## 11 Civil Rights Elite and Mass Interaction

## Elite and Mass Opinions and Race

Race has been the central domestic issue of American politics over the long history of the nation. In describing this issue we have relied heavily on the elite model—because elite and mass attitudes toward civil rights differ, and public policy appears to reflect the attitudes of elites rather than masses. Civil rights policy is a response of a national elite to conditions affecting a minority of Americans rather than a response of national leaders to majority sentiments. Policies of the national elite in civil rights have met with varying degrees of mass resistance at the state and local levels. We will contend that national policy has shaped mass opinion more than mass opinion has shaped national policy.

## Black–White Opinion Differences.

The attitudes of white masses toward African Americans are ambivalent. Relatively few whites believe that there is much discrimination in society, or that discrimination is a very serious problem (see [**Table 11–1**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl01)). In contrast, most blacks believe that discrimination is a very serious problem. However, whites and blacks agree that the election of Barak Obama as president will improve race relations.

Whites constitute a large majority of the nation’s population (see [**Figure 11–1**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fig01)). If public policy reflected the views of this *majority,* there would be very little civil rights legislation. Civil rights policy is *not* a response of the government to the demands of the white majority.

## Mass Opinion Lags behind Policy.

White majority opinion has *followed* civil rights policy rather than inspired it. That is, public policy has shaped white opinion rather than white opinion shaping public policy. Consider the changes in opinion among whites toward school integration over the years. Between 1942 and 1985, samples of white Americans were asked this question: “Do you think white and black students should go to the same schools or separate schools?” (See [**Table 11–2**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl02).) In 1942, not one white American in three approved of integrated schools. In 1956, two years *after* the historic *Brown* v. *Topeka* court decision, white attitudes began to shift, although about half of all whites still favored segregation. By 1964, two out of every three whites supported integrated schools. As public school integration proceeded in America, white parents became more accepting of sending their children to schools with substantial black enrollments. But, again, white opinion generally *follows* public policy rather than leads it.

## Elite–Mass Differences.

There is a wide gap between the attitudes of masses and elites on the subject of civil rights. The least favorable attitudes toward blacks are found among the less privileged, less educated whites. Whites of lower socioeconomic status are much less willing to have contact with blacks than those with higher socioeconomic status, whether it is a matter of using the same public restrooms, going to a movie or restaurant, or living next door. It is the affluent, well-educated white who is most concerned with discrimination and who is most willing to have contact with blacks. The political implication of this finding is obvious: opposition to civil rights legislation and to black advancement in education, jobs, income, housing, and so on, is likely to be strongest among less educated and less affluent whites. Within the white community support for civil rights will continue to come from the educated and affluent.

**The Development of Civil Rights Policy**

The initial goal in the struggle for equality in America was the elimination of discrimination and segregation practiced by governments, particularly in voting and public education. Later, discrimination in both public and private life—in transportation, theaters, parks, stores, restaurants, businesses, employment, and housing—came under legal attack.

**The Fourteenth Amendment.**

The Fourteenth Amendment, passed by Congress after the Civil War and ratified in 1868, declares,

* 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 language of the Fourteenth Amendment and its historical context leave little doubt that its original purpose was to achieve the full measure of citizenship and equality for African Americans. During Reconstruction and the military occupation of the Southern states, some radical Republicans were prepared to carry out in Southern society the revolution this amendment implied. The early success of Reconstruction was evident in widespread black voting throughout the South and the election of blacks to federal and state offices. Congress even tried to legislate equal treatment in theaters, restaurants, hotels, and public transportation in the Civil Rights Act of 1875, only to have the Supreme Court declare the effort unconstitutional in 1883.[**1**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn01)

Eventually Reconstruction was abandoned; the national government was not prepared to carry out the long and difficult task of really reconstructing society in the eleven states of the former Confederacy. In the Compromise of 1877, the national government agreed to end military occupation of the South, gave up its efforts to rearrange Southern society, and lent tacit approval to white supremacy in that region. In return, the Southern states pledged their support of the Union; accepted national supremacy; and agreed to permit the Republican candidate, Rutherford B. Hayes, to assume the presidency, even though his Democratic opponent, Samuel J. Tilden, had won more popular votes in the disputed election of 1876.

**Segregation.**

The Supreme Court agreed to the terms of the compromise. The result was a complete inversion of the meaning of the Fourteenth Amendment so that it became a bulwark of segregation. State laws segregating the races were upheld. The constitutional argument on behalf of segregation under the Fourteenth Amendment was that the phrase “equal protection of the laws” did not prevent state-enforced *separation* of the races. Schools and other public facilities that were “separate but equal” won constitutional approval. This separate but equal doctrine became the Supreme Court’s interpretation of the Equal Protection Clause of the Fourteenth Amendment in *Plessy* v. *Ferguson* in 1896.[**2**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn02)

However, segregated facilities, including public schools, were seldom if ever equal, even in physical conditions. In practice, the doctrine of segregation was separate and *un*equal. The Supreme Court began to take notice of this after World War II. Although it declined to overrule the segregationist interpretation of the Fourteenth Amendment, it began to order the admission of individual blacks to white public universities when evidence indicated that separate black institutions were inferior or nonexistent.[**3**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn03)

**NAACP.**

Leaders of the newly emerging civil rights movement in the 1940s and 1950s were not satisfied with court decisions that examined the circumstances in each case to determine if separate school facilities were really equal. Led by Roy Wilkins, executive director of the National Association for the Advancement of Colored People (NAACP), and Thurgood Marshall, chief counsel for the NAACP, the civil rights movement pressed for a court decision that segregation *itself* meant inequality within the meaning of the Fourteenth Amendment, whether or not facilities were equal in all tangible respects. In short, they wanted a complete reversal of the separate but equal interpretation of the Fourteenth Amendment and a ruling that laws separating the races were unconstitutional.

The civil rights groups chose to bring suit for desegregation to Topeka, Kansas, where segregated black and white schools were equal in buildings, curricula, qualifications, and salaries of teachers, and other tangible factors. The object was to prevent the Court from ordering the admission of blacks because tangible facilities were not equal and to force the Court to review the doctrine of segregation itself.

***Brown* v. *Topeka*.**

The Court rendered its historic decision in *Brown* v. *Board of Education of Topeka, Kansas,* on May 17, 1954:

* 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 law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.[**4**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn04)

Note that this first great step toward racial justice in the twentieth century was taken by the *nonelective* branch of the federal government. Nine men, secure in their positions with lifetime appointments, responded to the legal arguments of highly educated black leaders, one of whom—Thurgood Marshall—would later become a Supreme Court justice himself. The decision was made by a judicial elite, not by the people or their elected representatives.

**Mass Resistance to Desegregation**

Although the Supreme Court had spoken forcefully in the *Brown* case in declaring segregation unconstitutional, from a political viewpoint the battle over segregation was just beginning. Segregation would remain a part of American life, regardless of its constitutionality, until effective elite power was brought to bear to end it. The Supreme Court, by virtue of the American system of federalism and separation of powers, has little direct force at its disposal. Congress, the president, state governors and legislatures, and even mobs of people can act more forcefully than the federal judiciary. The Supreme Court must rely largely on the other branches of the federal government and on the states to enforce the law of the land.

