

## *Chapter 4*

# CIVIL RIGHTS

- ★ *How could a nation that embraced the Declaration of Independence's creed that "all men are created equal" condone slavery?*
- ★ *Why would a majority in society ever seek to extend and protect the rights of its minorities in the face of huge costs—even those imposed by a tragic civil war?*
- ★ *Has America's constitutional system impeded or promoted the cause of civil rights?*
- ★ *Why, after nearly a century of segregation and disenfranchisement, did the civil rights revolution burst onto the national scene in the 1960s and in short order succeed in dismantling segregation throughout the South?*

**O**n November 21, 1997, the Piscataway, New Jersey, school board announced it had settled an eight-year-long lawsuit with one of its teachers. Although the Supreme Court had agreed to hear the case within two months, the teacher decided to drop her suit in return for a \$433,500 settlement. On its face, the case seemed to be no more than a typical employment discrimination lawsuit—one of many court cases stemming from claims of racial or sex discrimination or reverse discrimination, the unfair loss of a job because of affirmative action (preferential hiring practices). The Piscataway case, arising from familiar circumstances, belonged in the reverse discrimination category. Its abrupt conclusion with a settlement, however, is highly peculiar and reveals the strategies employed by both sides in the present-day politics over civil rights.

The case dated back to 1989 when the Piscataway school board, facing a budget shortfall, decided to lay off one of its business administration teachers. The lowest-seniority positions were occupied by two women—one white, one black—who had been hired on the same day in 1980. After reviewing their files and finding the women equally qualified for the position, the school board laid off the white teacher. It cited the need for diversity within its teaching staff; at the time 30 percent of the students enrolled in the business program—but only one of the ten business teachers—were African American. The white teacher went to court charging illegal reverse discrimination. Although she was rehired in 1992, she continued to press her lawsuit to gain back pay and legal fees.

The lawsuit charged that racial preference had been inappropriately applied in this instance. A coin toss to deter-

mine which teacher to retain would have been fairer, lawyers for the white teacher argued. The Piscataway school board, however, seemed to be on solid ground. Although it had never been accused of practicing discrimination for which racial preference might serve as an appropriate remedy, some federal courts had shown a willingness to condone hiring preferences in the name of diversity. Universities were employing affirmative action to provide "educational enrichment." Some urban police departments, seeking to improve community relations, also were using affirmative action when hiring and promoting officers. Ostensibly, then, the school board, in enlisting diversity, was following a widely established practice. So why did it settle?

This is where the case took an unusual and instructive turn. The school board's attorneys appeared eager to test their case before the Supreme Court, but they were importuned by various national civil rights organizations to quit the case. These organizations feared the school board would lose and that, with its decision, the Supreme Court might take the opportunity to strike a sweeping blow against diversity as an appropriate justification for affirmative action. They noted that in recent decisions the mostly Republican-appointed Court had been shifting to more conservative ground on civil rights issues. During 1997 it had let stand, and thereby tacitly endorsed, blows to affirmative action from lower courts. Some civil rights leaders believed the only way to preserve some semblance of legitimacy for the diversity standard was to settle, in effect taking the case out of the Court's hands. Indeed, the Piscataway case was the only affirmative action case on the Supreme Court's 1997-1998 docket. Settling the case would at least buy those supporting affirmative action another year, with the possibility that one of the conservative justices might retire and a more compelling case might appear on the docket.

Civil rights organizations backed up their request with an offer to pay 70 percent of the settlement. Throughout the fall the civil rights leader Jesse Jackson had discreetly appealed to sympathetic donors who anonymously con-

tributed from \$1,000 to \$5,000 each to the settlement fund. In the end, then, the white teacher "won" her case and settlement—not from the school board but from those civil rights organizations who had opposed her suit. Conservative groups, who similarly sensed that an important victory was at hand, were upset. "I'd like to think that if I were embroiled in a major constitutional case, I'd have the fortitude to see it through," complained the spokesperson of the Independent Women's Forum which previously had filed a "friend of the court" brief against affirmative action.<sup>1</sup> Having already set the docket for their session, the Supreme Court justices must have looked ruefully as well. Their only opportunity for the year to review affirmative action had just slipped away.

This nondecision is noteworthy because of the way its potential impact was nipped by a carefully calculated, strategic political maneuver. Americans may not associate civil rights with politics, yet politics is the chief mechanism available to them for collectively defining and pursuing civil rights. Indeed, these rights represent society's most basic and controversial collective choices about the rules that govern how classes of citizens relate to one another. James Madison, who understood these choices only too well, prescribed factional competition for keeping a majority of the citizens in a democracy from tyrannizing a minority. This chapter, then, follows Madison closely in locating the course of civil rights in America as a product of its political process.

### What Are Civil Rights?

Throughout the nation's history, Americans have applied the term civil rights to a variety of rights and privileges. In colonial times civil rights took the form of "civic" rights—protections against arbitrary action by the distant British crown. Although the term civil rights did not enter common usage until the late 1860s, colonial Americans were clearly thinking about these rights when they rallied to the slogan "No taxation without representation." Thomas Jefferson's eloquent statement in the Dec-

laration of Independence that all governments must defer to mankind's "unalienable Rights" of "Life, Liberty and the pursuit of Happiness" gave the Revolutionary War its moral certitude.

