently and has upheld others. The Court held in the 1981 case of *Rostker v. Goldberg*, for example, that Congress may draft men but not women without violating due process. The Court has also upheld the congressional decision to deny federal funding for abortions and has allowed for state regulation of abortions.

Discussion Questions

1. Compare and contrast the Supreme Court’s rulings in racial and in gender civil rights cases. What differences exist in their reasoning about race-based versus gender-based inequities in treatment? What are your assessments of this difference?
2. What are the most significant “women’s issues” on the current political agenda? Are these issues of relevance only or even particularly to women? Why or why not?