The Congress of the United States required the segregation of the races in the public schools of the District of Columbia. Four additional states—Arizona, Kansas, New Mexico, and Wyoming—authorized segregation on the option of local school boards.

Thus, in deciding *Brown* v. *Topeka,* the Supreme Court struck down the laws of twenty-one states and the District of Columbia in a single opinion. Such a far-reaching decision was bound to meet with difficulties in implementation. In an opinion delivered the following year, the Supreme Court declined to order immediate nationwide desegregation but instead turned over the responsibility for desegregation to state and local authorities under the supervision of federal district courts. The way was open for extensive litigation, obstruction, and delay by states that chose to resist.

The six border states with segregated school systems—Delaware, Kentucky, Maryland, Missouri, Oklahoma, West Virginia—together with the school districts in Kansas, Arizona, and New Mexico that had operated segregated schools chose not to resist desegregation formally. The District of Columbia also desegregated its public schools the year following the Supreme Court’s decision.

## State Resistance.

However, resistance to school integration was the policy choice of the eleven states of the Old Confederacy. Refusal of a school district to desegregate until it was faced with a federal court injunction was the most common form of delay. State laws that were obviously designed to evade constitutional responsibilities to end segregation were struck down in federal courts; but court suits and delays slowed progress toward integration. On the whole, those states that chose to resist desegregation were quite successful in doing so from 1954 to 1964. In late 1964, ten years after the *Brown* decision, only about 2 percent of the black schoolchildren in the eleven southern states were attending integrated schools.

## Presidential Use of Force.

The historic *Brown* decision might have been rendered meaningless had President Dwight Eisenhower not decided to use military force in 1957 to secure the enforcement of a federal court order to desegregate Little Rock’s Central High School. Governor Orval Faubus had posted state units of the Arkansas National Guard at the high school to prevent federal marshals from carrying out federal court orders to admit black students. President Eisenhower officially called the Arkansas National Guard units into federal service, ordered them to leave the high school, and replaced them with units of the U.S. Eighty-Second Airborne Division under orders to enforce desegregation. Eisenhower had not publicly spoken on behalf of desegregation, but the direct threat to national power posed by a state governor caused the president to assert the power of the national elite. President John F. Kennedy also used federal troops to enforce desegregation at the University of Mississippi in 1962.

## Congress and the Power of the Purse.

Congress entered the civil rights field in support of court efforts to achieve desegregation in the Civil Rights Act of 1964. Title VI provided that every federal department and agency must take action to end segregation in all programs or activities receiving federal financial assistance. It was specified that this action was to include termination of financial assistance if states and communities receiving federal funds refused to comply with federal desegregation orders. Thus, in addition to court orders requiring desegregation, states and communities faced administrative orders, or “guidelines,” from federal executive agencies threatening loss of federal funds for noncompliance.

## Unitary Schools.

The last legal excuse for delay in implementing school desegregation collapsed in 1969 when the Supreme Court rejected a request by Mississippi school officials for a delay in implementing school desegregation in that state. The Court declared that every school district was obligated to end dual school systems “at once” and “now and hereafter” to operate only unitary schools.[**5**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn05) The effect of the decision, fifteen years after the original *Brown* case, was to eliminate any further legal justification for the continuation of segregation in public schools.

## Racial Balancing in Public Schools

After over a half century of efforts at desegregation by law, de facto segregation—black children attending public schools in which more than half the pupils are black—continues to characterize American education. Indeed, nationwide, roughly two-thirds of all black public school pupils attend schools with a black majority. One-third of black pupils attend schools with 90 to 100 percent minority enrollment.[**6**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn06) Years ago, the U.S. Civil Rights Commission reported that even when segregation was de facto—that is, a product of segregated housing patterns and neighborhood school attendance—the adverse effects on black students were still significant.[**7**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn07)

Ending racial isolation in the public schools often involves busing schoolchildren into and out of segregated neighborhoods. The objective is to achieve a racial balance in each public school, so that each has roughly the same percentage of blacks and whites as are found in the total population of the entire school district. Indeed, in some large cities where blacks make up the overwhelming majority of public school students, ending racial isolation may require city students to be bused to the suburbs and suburban students to be bused to the core city.

## Federal Court Intervention.

Federal district judges enjoy wide freedom in fashioning remedies for past or present discriminatory practices by governments. If a federal district court anywhere in the United States finds that any actions by governments or school officials have contributed to racial imbalances (e.g., by drawing school district attendance lines), the judge may order the adoption of a desegregation plan to overcome racial imbalances produced by official action.

In the important case of *Swann* v. *Charlotte-Mecklenburg County Board of Education* (1971), the Supreme Court upheld (1) the use of racial balance requirements in schools and the assignment of pupils to schools based on race, (2) “close scrutiny” by judges of schools that are predominantly of one race, (3) gerrymandering of school attendance zones as well as “clustering” or “grouping” of schools to achieve equal balance, and (4) court-ordered busing of pupils to achieve racial balance.[**8**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn08)The Court was careful to note, however, that racial imbalance in schools is not itself grounds for ordering these remedies, unless it is also shown that some present or past government action contributed to the imbalance.

In the absence of any government actions contributing to racial imbalance, states and school districts are *not* required by the Fourteenth Amendment to integrate their schools. For example, where central-city schools are predominantly black and suburban schools are predominantly white because of residential patterns, cross-district busing is not required unless some official action brought about these racial imbalances. Thus, in 1974, the Supreme Court threw out a lower federal court order for massive busing of students between Detroit and fifty-two suburban school districts. Although Detroit city schools were 70 percent black, none of the Detroit-area school districts segregated students within their own boundaries. Chief Justice Burger, writing for the majority, said, “Unless [Detroit officials] drew the district lines in a discriminatory fashion, or arranged for the white students residing in the Detroit district to attend schools in Oakland or Macomb counties, they were under no constitutional duty to make provision for Negro students to do so.”[**9**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn09) In a strong dissent, Justice Thurgood Marshall wrote, “In the short run it may seem to be the easiest course to allow our great metropolitan areas to be divided up each into cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.” This important decision means that the largely black central cities, surrounded by largely white suburbs, will remain segregated in practice.

Racial isolation continues to characterize public schools in many of the nation’s largest cities; racial isolation is especially prevalent in cities with majority African American populations, for example, Atlanta, Baltimore, Cleveland, Detroit, Memphis, New Orleans, Newark, St. Louis, and Washington, DC.[**10**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn10)

## An End to Racial Balancing?

Recent Supreme Court decisions suggest that racial balancing in public elementary and secondary schools may be nearing an end. With regard to schools with a history of segregation (Southern schools), the Supreme Court has begun to address the question of when desegregation has been achieved and therefore when racial balancing plans can be abandoned. In the 1990s the Court began to free school districts from direct federal court supervision and court-ordered racial balancing. When the last vestiges of state-sanctioned discrimination have been removed “as far as practicable,” the Supreme Court has allowed lower federal courts to dissolve racial balancing plans even though imbalances due to residential patterns continue to exist.[**11**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn11)

The Supreme Court has also held that all racial classifications by governments for whatever purpose are subject to “strict scrutiny” by the courts.[**12**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn12) This means that racial classifications must be “narrowly tailored” to achieve a “compelling government interest.” When a Seattle, Washington, school district voluntarily adopted student assignment plans that relied on race to determine which schools certain children would attend, the Supreme Court held that the district had violated the Fourteenth Amendment’s guarantee of equal protection of the laws.[**13**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn13) In as much as the Seattle district had no history of segregation, its racial balancing was subject to the strict scrutiny test. The Court went on to reason that achieving “diversity” in the student body was not proven to be a compelling interest in public elementary and secondary schools. Moreover, the Seattle district’s racial balancing plan was not narrowly tailored; the district had failed to consider race-neutral assignment plans that might achieve the same outcome as racial classifications. The Court noted that the Seattle plan considered race exclusively and not in a broader definition of “diversity.” The effect of the decision is to force school districts across the country to reconsider voluntary racial balancing plans.