Once they had gained their independence and established republican institutions, Americans turned from seeking protection from an arbitrary and distant government to looking for protection from one another. In *Federalist No. 10* Madison entertained the possibility that a majority of citizens could use government authority to gain a permanent advantage by stripping adversaries of their rights. This prospect bothered leaders on both sides of the Constitution's ratification issue. For Madison and the other nationalists, the pluralism offered by a large republic provided the best insurance against such factionally inspired tyranny. But Patrick Henry and others opposing ratification insisted on a Bill of Rights to further deter the new national government from usurping power. Along with voting (an issue the Constitution already had resolved by allowing the states to set voting requirements), freedom of speech, free assembly, and a free press appeared on virtually everyone's list of freedoms being proposed in Congress for the new Bill of Rights.

Modern-day "civil rights" encompass much more than these "civic" rights of political expression and participation. They also include safeguards against any effort by government and dominant groups in a community to subjugate another group and take unfair, mostly economic, advantage of it. In the slavery era, southern governments teamed up with white slave owners to configure state laws and institutions to legalize and preserve this tyranny. In most southern states, for example, it was illegal for slave masters to free their slaves. Many decades later, segregation in the South, also regulated by the states, was applied to virtually all interpersonal contact between the races. Civil rights, then, also include the rights of individuals in their relations with one another: to live free from bondage and intimidation, to enter into contracts and own property, and to have access to businesses that

serve the public and equal educational opportunities, among many other things.

A closely related set of principles and issues, known as civil liberties, defines the fundamental personal freedoms that lie beyond government interference. Freedom of speech, freedom of religion, and the right to privacy are examples of civil liberties. Typically, violations of these liberties occur when some government agency, at any level, oversteps its authority. For example, for years the courts have consistently ruled that a school district's practice of opening each school day with recitation of the Lord's Prayer infringes on the religious freedom of those students and their families who worship a different god or none at all. Likewise, when a majority of citizens or some governmental entity decides that a particular behavior—such as flag burning, assisted suicides, or nude dancing—is objectionable and seeks to suppress it, the court battles begin.

Definitions and lists help to distinguish between civil rights and civil liberties, but when the private behavior of a class of people is the object of judicial scrutiny, the boundary between these concepts can become ambiguous and arbitrary. The controversial abortion rights issue falls in this category. On the one hand, the Supreme Court has ruled that a woman's decision to have an abortion is protected by an implicit constitutional right to privacy—that is, the right to an abortion is a civil liberty. On the other hand, abortion policy affects women as a class and so is debated and reported as a civil rights issue. Chapter 5 examines the state of civil liberties in America.

## The Civil Rights of African Americans

In December 1997 Bill Lann Lee, a second-generation Chinese American, opened his acceptance statement as President Bill Clinton's acting assistant attorney general for civil rights by characterizing his post as one "haunted by the ghosts of slavery, the Civil War, Jim Crow." He then proceeded to cite modern instances of racial, ethnic,



Do not look at the Negro.  
His earthly problems are ended.  
Instead, look at the seven WHITE children who gaze at this gruesome spectacle.  
Is it horror or gloating on the face of the neatly dressed seven-year-old girl on the right?  
Is the tiny four-year-old on the left old enough, one wonders, to comprehend the barbarism her elders have perpetrated?  
Rubin Stacy, the Negro, who was lynched at Fort Lauderdale, Florida, on July 19, 1935, for "threatening and frightening a white woman," suffered PHYSICAL torture for a few short hours. But what psychological torture was wrought in the minds of the white children? Into what kind of

*Between 1882 and 1950, 4,729 lynchings were reported in the United States. African Americans were the victims in about three-quarters of cases. In the 1930s the NAACP graphically featured this tyrannical practice designed to intimidate the entire black population.*

and religious discrimination.<sup>2</sup> Indeed, as Lee knew and the history books describe, African Americans have been engaged in a two-hundred-year struggle for civil rights—a struggle that has spanned slavery to full citizenship. As we shall see in this chapter and the next, the results have redefined the rights and liberties of all Americans.

A more theoretical reason for concentrating on the history of black civil rights is that it contains all of the essen-

tial ingredients for testing James Madison's ideas on democracy in America, laid out in his *Federalist* essays. The treatment of African Americans in the South before the civil rights victories of the 1960s corresponded closely to the factional tyranny Madison warned against in *Federalist* No. 10. Dominant white majorities throughout the South instituted slavery—and later segregation—to gain a permanent advantage over the black minority. And what is the solution to such tyranny? As Madison argued, a diverse national community will be less inclined than state-level majorities to engage in tyranny and more inclined to halt it.

The history of African American civil rights may follow the broad contours of Madison's script, but one fact is unsettling to his theory: slavery and then segregation with their myriad abuses endured almost two centuries before the national majority struck out against local tyranny. Several factors related to institutions and their effects on democracy shed light on this fact. For one thing, the Framers, instead of providing for a national veto over all state laws, as Madison had proposed, ceded in the Constitution a broad, exclusive jurisdiction to the states. In the South, slavery and later segregation flourished within that jurisdiction. The Constitution also originally called for members of the Senate to represent the interests of the majority in the state legislature that elected them. Had some oracle told Madison that the Constitution would occasionally fail to protect citizens' civil rights, he surely would have pointed an accusing finger first at the states and then at the Senate.<sup>3</sup>

African Americans, then, faced two obstacles in securing rights. The first was the Constitution itself. It reserves important authority for the states, such as determining voting eligibility, and separates powers among the three branches of government, making it difficult for national majorities to control the national government to the extent required to strike against tyranny in the states.