## The Civil Rights Movement

The early goal of the civil rights movement in America was to prevent discrimination and segregation by *governments,* particularly states, municipalities, and school districts. But even while important victories for the civil rights movement were being recorded in the prevention of discrimination by governments, particularly in the *Brown* case, the movement began to broaden its objectives to include the elimination of discrimination in *all* segments of American life, private as well as public. Governments should not only cease discriminatory practices of their own, they should also act to halt discrimination by private firms and individuals.

The goal of eliminating discrimination in private life creates a positive obligation of government to act forcefully in public accommodations, employment, housing, and many other sectors of society. When the civil rights movement turned to combating private discrimination,

practices of their own, they should also act to halt discrimination by private firms and individuals.

The goal of eliminating discrimination in private life creates a positive obligation of government to act forcefully in public accommodations, employment, housing, and many other sectors of society. When the civil rights movement turned to combating private discrimination, it had to carry its fight into the legislative branch of government. The federal courts could help end discrimination by state and local governments and school authorities, but only Congress, state legislatures, and city councils could end discrimination practiced by private owners of restaurants, hotels, and motels, private employers, landlords, real estate agents, and other individuals who were not government officials.

**The Montgomery Bus Boycott.**

The leadership in the struggle to eliminate discrimination and segregation from private life was provided by a young African American minister, Martin Luther King, Jr. His father was the pastor of one of the South’s largest and most influential congregations, the Ebenezer Baptist Church in Atlanta, Georgia. Martin Luther King, Jr., received his doctorate from Boston University and began his ministry in Montgomery, Alabama. In 1955 the African American community of Montgomery began a year-long boycott, with frequent demonstrations against the Montgomery city buses over segregated seating. The dramatic appeal and the eventual success of the boycott in Montgomery brought nationwide attention to its leader and led to the creation in 1957 of the Southern Christian Leadership Conference.

**Nonviolent Direct Action.**

Under King’s leadership the civil rights movement developed and refined political techniques for minorities in American politics, including nonviolent direct action, a form of protest that involves breaking “unjust” laws in an open, “loving,” nonviolent fashion. The general notion of civil disobedience is not new; it has played an important role in American history, from the Boston Tea Party to the abolitionists who illegally hid runaway slaves, to the suffragettes who demonstrated for women’s voting rights, to the labor organizers who formed the nation’s major industrial unions, to the civil rights workers of the early 1960s who deliberately violated segregation laws. The purpose of the nonviolent direct action is to call attention, or to “bear witness,” to the existence of injustice. In the words of King, civil disobedience “seeks to dramatize the issue so that it can no longer be ignored.”[**14**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn14)

There should be no violence in true civil disobedience, and only “unjust” laws are broken. Moreover, the law is broken “openly, lovingly” and with a willingness to accept the penalty. Punishment is actively sought rather than avoided since it will help to emphasize the injustice of the law. The object is to stir the conscience of an elite and win support for measures that will eliminate the injustices. By willingly accepting punishment for the violation of an unjust law, one demonstrates the strength of one’s convictions. The dramatization of injustice makes news, the public’s sympathy is won when injustices are spotlighted, and the willingness of demonstrators to accept punishment is visible evidence of their sincerity. Cruelty or violence directed against the demonstrators by police or others plays into the hands of the protesters by further emphasizing the injustices they are experiencing.

**Martin Luther King, Jr.**

In 1963 a group of Alabama clergymen petitioned Martin Luther King, Jr., to call off mass demonstrations in Birmingham. King, who had been arrested in the demonstrations, replied in his famous “Letter from Birmingham City Jail”:

* In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it *openly, lovingly* (not hatefully as the white mothers did in New Orleans when they were seen on television screaming “nigger, nigger, nigger”) and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.[**15**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn15)

It is important to note that King’s tactics relied primarily on an appeal to the conscience of white elites. The purpose of demonstrations was to call attention to injustice and stimulate established elites to remedy the injustice by lawful means. The purpose of civil disobedience was to dramatize injustice; only *unjust* laws were to be broken “openly and lovingly,” and punishment was accepted to demonstrate sincerity. King did *not* urge black masses to remedy injustice themselves by any means necessary; and he did *not* urge the overthrow of established elites.

In 1964, Martin Luther King, Jr., received the Nobel Peace Prize in recognition of his unique contributions to the development of nonviolent methods of social change.

**“I Have a Dream.”**

The culmination of the nonviolent philosophy was a giant, yet orderly, march on Washington, held on August 28, 1963. More than 200,000 blacks and whites participated in the march, which was endorsed by many labor leaders, religious groups, and political figures. The march ended at the Lincoln Memorial where King delivered his most eloquent appeal, entitled “I Have a Dream”: “I have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: ‘We hold these truths to be self-evident, that all men are created equal.’” In response President Kennedy sent a strong civil rights bill to Congress, which was passed after his death—the famous Civil Rights Act of 1964.

**The Civil Rights Act of 1964.**

The Civil Rights Act of 1964 passed both houses of Congress by better than a two-thirds favorable vote; it won the overwhelming support of both Republican and Democratic members of Congress. It was signed into law by President Lyndon Johnson on July 4, 1964. It ranks with the Emancipation Proclamation, the Fourteenth Amendment, and *Brown* v. *Topeka* as one of the most important steps toward full equality for blacks in America. Among its most important provisions are the following:

* *Title II:* It is unlawful to discriminate or segregate persons on the grounds of race, color, religion, or national origin in any public accommodation, including hotels, motels, restaurants, movies, theaters, sports arenas, entertainment houses, and other places that offer to serve the public. This prohibition extends to all establishments whose operations affect interstate commerce or whose discriminatory practices are supported by state action.
* *Title VI:* Each federal department and agency shall take action to end discrimination in all programs or activities receiving federal financial assistance in any form. This action shall include termination of financial assistance.
* *Title VII:* It shall be unlawful for any employer or labor union to discriminate against any individual in any fashion in employment because of his race, color, religion, sex, or national origin, and that an Equal Employment Opportunity Commission shall be established to enforce this provision by investigation, conference, conciliation, persuasion, and if need be, civil action in federal court.

**The Civil Rights Act of 1968.**

For many years fair housing had been considered the most sensitive area of civil rights legislation. Discrimination in the sale and rental of housing was the last major civil rights problem on which Congress took action. Discrimination in housing had not been mentioned in any previous legislation—not even in the comprehensive Civil Rights Act of 1964. Prohibiting discrimination in the sale or rental of housing affected the constituencies of northern members of Congress more than any of the earlier, southern-oriented legislation.