Madison's observation that "Men are not angels" sums up the second obstacle facing efforts to secure civil rights

for African Americans. People do not engage in costly behavior without some expected return. Madison, recognizing that citizens and politicians alike act most forcefully when they have a personal stake in the outcome, believed that tyranny could best be avoided by empowering every faction to look out for its own interests. But what becomes of the faction that does not possess the capacity to defend itself? This predicament is at the heart of the nation's long ordeal over civil rights for African Americans. Indeed, the politics of self-interest in a fragmented constitutional system largely answers the question of why it took so long to eradicate slavery, segregation, and other forms of discrimination. Instead, the real question is why they were ever addressed at all.

## The Politics of Black Civil Rights

Over the decades, efforts to seek civil rights for African Americans have taken different forms at different times. From well before the 1787 Constitutional Convention until the emancipation of black slaves during the Civil War, a small but persistent abolitionist movement forced the nation to face the discrepancy between its creed "Life, Liberty and the pursuit of Happiness" and the enslavement of 10 percent of its population.<sup>4</sup> Emancipation shifted the issue from fundamental "life and liberty" rights to those of full citizenship.<sup>5</sup> Several years later former slaves gained the right to vote through the Fifteenth Amendment,<sup>6</sup> but another century would pass before most could safely exercise this right. With civic rights secured, the dominant issue again shifted, this time to equal opportunity in the marketplace—particularly in education, employment, and housing.

By and large, national majorities have over the decades consistently favored the cause of civil rights for blacks, but only twice did they strike out forcefully against the sources of discrimination. The first was Reconstruction after the Civil War; the second was the national attack on segregation in the 1960s. Why were rights advanced at these particular moments in American history and not at

others? A look at the occasions of success and of failure will reveal the answer to this question and shed light on the conditions that must be satisfied for national majorities to dictate national policy.

### *The Height of Slavery: 1808–1865*

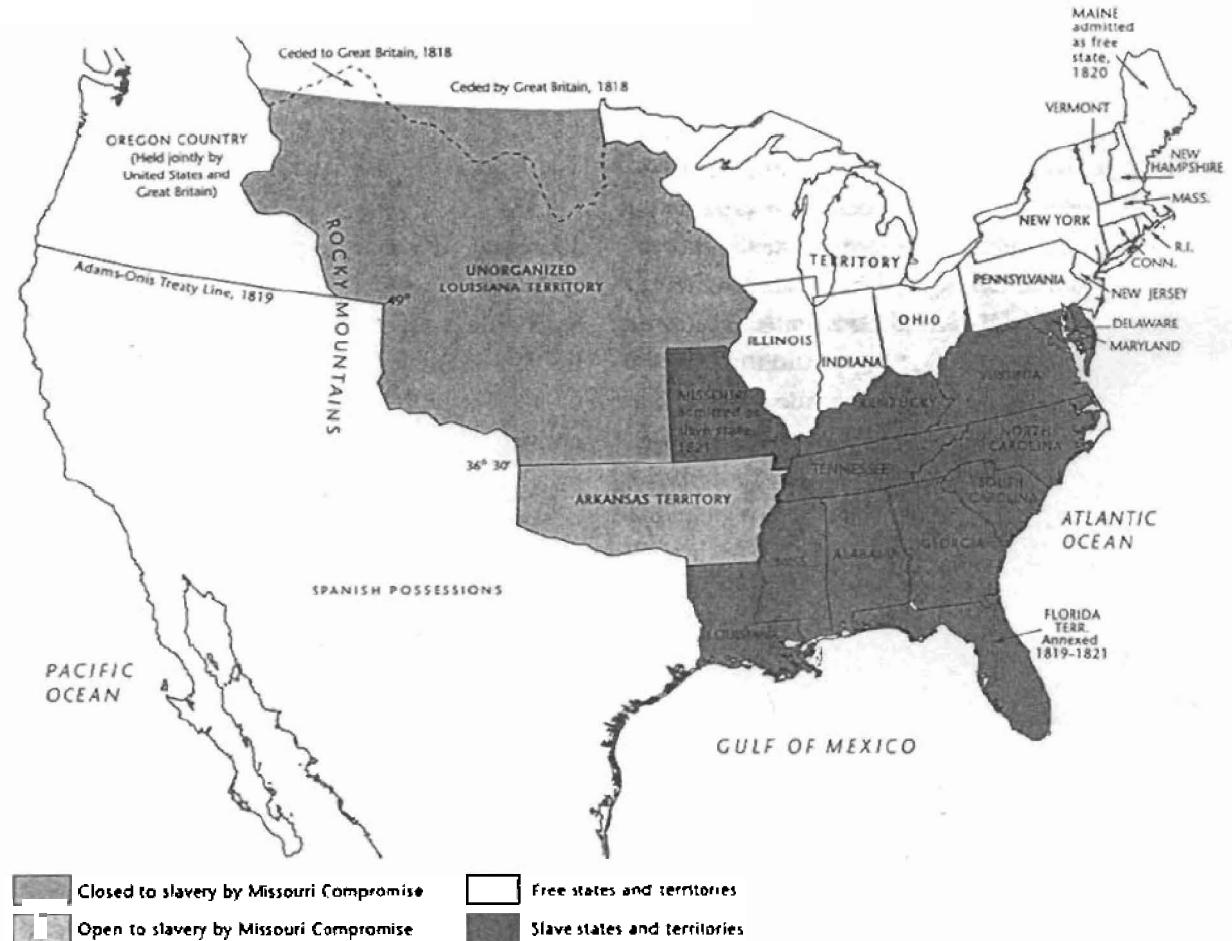
Late in 1807, with the Constitution's prohibition against regulation of the slave trade about to expire, Congress passed a law ending the importation of slaves. Southern representatives in Congress, not yet aware that the rise of "King Cotton" would soon place a premium on a slave-centered, plantation economy, did not vigorously contest the new law. In fact, some of their slave-owning constituents probably anticipated that the restricted supply might drive up the market value of their human property. Thus the nation took its first step toward civil rights for African Americans with deceptive ease. It would never be easy again.