The prospects for a fair housing law were not very good at the beginning of 1968. However, when Martin Luther King, Jr., was assassinated on April 4, the mood of Congress and the nation changed dramatically. Congress passed a fair housing law as tribute to the slain civil rights leader.

The Civil Rights Act of 1968 prohibited the following forms of discrimination:

* Refusal to sell or rent a dwelling to any person because of his race, color, religion, or national origin.
* Discrimination against a person in the terms, conditions, or privileges of the sale or rental of a dwelling.
* Advertising the sale or rental of a dwelling indicating a preference or discrimination based on race, color, religion, or national origin.

**Public Policy and Affirmative Action**

The gains of the early civil rights movement were primarily gains in *opportunity* rather than in *results.* Racial politics today center on the actual inequalities between whites and minorities in incomes, jobs, housing, health, education, and other conditions of life.

**Continuing Inequalities.**

The problem of inequality is often posed as differences in the “life chances” of whites and minorities (see [**Table 11–3**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl03)). The average income of a black household is only 68 percent of the average white household income. More than 24 percent of all black families are below the recognized poverty line, while only about 10 percent of white families live in poverty. The black unemployment rate is more than twice as high as the white unemployment rate. The civil rights movement of the 1960s opened up new opportunities for black Americans. But equality of opportunity is not the same as equality of results.

**Opportunity versus Results.**

Most Americans are concerned more with equality of opportunity than equality of results. *Equality of opportunity* refers to the ability to make of oneself what one can; to develop one’s talents and abilities; and to be rewarded for work, initiative, and achievement. It means that everyone comes to the same starting line with the same chance of success, that whatever differences develop over time do so as a result of abilities, talents, initiative, hard work, and perhaps good luck. *Equality of results* refers to the equal sharing of income, jobs, contracts, and material rewards regardless of one’s condition in life. It means that everyone starts and finishes the race together, regardless of ability, talent, initiative, or work.

## Equal Opportunity versus Affirmative Action.

The earlier emphasis of government policy, of course, was nondiscrimination, or equal employment opportunity. “It was not a program to offer special privilege to any one group of persons because of their particular race, religion, sex, or national origin.”[**16**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn16) This appeared to conform to the original nondiscrimination approach, beginning with President Harry Truman’s decision to desegregate the armed forces in 1946 and carrying through Title VI and Title VII of the Civil Rights Act of 1964 to eliminate discrimination in federally aided projects and private employment.

Gradually, however, the goal of the civil rights movement shifted from the traditional aim of *equality of opportunity* through nondiscrimination alone to affirmative action to establish “goals and timetables” to achieve *equality of results* between blacks and whites. While avoiding the term *quota,* the notion of affirmative action tests the success of equal employment opportunity by observing whether blacks achieve admissions, jobs, and promotions in proportion to their numbers in the population.

Affirmative action programs were initially products of the federal bureaucracy. They were not begun by Congress. Instead, they were developed by the federal executive agencies that were authorized by the Civil Rights Act of 1964 to develop “rules and regulations” for desegregating activities receiving federal funds (Title VI) and private employment (Title VII). President Lyndon B. Johnson gave impetus to affirmative action with Executive Order No. 11246 in 1965, which covered employment and promotion in federal agencies and businesses contracting with the federal government. In 1972 the U.S. Office of Education issued guidelines that mandated “goals” for university admissions and faculty hiring of minorities and women. The Equal Employment Opportunity Commission, established by the Civil Rights Act of 1964 (Title VII) to eliminate discrimination in private employment, has carried the notion of affirmative action beyond federal contractors and recipients of federal aid into all sectors of private employment.

## The Supreme Court and Affirmative Action

Affirmative action programs pose some important constitutional questions. Do these programs discriminate against whites in violation of the Equal Protection Clause of the Fourteenth Amendment? Do these programs discriminate against whites in violation of the Civil Rights Act of 1964, which prohibits discrimination “on account of race,” not just discrimination against African Americans?

## The Bakke Case.

In an early, controversial case, *Regents of the University of California* v. *Bakke* (1978), the Supreme Court struck down a special admissions program for minorities at a state medical school on the grounds that it excluded a white applicant because of his race and violated his rights under the equal protection clause.[**17**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn17) Allan Bakke applied to the University of California Davis Medical School two consecutive years and was rejected; in both years black applicants with significantly lower grade point averages and medical aptitude test scores were accepted through a special admissions program that reserved sixteen minority places in a class of one hundred.[**\***](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn01a) The University of California did not deny that its admissions decisions were based on race. Instead, it argued that its racial classification was “benign,” that is, designed to assist minorities, not to hinder them. The special admissions program was designed (1) to “reduce the historical deficit of traditionally disfavored minorities in medical schools and the medical profession,” (2) to “counter the effects of societal discrimination,” (3) to “increase the number of physicians who will practice in communities currently underserved,” and (4) to “obtain the educational benefits that flow from an ethnically diverse student body.”

\*Bakke’s grade point average was 3.51; his MCAT scores were verbal 96, quantitative 94, science 97, general information 72. The *average* for the special admissions students were grade point average 2.62, MCAT verbal 34, quantitative 30, science 37, general information 18.

The Court held that these objectives were legitimate and that race and ethnic origin may be considered in reviewing applications to a state school without violating the Equal Protection Clause. However, the Court also held that a separate admissions program for minorities with a specified quota of openings that were unavailable to white applicants did violate the Equal Protection Clause. The Court ordered Bakke admitted to medical school and the elimination of the special admissions program. It recommended that California consider developing an admissions program that considered disadvantaged racial or ethnic background as a “plus” in an overall evaluation of an application, but did not set numerical quotas or exclude any persons from competing for all positions.

## Affirmative Action as a Remedy for Past Discrimination.

However, the Supreme Court has approved affirmative action programs where there is evidence of past discriminatory actions. In *United Steelworkers of America* v. *Weber* (1979), the Court approved a plan developed by a private employer and a union to reserve 50 percent of higher-paying, skilled jobs for minorities. Kaiser Aluminum Corporation and the United Steelworkers Union, under federal government pressure, had established a program to get more African Americans into skilled technical jobs. When Weber was excluded from the training program and African Americans with less seniority and fewer qualifications were accepted, he filed suit in federal court claiming that he had been discriminated against because of his race in violation of Title VII of the Civil Rights Act of 1964. But the Supreme Court held that Title VII of the Civil Rights Act of 1964 “left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such … affirmative action plans.” Weber’s reliance on the clear language of Title VII was “misplaced.” According to the Court, it would be “ironic indeed” if the Civil Rights Act were used to prohibit voluntary, private race-conscious efforts to overcome the past effects of discrimination.[**18**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn18)

Despite changing membership over time, the Supreme Court has not altered its policy regarding affirmative action as a remedy for past discrimination. In *United States* v. *Paradise* (1987), the Court upheld a rigid 50 percent African American quota system for promotions in the Alabama Department of Safety, which had excluded blacks from the ranks of state troopers before 1972 and had not promoted any blacks higher than corporal before 1984. In a 5-to-4 decision, the majority stressed the long history of discrimination in the agency as a reason for upholding the quota system. Whatever burdens were imposed on innocent parties were outweighed by the need to correct the effects of past discrimination.

**Cases Questioning Affirmative Action.**

Yet in the absence of past discrimination, the Supreme Court has expressed concern about whites who are directly and adversely affected by government action solely because of their race. In *Firefighters Local Union* v. *Stotts* (1984), the Court ruled that a city could not lay off white firefighters in favor of black firefighters with less seniority.[**20**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn20) In *Richmond* v. *Crosen* (1989), the Court held that a minority set-aside program in Richmond, Virginia, which mandates that 30 percent of all city construction contracts must go to “blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts,” violated the Equal Protection Clause of the Fourteenth Amendment.[**21**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn21)

However, the Supreme Court has never adopted the *color-blind doctrine* first espoused by Justice John Harlan in his dissent from *Plessy* v. *Ferguson*—that “our constitution is color-blind and neither knows nor tolerates classes among citizens.”[**22**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn22) If the Equal Protection Clause required that the laws of the United States and the states be truly color-blind, then *no* racial preferences, goals, or quotas would be tolerated. This view has occasionally been expressed in minority dissents and concurring opinions.[**23**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn23)

**Proving Discrimination.**

The Civil Rights Act of 1964, Title VII, bars racial or sexual discrimination in employment. But how can persons who feel that they have been passed over for jobs or promotions go about the task of proving that discrimination was involved? Evidence of direct discrimination is often difficult to obtain. Can underrepresentation of minorities or women in a work force be used as evidence of discrimination, in the absence of any evidence of direct discriminatory practice? If an employer uses a requirement or test that has a “disparate effect” on minorities or women, who has the burden of proof that the requirement or test is relevant to effective job performance?

The Supreme Court responded to both of these questions in its interpretation of the Civil Rights Act in *Wards Cove Packing Co., Inc.* v. *Atonio* (1989).[**24**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn24) In a controversial 5-to-4 decision, the Court held that statistical imbalances in race or gender in the workplace were *not* sufficient evidence by themselves to prove discrimination. The Court also ruled that it was up to the plaintiffs to prove that an employer had no business reason for requirements or tests that had an adverse impact on minorities or women. This decision clearly made it more difficult to prove job discrimination.

Civil rights groups were highly critical of what they regarded as the Supreme Court’s “narrowing” of the Civil Rights Act protections in employment. They turned to Congress to rewrite portions of the Civil Rights Act to restore these protections. Business lobbies, however, believed that accepting statistical imbalances as evidence of discrimination or shifting the burden of proof to employers would result in hiring by “quotas” simply to avoid lawsuits. After nearly two years of negotiations on Capitol Hill and a reversal of President George H.W. Bush’s initial opposition, Congress crafted a policy in its Civil Rights and Women’s Equity Act of 1991. Among the more important provisions of the act are the following:

* *Statistical imbalances:* The mere existence of statistical imbalance in an employer’s work force is not, by itself, sufficient evidence to prove discrimination. However, statistical imbalances may be evidence of employment practices (rules, requirements, academic qualifications, tests) that have a “disparate impact” on minorities or women.
* *Disparate employment practices:* Employers bear the burden of proof that any practice that has a “disparate impact” is necessary and has “a significant and manifest relationship to the requirements for effective job performance.”

**“Strict Scrutiny.”**

In 1995, the Supreme Court held that racial classifications in law must be subject to “strict scrutiny.” This means that race-based actions by government—any disparate treatment of the races by federal, state, or local public agencies—must be found necessary to remedy past proven discrimination, or to further clearly identified legitimate and “compelling” government objectives. Moreover, it must be “narrowly tailored” so as not to adversely affect the rights of individuals. In striking down a federal construction contract set-aside program for small businesses owned by racial minorities, the Court expressed skepticism about governmental racial classifications: “There is simply no way of determining what classifications are ‘benign’ and ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”[**25**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn25)

**Affirmative Action in Higher Education.**

College and university efforts to achieve “diversity” in higher education, that is, efforts to recruit more minority students and faculty are also subject to “strict scrutiny”. In practice, diversity is another term for affirmative action. (See “‘Diversity in Higher Education” in [**Chapter 6**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch06).) The U.S. Supreme Court ruled in 2003 that diversity may be “a compelling government interest.”[**26**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn26) However, programs to achieve diversity must be “narrowly tailored” to that purpose. They must not establish race as the “decisive factor” in university admissions.[**27**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn27)

**Mass Opinion and Affirmative Action**

Americans are divided over the issue of affirmative action. Polls reveal that whites are almost equally divided when the question is posed as general support for “affirmative action.” In contrast, blacks and Hispanics are strongly supportive of affirmative action programs for racial minorities.[**2**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn28)

But when the question is phrased in a way that implies minority preference over merit for admission to colleges and universities, then a strong majority of whites favor admission “solely on the basis of merit.” Hispanics also favor merit over racial preference, but blacks appeared to be split on the issue.

* Q. “Which comes closer to your view about evaluating students toward admission into a college or university?
* Applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted. Or, an applicant’s race and ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted.”