Over the next decade slavery remained off center stage, but only because the northern and southern states carefully maintained regional balance in the Senate, thereby preserving the South's veto over national policy. Balance was achieved by matching states' entry—one slave state with one free state—into the Union. Although many northerners found slavery objectionable, they were not prepared to press for its eradication. Indeed, the conventional wisdom in the North seemed to be that slavery would eventually wither away.

Then in 1819 the citizens of Missouri, most of whom had emigrated from the slave states of Kentucky and Tennessee, petitioned Congress for admission as a slave state. Instead of shriveling up, slavery was threatening to expand beyond its southern borders and become a national cancer. "Like a fire bell in the night," wrote Thomas Jefferson from retirement, this prospect "awakened and filled me with terror."

After months of debate in Washington and throughout the country, Congress enacted the Missouri Compromise in 1820. The plan matched Missouri's entry as a slave state with Maine's entry as a free state, thereby maintain-

Figure 4-1 The Missouri Compromise and the State of the Union, 1820



Source: Mary B. Norton et al., *People and a Nation: A History of the United States*, 2 vols., 5th ed. (Boston: Houghton Mifflin, 1987), 1: 250.

ing a balance in the Senate between free and slave states. Moreover, the South agreed to accept Missouri's southern border as the northern boundary beyond which slavery could not extend in the future (Figure 4-1). The boundary, known as the Mason-Dixon line (after the English surveyors Charles Mason and Jeremiah Dixon who had established these early colonial borders), stretched to the end of the Louisiana Territory, where Spain's territories began. Once again, slavery appeared to be fenced in. The compromise itself was a classic "political" solution—one

that was not entirely satisfactory to either side but that allowed the competing sides to agree to a national policy applicable to the foreseeable future.

For the next decade or so this compromise worked. As each side became dissatisfied with the results, however, it began to unravel. Territories applying for statehood did not conveniently pair off as slave states and free states, and each statehood petition threatened the agreement. Gradually, southern senators realized that, under the current formula, their ability to block national policy was

doomed: continued westward expansion would result in more free states than slave states joining the Union. Thus they began searching for an effective alternative to their Senate veto—an alternative that would allow them to ensure continuation of the institution of slavery.

Meanwhile, the containment strategy also was losing favor in the North, where a small but highly vocal group of abolitionists had never accepted the compromise. More broadly, the abolitionist movement, under the banner of the Liberty Party, reminded the nation of its hypocrisy in condoning slavery. Although few voters would endorse the outright eradication of slavery, they were angry about slavery's territorial expansion. After its recent war with Mexico, the nation had annexed territory in the southwest, almost all of it falling into the slavery zone. Moreover, California was petitioning for statehood and southerners were proposing that the Mason-Dixon line be projected to the Pacific Ocean and California be split into two states—one slave, one free.

In 1846 David Wilmot, a Democratic representative from Pennsylvania, introduced a bill that would have gutted the compromise by banning slavery in the recently acquired territories. Asked to explain his position on the slavery issue, Wilmot denied any "squeamish sensitivities" or "morbid sympathy for the slave." Rather, he professed devotion to "the rights of white freemen . . . [and] white free labor."<sup>8</sup> The issue was simply this: the presence of slaves depressed wages. The Wilmot Proviso was introduced twice and passed the House of Representatives both times, but it made no headway in the still evenly divided Senate. All was not lost, however. The political considerations surrounding the failure of Wilmot's proposal eventually led significant numbers of northern whites to recognize they had a stake in containing slavery.

By 1848 Wilmot's allies had joined the abolitionists in the new antislavery Free Soil Party. Its election slate that year was headed by presidential candidate Martin Van Buren who already had served one term as president, elected on the Democratic ticket in 1836. His 1848 campaign re-

volved around a single issue: opposition to the extension of slavery in behalf of "free labor." The Free Soil Party managed to scare the two major political parties, the Democrats and the Whigs, by winning 10 percent of the national popular vote and finishing second in several states. Six years later the Free Soil Party joined a broader coalition against slavery's extension that called itself the Republican Party.

The year 1850 saw the Missouri Compromise collapse under the weight of southern and northern grievances. Southerners complained that runaway slaves who reached the North via the underground railroad—a network of abolitionists who hid slaves and provided them with transportation northward—were not being returned to their owners. At the same time, northerners were repulsed by the presence of slave auctions in Washington, D.C., "within the shadow of the Capitol." But the final straw was California's 1849 application for admission to the Union as a free state. If the South agreed to admit California, it would lose its ability to block legislation in the Senate. Ultimately the South did agree, but only in return for passage of the Fugitive Slave Law compelling northerners to honor southerners' property claims to slaves. Moreover, the new Compromise of 1850, introduced by the aging Whig senator Henry Clay of Kentucky, allowed the residents of the territories to decide for themselves whether to apply for statehood as a slave state or a free state.