| most Americans agree that discrimination still exists in American society. Many supporters of affirmative action would ideally prefer a society in which “our children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Martin Luther King, Jr.’s dream remains the ultimate goal for the nation. Elites are more likely to see race-conscious policies as a continuing necessity to remedy currentdiscrimination and the effects of past discrimination. Elites perceive affirmative action as a necessary tool in achieving equality of opportunity.  **Mass Initiatives against Racial Preferences.**  “Direct democracy,” in which the people themselves initiate and decide on policy questions, has always been viewed with skepticism by America’s elite. James Madison believed that “such democracies have ever been spectacles of turbulence and contention.” Policy should be made “through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country.”[**29**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn29) There is no provision in the U.S. Constitution for national referenda. But the Progressive Era of the late nineteenth and early twentieth centuries brought with it many popular reforms, including the initiative and referendum. Currently, eighteen states provide for state constitutional initiatives—allowing citizens to place amendments on the ballot by petition—followed by a referendum vote—allowing citizens to adopt or reject the amendment.[**30**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn30)  Mass opposition to affirmative action has been expressed in several states through the popular initiative device. California voters led the way in 1996 with a citizens’ initiative (Proposition 209) that added the following phrase to that state’s constitution:   * Neither the state of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State’s system of public employment, public education or public contracting.   Supporters of the “California Civil Rights Initiative” argued that this initiative leaves all existing federal and state civil rights protections intact. It simply extends the rights of specially protected groups to all of the state’s citizens. Opponents argued that it sets back the civil rights movement, that it will end the progress of minorities in education and employment, and that it denies minorities the opportunity to seek assistance and protection from government. The initiative was approved by 54 percent of California’s voters.  Following the adoption of the California initiative, opponents filed suit in federal court arguing that it violated the Equal Protection Clause of the U.S. Constitution because it denied minorities and women an opportunity to seek preferential treatment by governments. But a federal Circuit Court of Appeals upheld the constitutionality of the initiative: “Impediments to preferential treatment do not deny equal protection.”[**31**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn31) The court reasoned that the Constitution allows some race-based preferences to correct past discrimination, but it does not prevent states from banning racial preferences altogether.  The success of the California Civil Rights Initiative inspired similar mass movements in other states: Washington adopted a similarly worded stare constitutional amendment in 1998, and Michigan approved a statewide ban on racial preferences in public education, employment, and state contracts in 2006. In Michigan this initiative was opposed by elites in the political, business, and academic worlds, including both Democratic and Republican gubernatorial candidates. Nonetheless, 58 percent of Michigan voters favored banning racial preferences. Following voter approval of the referendum, the president of the University of Michigan announced her intention “not ro allow our University” to end its affirmative action efforts.  **Public Policy and Hispanic Americans**  Hispanic Americans are now the nation’s largest minority. The experience of Hispanics—a term that the U.S. Census Bureau uses to refer to Mexican Americans, Puerto Ricans, Cubans, and others of Spanish-speaking ancestry and culture—differs significantly from that of African Americans. It is true, of course, that the Equal Protection Clause of the Fourteenth Amendment protects “any person” and the Civil Rights Act of 1964 specifically identifies “national origin” as a category coming under its protection. Thus, the Constitution and laws of the United States offer Hispanics protection against discrimination.  **Elite Exploitation.**  Some Mexican Americans are descendants of citizens who lived in the Mexican territory annexed by the United States in 1848, but most have come to the United States in accelerating numbers in recent decades. For many years, agricultural businesses encouraged immigration of Mexican farm labor willing to endure harsh conditions for low pay. Farm workers were not covered by the federal National Labor Relations Act; thus, they were not guaranteed a minimum wage or protected in the right to organize labor unions. It was not until the 1960s that civil rights activity among Hispanic farm workers, under the leadership of Cesar Chávez and the United Farm Workers union, began to make improvements in the wages and living conditions of Mexican farm workers. The movement (often referred to as *La Raza*) encouraged Mexican Americans throughout the Southwest to engage in political activity.  However, inasmuch as many Mexican American immigrants were noncitizens, and many were *indocumentados* (undocumented residents or illegal aliens), they were vulnerable to exploitation by employers. Many continued to work in sub-minimum wage jobs with few or no benefits and under substandard conditions.  Inequalities between Hispanics and whites (“Anglos”) can be observed in overall statistics on employment, income, and education (see [**Table 11–3**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl03) earlier in this chapter). Hispanics are included in affirmative action program protections. However, the federal Equal Employment Opportunity Commission receives fewer complaints from Hispanics than from African Americans or women.  Most Hispanics today believe that they confront less prejudice and discrimination than their parents. Nonetheless, in 1994, California voters approved a referendum, Proposition 187, that would have barred welfare and other benefits to persons living in the state illegally. Most Hispanics opposed the measure, believing that it was motivated by prejudice. A federal court later declared major portions of Proposition 187 unconstitutional. Moreover, the U.S. Supreme Court has held that a state may not bar children of illegal immigrants from attending public schools.[**32**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn32)  **Voting Rights.**  The Voting Rights Act of 1965, as later amended and as interpreted by the U.S. Supreme Court, extends voting rights protections to “language minorities.” Following redistricting after the 1990 census, Hispanic representation in Congress rose substantially. Today about 4 percent of the U.S. House of Representatives are Hispanic, still well below the nation’s 15 percent Hispanic population. The Constitution and Gender Equality Although the historical context of the Fourteenth Amendment implies its intent to guarantee equality for newly freed slaves, the wording of its Equal Protection Clause applies to “any person.” Thus the text of the Fourteenth Amendment *could* be interpreted to bar any gender differences in the law. However, the Supreme Court has never interpreted the Equal Protection Clause to give the same level of protection to gender equality as to racial equality. Indeed, the Supreme Court in the nineteenth century specifically rejected the argument that this clause applied to women; the Court once upheld a state law banning women from practicing law, arguing that “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”[**33**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn33) Early Feminist Politics. The first generation of feminists learned to organize, hold public meetings, and conduct petition campaigns in the pre–Civil War antislavery movement. Following the Civil War, women were successful in changing many state laws that abridged the property rights of married women and otherwise treated them as chattel (property) of their husbands. Activists were also successful in winning some protections for women in the work-place, including state laws improving hours of work, working conditions, and physical demands. At the time, these laws were regarded as progressive. Feminist efforts of the 1800s also centered on the protection of women in families. The perceived threats to women’s well-being were their husbands’ drinking, gambling, and consorting with prostitutes. Women led the Anti-Saloon League and succeeded in outlawing gambling and prostitution in every state except Nevada and provided the major source of moral support for the Eighteenth Amendment (Prohibition).  The feminist movement in the early twentieth century concentrated on women’s suffrage—the drive to guarantee women the right to vote. The early suffragettes employed mass demonstrations, parades, picketing, and occasional disruption and civil disobedience—tactics similar to those of the civil rights movement of the 1960s. The culmination of their efforts was the 1920 passage of the Nineteenth Amendment to the Constitution: “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.” Judicial Scrutiny of Gender Classifications. The Supreme Court became responsive to arguments that sex discrimination might violate the Equal Protection Clause of the Fourteenth Amendment in the 1970s. It ruled that sexual classifications in the law “must be reasonable and not arbitrary, and must rest on some ground of difference having fair and substantial relation to … important governmental objectives.”[**34**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn34) Thus, for example, the Court has ruled (1) that a state can no longer set different ages for men and women to become legal adults[**35**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn35) or purchase alcoholic beverages;[**36**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn36) (2) women cannot be barred from police or firefighting jobs by arbitrary height and weight requirements;[**37**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn37) (3) insurance and retirement plans for women must pay the same monthly benefits (even though women on the average live longer);[**38**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn38) and (4) public schools must pay coaches in girls’ sports the same as coaches in boys’ sports.[**39**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn39) Court Recognition of Gender Differences. Yet the Supreme Court has continued to recognize some gender differences in law. For example, the Court has upheld statutory rape laws that make it a crime for an adult male to have sexual intercourse with a female under the age of 18, regardless of her consent. The Court has upheld Congress’s draft registration law for men only, and it has declined to intervene in U.S. Defense Department decisions regarding the assignments of women in the military. Equal Rights Amendment. At the center of feminist activity in the 1970s was the Equal Rights Amendment (ERA) to the Constitution. The amendment stated simply, “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The ERA passed Congress easily in 1972 and was sent to the states for the necessary ratification by three-fourths (thirty-eight) of them. The amendment won quick ratification in half the states, but a developing “Stop ERA” movement slowed progress and eventually defeated the amendment itself. In 1979, the original seven-year time period for ratification—the period customarily set by Congress for ratification of constitutional amendments—expired. Proponents of the ERA persuaded Congress to extend the ratification period for three more years, to 1982. But despite heavy lobbying efforts in the states and public opinion polls showing national majorities favoring it, the amendment failed to win ratification by the necessary thirty-eight states.[**\***](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn02a) Public Policy and Gender Equality Today, women’s participation in the labor force is not much lower than men’s, and the gap is closing over time. More than 68 percent of married women with school-age children are working; and about 60 percent of married women with children under 6 years of age are working.[**40**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn40) The movement of women into the American work force shifted feminist political activity toward economic concerns—gender equality in education, employment, pay, promotion, and credit. Civil Rights Laws. The Civil Rights Act of 1964, Title VII, prevents sexual (as well as racial) discrimination in hiring, pay, and promotions. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with eliminating discrimination in employment, has established guidelines barring stereotyped classifications of “men’s jobs” and “women’s jobs.” The courts have repeatedly struck down state laws and employer practices that differentiate between men and women in hours, pay, retirement age, and so forth.  The Federal Equal Credit Opportunity Act of 1974 prohibits sex discrimination in credit transactions. Federal law prevents banks, credit unions, savings and loan associations, retail stores, and credit card companies from denying credit because of sex or marital status. However, these businesses may still deny credit for a poor or nonexistent credit rating, and some women who have always maintained accounts in their husbands’ name may still face credit problems if they apply in their own name.  \*By 1982, thirty-four states had ratified the ERA. Three of them-Idaho, Nebraska, and Tennessee-subsequently voted to “rescind” their ratification; but the U.S. Constitution does not mention rescinding votes. The states that had not ratified it by 1982 were Nevada, Utah, Arizona, Oklahoma, Illinois, Indiana, Missouri, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, North Carolina, South Carolina, and Virginia.  The Education Act Amendment of 1972, Title IX, deals with sex discrimination in education. This federal law bars discrimination in admissions, housing, rules, financial aid, faculty and staff recruitment and pay, and—most troublesome of all—athletics. Athletics has proven very difficult because men’s football and basketball programs have traditionally brought in the money to finance all other sports, and men’s football and basketball have received the largest share of school athletic budgets. But the overall effect of Title IX has been to bring about a dramatic increase in women’s participation in sports. The Earnings Gap. Overall, women’s earnings remain less than men’s earnings, although the gap has narrowed over the years (see [**Figure 11–3**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fig03)). Today, on average, women earn about 78 percent of men’s earnings |
| --- |