The South may have lost its Senate veto, but a few years later it would unexpectedly acquire a new one. In 1857 the Supreme Court delivered one of its most unfortunate decisions in *Dred Scott v. Sandford*.<sup>9</sup> With every justice writing a separate opinion, a narrow 5–4 majority of the Court concurred that the federal government could not prevent slavery in the territories. The herculean effort to legislate mutually acceptable policy over the previous half-century was undone in a single decision by the nine unelected justices. The mostly southern majority argued that the Constitution's Framers had never intended blacks to be citizens. Consequently, blacks enjoyed "no rights

# **CAUTION!! COLORED PEOPLE**

**OF BOSTON, ONE & ALL,**

You are hereby respectfully CAUTIONED and advised, to avoid conversing with the **Watchmen and Police Officers of Boston,**

For since the recent ORDER OF THE MAYOR & ALDERMEN, they are empowered to act as

**KIDNAPPERS AND Slave Catchers,**

And they have already been actually employed in KIDNAPPING, CATCHING, AND KEEPING SLAVES. Therefore, if you value your LIBERTY, and the Welfare of the Fugitives among you, Shut them in every possible manner, as so many HOUNDS on the track of the most unfortunate of your race.

**Keep a Sharp Look Out for KIDNAPPERS, and have TOP EYE open.**

APRIL 24, 1851

The Fugitive Slave Law of 1850 forced law enforcement authorities in both the North and South to act as slaveholders' agents in seizing and returning their "property." As this broadside warned, even free blacks were in danger of being seized and sent into slavery as unscrupulous law enforcement officials colluded with slaveholders in making bogus claims that these free citizens were actually runaway slaves.

which a white man was bound to respect," and any federal law that interfered with the right of an individual to his property, including slaves, was unconstitutional. Sympathetic lower-court judges appeared ready to extend the logic of this argument and rule that state laws banning slavery also were unconstitutional. The specter of the whole nation being opened to slave holding by judicial fiat galvanized the North. Campaigning vigorously on the is-

sue "Free Soil, Free Labor, Free Men" in the 1860 presidential election, the Republican candidate, Abraham Lincoln, was swept into office. So too were other Republican candidates—so many, in fact, that they enjoyed a commanding majority in the House of Representatives and, in alliance with splinter parties, formed a narrow antislavery majority in the Senate. For the first time in American history, the president and a majority of both houses of Congress were aligned against slavery's extension. The Supreme Court, by a single vote, remained the only roadblock to national action.

Recognizing the inevitable, the South did not linger long once Lincoln announced that the national government would no longer tolerate "the minority [the South] over the majority." South Carolina bolted before Lincoln's inauguration and proclaimed its independence on December 20, 1860. By June 1861 ten more states had left the Union and established a new, confederation-styled government. On April 12, 1861, the "Confederates" fired on Fort Sumter, a federal garrison in Charleston harbor. The Civil War had begun. It would leave more than 600,000 American soldiers dead and many thousands more maimed for life.

Thus the first half-century of racial politics in the United States closely followed Madison's prediction of tyranny in the states unconstrained by national majorities. In the South white majorities enlisted state authority to preserve slavery. They were aided and abetted by their agents in the Senate who, as Madison had warned, succeeded in frustrating national action. Only a decisive Republican victory in 1860 and the exit of the slave states from the Union gave the national majority sufficient control over government to enforce its preferences. Along the way, strategic politicians—men like Wilmot and Lincoln—transformed a losing issue into a winning issue by remaining narrowly focused on the territories and the interests of their constituencies. Because they knew they had the support of abolitionists by default, they ignored this "captive" constituency and appealed to those northern whites more

## LOGIC OF POLITICS

# THE EMANCIPATION PROCLAMATION

Emancipation of the slaves was borne of war rather than politics, but its planning and implementation were nonetheless highly strategic. When read carefully, President Abraham Lincoln's Emancipation Proclamation, issued in the fall of 1862, appears to have been composed more with an eye to encouraging southern defections from the Confederacy than to emancipating slaves. Lincoln announced that slaves would be freed in those states that persisted with the rebellion. Slavery was to remain intact in the border states that had stayed in the Union, and even in those sections of the Confederacy that had fallen under Union control.

This policy exposed the president to the criticism that he had failed to free the slaves where he could and freed them where he could not. But by mapping emancipation



this way, he prevented it from becoming politically divisive among the Union states (a few still allowed slave ownership), while simultaneously trying to drive a wedge into the Confederacy. Moreover, the rebel states might have to deal with slaves asserting their freedom. Not until the 1864 presidential campaign did Lincoln openly endorse the universal abolition of slavery.

In 1863 David Gilmour Blythe depicted a homespun Lincoln (his rail-splitter's maul is in the foreground) at work in his study writing the Emancipation Proclamation. Pushed to one side, unheeded, are the states' rights theories of John C. Calhoun and John Randolph. Instead, Lincoln rests his hand on the Holy Bible and heeds Andrew Jackson's call: "The Union Must & Shall Be Preserved."

concerned about their own welfare than that of slaves. In the end, this appeal enabled these politicians to win control of government and eventually eradicate slavery.<sup>10</sup>

### *Reconstruction: 1865–1877*

In the short span of five years, from 1865 to 1870, slaves were formally emancipated (Thirteenth Amendment), granted citizenship (Fourteenth Amendment), and guaranteed the right to vote (Fifteenth Amendment). At the close of the Civil War, however, only a handful of Union states gave black citizens equal access to the ballot box.

Some subjected African Americans to special criteria—such as proof of property ownership and literacy—that effectively disenfranchised most of them. Other northern states simply barred African Americans from voting.<sup>11</sup> For most states, then, freeing slaves and granting them full-fledged citizenship were two different things, and the latter was regarded as radical even by abolitionists.<sup>12</sup> So how did the Fifteenth Amendment manage to clear the formidable hurdles of the amendment process, and do with remarkable alacrity?

The ability to count is an invaluable asset for a politi-

cian. Shortly after the war ended in 1865, House Republican leader Thaddeus Stevens of Pennsylvania began calculating the probable partisan makeup of Congress after the South returned to the Union. Taking into account that blacks now counted as full rather than three-fifths citizens for the purpose of apportioning congressional seats across the states, Stevens estimated that the South would gain thirteen seats over its prewar level.<sup>13</sup> Moreover, with southern legislatures busily enacting laws, called black codes, that would effectively prevent former slaves from voting (and thus from supporting the party of Lincoln), Stevens rightly suspected that all thirteen seats would be added to the Democratic column.<sup>14</sup> Southerners, he noted, "with their kindred Copperheads [Democrats] of the North, would always elect the President [as well as] control Congress."<sup>15</sup>

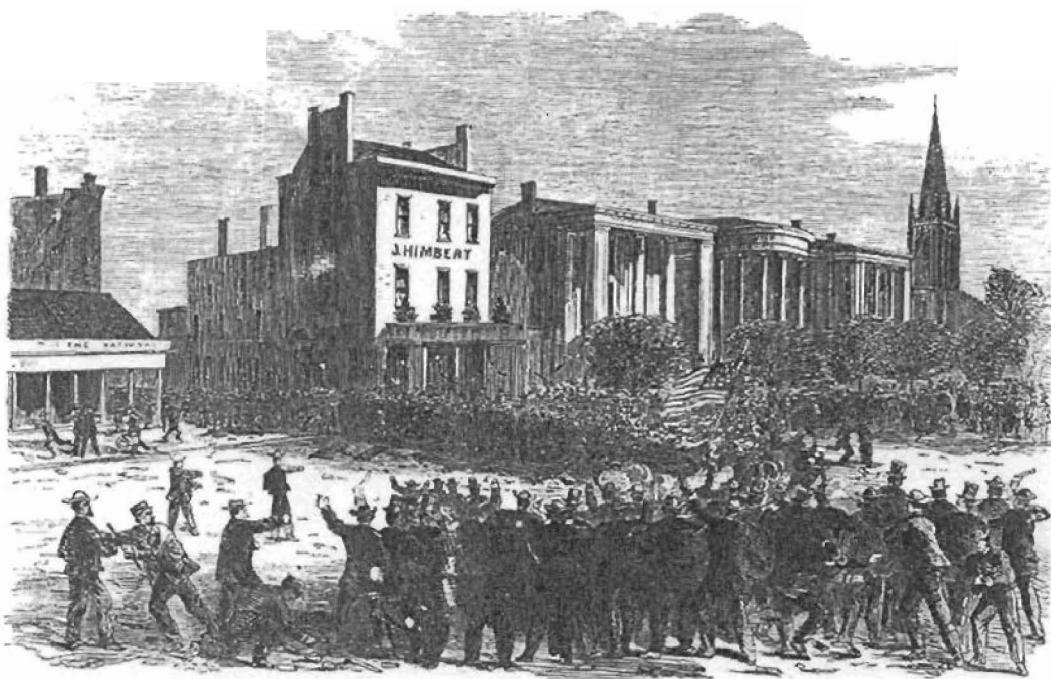
The outlook, then, was bleak. Even as Andrew Johnson of Tennessee, Lincoln's Democratic successor in the White House, was readying plans for the South's rapid readmission to the Union, congressional Republicans were staring at possible defeat in the next national election.<sup>16</sup> Something had to be done in a hurry. That "something" was Reconstruction; under the watchful eye of federal troops, the South would be transformed from a slave society into a free society where African Americans would fully enjoy the privileges of citizenship. At least that was the plan.

*The Fourteenth and Fifteenth Amendments.* The Republicans' foray into the unfamiliar business of political and social reconstruction began with the Fourteenth Amendment. It opens with a straightforward definition of citizenship that encompasses former slaves: "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." It then declares that no state shall "deprive any person of life, liberty, or property, without the *due process of law*; nor deny to any person within its jurisdiction the *equal protection of the laws*" (emphasis added). (The full impact of the due process and equal protection clauses on the liberties of all Americans is examined in Chapter 5.)

Section 2 of the Fourteenth Amendment turns to the immediate business of reconstruction. It reaffirms the constitutional prescription of apportioning seats in the House of Representatives according to a state's population, but it then makes an exception: if a state fails to allow black males to vote in federal and state elections, the number of seats allocated to it will be reduced proportionately. The political principle was that the additional seats would be provided only where the Republican Party stood a fighting chance of winning. The amendment was intended to protect two constituencies: African Americans in the South and the Republican majority in Washington. After the war, as before, civil rights rode on the shoulders of partisan, self-interested politics.