The earnings gap is not so much a product of direct discrimination, that is, women in the same job with the same skills, qualifications, experience, and work record being paid less than men. This form of direct discrimination has been illegal since the Civil Rights Act of 1964. Rather, the earnings gap is primarily a product of a division in the labor market between traditionally male and female jobs, with lower salaries paid in traditionally female occupations.

The initial efforts of the women’s movement were directed toward ensuring that women enjoyed equal access to traditionally male “white-collar” occupations, for example, physician, lawyer, and engineer. Success in these efforts would automatically narrow the wage gap. And indeed, women have been very successful over the last several decades in increasing their representation in prestigious white-collar occupations (see [**Table 11–4**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl04)), although most of these occupational fields continue to be dominated by men.

## Dual Labor Market.

Nonetheless, evidence of a “dual” labor market, with male-dominated “blue-collar” jobs distinguishable from female-dominated “pink-collar” jobs, continues to be a major obstacle to economic equality between men and women. These occupational differences may be attributed to cultural stereotyping, social conditioning, and premarket training and education, which narrow the choices available to women. Progress has been made in recent years in reducing occupational sex segregation (a majority of bartenders are now women). Women are reaching parity as college and university professors; women also constitute about half of law and medical school students today, suggesting parity in the future in these professions (see [**Table 11–4**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11tbl04)).

## The Glass Ceiling.

Few women have climbed the ladder to become president or chief executive officer or director of the nation’s largest industrial corporations, banks, utilities, newspapers, or television networks. Large numbers of women are entering the legal profession, but few have made it to senior partner in the nation’s largest and most prestigious law firms. Women are more likely to be found in the president’s cabinet than in the corporate boardroom.

The barriers to women’s advancement to top positions are often very subtle, giving rise to the phrase *the glass ceiling*. There are many explanations for the absence of women at the top, and all of them are controversial: women choose staff assignments rather than fast-track, operating-head assignments. Women are cautious and unaggressive in corporate politics. Women have lower expectations about peak earnings and positions, and these expectations become self-fulfilling. Women bear children, and even during relatively short maternity absences they fall behind their male counterparts. Women are less likely to want to change locations than men, and immobile executives are worth less to a corporation than mobile ones. Women executives in sensitive positions come under even more pressure than men in similar posts. Women executives believe that they get much more scrutiny than men and must work harder to succeed. Finally, it is important to note that affirmative action efforts by governments, notably the EEOC, are directed primarily at entry-level positions rather than senior management posts.

## Sexual Harassment.

The specific phrase “sexual harassment” does not appear in the Civil Rights Act of 1964. However, Title VII protects employees from sexual discrimination “with respect to compensation, terms, conditions, or privileges of employment.” The Supreme Court held in 1986 that “discriminatory intimidation” of employees could be “sufficiently severe” to alter the “conditions” of employment and therefore violate Title VII.

Discriminatory intimidation based on sex (sexual harassment) may take various forms. There seems to be little doubt that it includes (1) conditioning employment or promotion or privileges of employment on the granting of sexual favors by an employee and (2) “tangible” acts of touching, fondling, or forced sexual relations. But sexual harassment has also been defined to include (3) a “hostile working environment.” This phrase may include offensive utterances, sexual innuendos, dirty jokes, the display of pornographic material, and unwanted proposals for dates. Several problems arise with this definition. First, it would appear to include speech and hence raise First Amendment questions regarding how far speech may be curtailed by law in the workplace. Second, the definition depends more on the subjective feelings of the individual employee about what is “offensive” and “unwanted” rather than on an objective standard of behavior that is easily understood by all. The Supreme Court wrestled with the definition of a “hostile work environment” in *Harris* v. *Forklift* in 1993. It held that a plaintiff need not show that the utterances caused psychological injury but only that a “reasonable person” would perceive the work environment as hostile or abusive. Presumably a single incident would not constitute harassment; rather, courts should consider “the frequency of the discriminatory conduct,” “its severity,” and whether it “unreasonably interferes with an employee’s work performance.”[**41**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn41)

## Abortion and the Right to Life

Abortion is not an issue that can easily be compromised. The arguments touch on fundamental moral and religious principles. Proponents of abortion, who often refer to themselves as “pro choice,” argue that a woman should be permitted to control her own body and should not be forced by law to have unwanted children. They cite the heavy toll in lives lost in criminal abortions and the psychological and emotional pain of an unwanted pregnancy. Opponents of abortion, who often refer to themselves as “pro life,” generally base their belief on the sanctity of life, including the life of the unborn child, which they believe deserves the protection of law—“the right to life.” Many believe that the killing of an unborn child for any reason other than the preservation of the life of the mother is murder.

## Early State Laws.

Historically, abortions for any purpose other than saving the life of the mother were criminal offenses under state law. About a dozen states acted in the late 1960s to permit abortions in cases of rape or incest or to protect the physical health of the mother, and in some cases her mental health as well. Relatively few abortions were performed under these laws, however, because of the red tape involved—review of each case by several concurring physicians, approval of a hospital board, and so forth. Then, in 1970, New York, Alaska, Hawaii, and Washington enacted laws that in effect permitted abortion at the request of the woman involved and the concurrence of her physician.