But would this adroitly crafted amendment ever find the support it needed? By the time it was sent to the states for ratification, several of the rebel states had, at the urging of President Johnson, already convened new legislatures and applied for readmission to the Union. The new legislatures also had rejected the Fourteenth Amendment, in each instance by nearly unanimous majorities. If their votes counted in the drive for ratification, the Fourteenth Amendment—the legal cornerstone of Reconstruction—would be doomed. Once again, it seemed, the South had found, in a sympathetic president and the Constitution's difficult amendment rules, a couple of veto levers for defeating the national majority.

The Republican majority in Congress, however, held its own formidable assets. First, it attacked President Johnson's sympathy for the enemy and was rewarded with a landslide victory in the 1866 midterm elections. Then, enjoying veto-proof majorities, congressional Republicans devised an ingenious plan to foil southern opposition to the Fourteenth Amendment. The First Reconstruction Act of 1867 disbanded the governments of the southern states (with the exception of Tennessee which already had been readmitted to the Union), thereby voiding their votes against the amendment. It then replaced the state governments with five military districts headed by generals and administered by more than twenty thou-



*When a procession of former slaves and Republican politicians were met by a white mob in New Orleans in 1866, one of the bloodiest riots of Reconstruction ensued. The local police joined white rioters, killing thirty-four blacks and two white Republicans.*

sand northern troops. To assure ratification once the state governments were reconstituted, the law bluntly extended the vote to all freedmen and withheld it from the white, rebel ex-soldiers. In Louisiana, where the racial composition of the adult male population was roughly equal, black voter registration was soon double that of whites.<sup>17</sup> Then, putting one last nail in the Confederacy's coffin, Congress made readmission to the Union contingent on a state's ratification of the Fourteenth Amendment.

The narrow partisan purpose of Reconstruction also can be found in what the Republican policy omitted. Abolitionists and black leaders had pressed Congress for land reform, and with it a degree of economic independence for slaves from their former masters. Instead, all that the freed slaves got from Congress was the ballot. This prompted Republican cabinet secretary Gideon Welles to conclude cynically, "It is evident that intense partisanship rather than philanthropy is the root of the movement."<sup>18</sup>

Two years later congressional Republicans sought to make the black franchise inviolable by passing and send-

ing to the states the Fifteenth Amendment. Quickly ratified, it simply states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

*Rights Lost: The Failure of Reconstruction.* Despite these efforts, Reconstruction's advancement of black civil rights proved temporary. Relying heavily on black support, Republicans maintained control of southern state legislatures for a few years, but white Democrats seized control of Tennessee and Virginia as early as 1869, and by 1877 all of the former Confederate states had reverted to white Democratic control. Once this happened, Reconstruction was doomed and African Americans saw their newly acquired status as freed men and women slide back to one of near servitude.

Power slipped away from African Americans during these years for several reasons. The late 1860s saw the rise of vigilante violence as a political resource. Murderous white riots in New Orleans, Memphis, and other south-

ern cities targeted politically active African Americans and their white allies. In the countryside, the Ku Klux Klan, a secret society of white men seeking to maintain white supremacy, perfected intimidation through selective brutality.

Meanwhile, northern politicians' commitment to Reconstruction was waning. After many Republicans went down to defeat in the 1874 midterm congressional elections, apparently because of an economic recession, the new Democratic majority in the House of Representatives refused to appropriate funds to support the military forces that remained in the South. Constituents wanted their sons returned home. Congress passed additional laws to protect the freed slaves, but because none contained serious enforcement provisions, they offered blacks in the distant South little substantive support. With the rise of the Ku Klux Klan accompanied by the rapid demobilization of the occupying Union Army, the trajectory of southern politics became clear.

Killed by the same short-term partisan considerations that gave birth to it, Reconstruction met its end with the 1876 presidential election. The Democratic candidate, Samuel Tilden, came within one vote of a majority in the electoral college, but in the disputed states of Florida and Louisiana both parties managed to come up with their own favorable vote counts. As a result, the election was thrown into the House of Representatives, where a Republican pledge to end Reconstruction induced southerners to break ranks and support the Republican candidate, Rutherford B. Hayes. In 1877 federal troops pulled out of the South, leaving African Americans at the mercy of their former masters.<sup>19</sup>

During the early post-Civil War years, then, the Constitution presented fewer barriers to majority rule than in any other period in American history. The Republican majority in Congress and the White House—or the "radical Republicans," as their opponents and historians later misnamed them—were able to dictate the terms of the South's readmission to the Union. Yet they opted for a middle course of political reform. Rather than undertake

a massive social and economic reconstruction of the South, they limited Reconstruction to making the South Republican, thereby realizing the party's national goals and satisfying the interests of the citizens they represented. Even so, local interests soon rose against the limited reconstruction under way. Twenty thousand war-weary northern sons remained in the South, and the government continued to assess high wartime taxes to achieve in the South what few white citizens anywhere would have tolerated in their own communities—the creation of a sizable black electorate. In the North, voters no longer wanted to sacrifice to solve someone else's problem. Reacting to these sentiments, the Republican majority soon lost the will to act. Full citizenship for African Americans would have to await the emergence of a group of northern politicians whose constituencies favored intervention in race relations in the South. Such a mandate would come, but not for nearly a hundred years.