## *Roe* v. *Wade*.

The U.S. Supreme Court’s 1973 decision in *Roe* v. *Wade* was one of the most important and far-reaching in the Court’s history.[**42**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn42) The Court ruled that the constitutional guarantee of “liberty” in the Fifth and Fourteenth Amendments included a woman’s decision to bear or not to bear a child. The Court also ruled that the word *person* in the Constitution did *not* include the unborn child. Therefore, the Fifth and Fourteenth Amendments to the Constitution, guaranteeing “life, liberty, and property,” did not protect the “life” of the fetus. The Court also ruled that a state’s power to protect the health and safety of the mother could not justify *any* restriction on abortion in the first three months of pregnancy. Between the third and sixth months of pregnancy, a state could set standards for abortion procedures to protect the health of women, but a state could not prohibit abortions. Only in the final three months could a state prohibit or regulate abortion to protect the unborn.

## Government Funding of Abortions.

The Supreme Court’s decision did not end the controversy over abortion. Congress defeated efforts to pass a constitutional amendment restricting abortion or declaring that the guarantee of life begins at conception. However, Congress, in what is known as the “Hyde Amendment,” banned the use of federal funds under Medicaid (medical care for the poor) for abortions except to protect the life of a woman. The Supreme Court upheld the constitutionality of laws denying tax funds for abortions. Although women retained the right to an abortion, the Court held that there was no constitutional obligation for governments to pay for abortions;[**43**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn43) the decision about whether to pay for abortion from tax revenues was left to Congress and the states.

## Abortions in the United States.

About 1.3 million abortions are currently performed each year in the United States. There are approximately 319 abortions for every 1,000 live births.[**44**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn44) This abortion rate has *declined* since 1990. About 85 percent of all abortions are performed at abortion clinics; others are performed in physicians’ offices or in hospitals, where the cost is significantly higher. Most of these abortions are performed in the first three months; about 10 percent are performed after the third month.

## Abortion Battles.

Early efforts by the states to limit abortion ran into Supreme Court opposition. The Court held that states may not interfere with a woman’s decision to terminate a pregnancy. However, opponents of abortion won a victory in *Webster* v. *Reproductive Health Services* (1989), when the Supreme Court upheld a Missouri law restricting abortions.[**45**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn45) The right to abortion under *Roe* v. *Wade* was not overturned, but the Court held that Missouri could deny public funds for abortions that were not necessary for the life of the women and could deny the use of public facilities or employees in performing or assisting in abortions. More important, the Court upheld the requirement for a test of “viability” after twenty weeks and a prohibition on abortions of a viable fetus except to save a woman’s life. The Court recognized the state’s “interest in the protection of human life when viability is possible.” The effect of the *Webster* decision was to rekindle contentious debates over abortion in virtually all state capitols. Various legal restrictions on abortions have been passed in some states, including (1) prohibitions on public financing of abortions; (2) requirements for a test of viability and prohibitions on abortions of a viable fetus; (3) laws granting permission to doctors and hospitals to refuse to perform abortions; (4) laws requiring humane and sanitary disposal of fetal remains; (5) laws requiring physicians to inform patients about the development of the fetus and the availability of assistance in pregnancy; (6) laws requiring that parents of minors seeking abortion be informed; (7) laws requiring that late abortions be performed in hospitals; (8) laws setting standards of cleanliness and care in abortion clinics; (9) laws prohibiting abortion based on the gender of the fetus; (10) laws requiring a waiting period.

## Reaffirming *Roe* v. *Wade*.

Abortion has become such a polarizing issue that pro-choice and pro-life groups are generally unwilling to search out a middle ground. Yet the Supreme Court appears to have chosen a policy of affirming a woman’s right to abortion while upholding modest restrictions.

When Pennsylvania enacted a series of restrictions on abortion—physicians must inform women of risks and alternatives; a 24-hour waiting period is required; minors must have consent of parents or a judge; spouses must be notified—these restrictions reached the Supreme Court in the case of *Planned Parenthood of Pennsylvania* v. *Casey* in 1992. Justice Sandra Day O’Connor took the lead in forming a moderate, swing bloc on the Court; her majority opinion strongly reaffirmed the fundamental right of abortion:

* Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education…. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment…. A woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.[**46**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn46)

Justice O’Connor went on to establish a new standard for constitutionally evaluating restrictions: They must not impose an “undue burden” on women seeking abortion or place “substantial obstacles” in her path. All of Pennsylvania’s restrictions were upheld except spousal notification.

**Medicaid and Abortion.**

Pro-choice and pro-life forces battle in Congress as well as the courts. Pro-choice forces regularly attempt to repeal the Hyde Amendment that prevents states from using federal Medicaid funds to pay for abortions. A Democratic-controlled Congress responded in a limited fashion in 1993 by making abortions in cases of rape and incest eligible for Medicaid payments.

**“Partial Birth Abortion.”**

Following a long and emotional battle, Congress outlawed an abortion procedure known as “partial birth” abortion in 2003. (Congress had passed such a ban in 1996 only to have it vetoed by President Clinton.) This procedure, which is used in less than 1 percent of all abortions, involves partial delivery of a living fetus feet-first, then vacuuming out the brain and crushing the skull to ease complete removal. In 2000 the Supreme Court declared a Nebraska law prohibiting the procedure to be an unconstitutional “undue burden” on a woman’s right to an abortion.[**47**](https://jigsaw.vitalsource.com/books/9781256053354/content/id/ch11fn47) The Court noted that the Nebraska law failed to make an exception to preserve the life and health of the mother. Congress designed its law to try to meet the Supreme Court’s objections, although Congress failed to make an exception for the health of the mother. Abortion rights advocates argue that banning this procedure is a first step in outlawing abortions altogether.

**Public Policy and the Disabled**

The Americans with Disabilities Act (ADA) of 1990 is a sweeping law that prohibits discrimination against disabled people in private employment, government programs, public accommodations, and telecommunications. The act is vaguely worded in many of its provisions, requiring “reasonable accommodations” for disabled people that do not involve “undue hardship.” This means disabled Americans do not have exactly the same standard of protection as minorities or women, who are protected from discrimination *regardless* of hardship or costs. (It also means that attorneys, consultants, and bureaucrats are making handsome incomes interpreting the meaning of these phrases.) Specifically the ADA includes the following protections:

* *Employment:* Disabled people cannot be denied employment or promotion if, with “reasonable accommodation,” they can perform the duties of the job. Reasonable accommodation need not be made if doing so would cause “undue hardship” on the employer.
* *Government programs:* Disabled people cannot be denied access to government programs or benefits. New buses, taxis, and trains must be accessible to disabled persons, including those in wheelchairs.
* *Public accommodations:* Disabled people must enjoy “full and equal” access to hotels, restaurants, stores, schools, parks, museums, auditoriums, and the like. To achieve equal access, owners of existing facilities must alter them “to the maximum extent feasible”; builders of new facilities must ensure that they are readily accessible to disabled persons unless doing so is structurally impossible.
* *Communications:* The Federal Communications Commission is directed to issue regulations that will ensure telecommunications devices for hearing- and speech-impaired people are available “to the extent possible and in the most efficient manner.”

But the ADA, as interpreted by the Equal Employment Opportunity Commission and federal courts, has begun to generate considerable controversy. Persons who are “learning disabled” have successfully sued colleges and universities, and even state bar associations, not only for admission but also to gain extra time and assistance in passing examinations. Persons claiming various mental disorders have successfully sued employers for being dismissed for chronic tardiness, inability to concentrate on the job, uncooperative and hostile attitudes toward supervisors, and the like.