#### *The Jim Crow Era and Segregation: 1877–1933*

In the 1890s Jim Crow laws were adopted throughout the South to disenfranchise black citizens and segregate—physically divide—blacks and whites. The result was segregation of blacks and whites in their access to schools, hospitals, prisons, public parks, restrooms, housing, and public conveyances. Indeed, hardly any government service or social interaction between the races was unaffected.

But to secure segregation the southern states had to prevent black citizens from voting, and so they did. By the end of the century all southern states had constructed a maze of electoral laws that systematically excluded African Americans from civic life. One commonly employed device was the white primary, which excluded African Americans from voting in primary elections. Since winning the Democratic primary in the solidly Democratic South was tantamount to winning the general election, this law effectively disenfranchised southern black voters. Another effective barrier was the poll tax levied on all registered voters which typically had to be paid months before the election.

Perhaps the most notorious and effective legal barrier was the literacy test. Local white registrars would require prospective voters to read and interpret arcane passages of the state's constitution. Few could satisfy the registrars' rigorous demands, and by 1910 less than 10 percent of black males were voting in the South. These restrictive laws also netted many poor and illiterate whites. Most states, however, provided grandfather clauses which exempted from these registration requirements those whose grandfathers had voted before the Civil War.

Without the backing of the Supreme Court, the southern state legislatures would have found it harder to strip away black civil rights. When segregation and disenfranchisement laws were challenged, the Court generally sustained them. Conversely, when federal laws extending rights were challenged, the Court summarily overturned them. The Court based these decisions on a tortuously narrow reading of the Fourteenth and Fifteenth Amendments. Consider this passage from the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Supreme Court interpreted this clause to mean only that states could not abridge privileges conferred explicitly by the Constitution to the national government such as unrestricted interstate travel and open navigation of rivers. The justices excluded the Bill of Rights from the federal guarantees that applied to the states. Decades later, the Supreme Court would reject this interpretation of the Fourteenth Amendment and rediscover the broad national guarantees this clause provides.<sup>20</sup>

The *coup de grâce* came in 1896 when the Supreme Court, ruling in *Plessy v. Ferguson*, blessed the Jim Crow laws and declared the South's segregation laws constitutional.<sup>21</sup> The case arose when Homer Plessy, who was seven-eighths white, appealed his conviction for having violated Louisiana's segregation law by sitting in a "whites only" railroad car. The Court argued that the Fourteenth Amendment's guarantee of equal protection of the law referred only to "political" equality. If African Americans



Until federal laws in the 1960s banned segregation in public accommodations, the doctrine "separate but equal" pervaded every aspect of social contact between the races throughout the South. The policy differed little from South Africa's recently dismantled apartheid.

were socially inferior to whites, the Court reasoned, laws such as Louisiana's could reflect that inferiority so long as political equality was not compromised. The Court then ruled that government-enforced segregation of the races was constitutional as long as the facilities for blacks and whites were equal. With that ruling, the Court established nationally the separate but equal doctrine which officially sanctioned segregation throughout the South.

Why would a mostly Republican-appointed Supreme Court strain to interpret the Fourteenth and Fifteenth Amendments in ways that negated Reconstruction? The answer is a complicated story beyond the bounds of this chapter,<sup>22</sup> but it is clear that, given the broad sweep of the Court's decisions, Republican presidents and members of Congress would have had to change the Constitution or change the Court in order to fulfill the intent of the Fourteenth and Fifteenth Amendments. With the South restored to the Union, neither of these changes was possible.



Eleanor Roosevelt's civil rights activism worked to the advantage of the president. FDR was able to woo African American voters, many of whom had voted Republican (the party of Lincoln) in the 1932 election, without alienating southern Democrats in Congress whose support was essential to sustain his New Deal programs. In serving as her husband's de facto envoy to the black community, the first lady often conveyed her messages through public speeches, here to a black college in Florida. Seated is Mary McLeod Bethune, president of the college and director of Negro affairs for the National Youth Administration, a New Deal federal agency.

#### *Democratic Party Sponsorship of Civil Rights: 1933–1940s*

From 1929 until 1933 the Republican Party presided over the worst depression in American history. Among the many victims of these economic hard times was the party itself. The Great Depression ended the party's dominance in national politics for the next half-century. Ironically, while the rest of the nation was abandoning the Republican incumbent, Herbert Hoover, in favor of Democrat Franklin Roosevelt, most black voters were sticking with their party's ticker in the presidential election of 1932, despite being hit harder by the Great Depression than any group of Americans. (By 1936, however, three-

quarters of blacks had been won over to Roosevelt's re-election.) Today, the appeal of mostly liberal Democratic politicians to black voters appears quite natural, requiring no special explanation. It is a partnership, however, that took nearly three decades to establish.

Both sides first had to break enduring ties that pulled in opposing directions. For black voters, Emancipation and Reconstruction had attracted them to the Republican Party, and Democratic politicians had done nothing in the intervening years to prompt them to question their partisanship. But it was a loyalty rooted more in habit than reward and thus susceptible to a Democratic appeal. For Democratic politicians, any effort to take up the cause of African Americans was fraught with risk. Ever since its return to the Union, the South had provided the Democratic Party with the electoral base it needed to compete nationally. Northern Democratic members of Congress had long depended on the automatic victories of their southern colleagues to win majority control of Congress. Democratic presidential candidates could count on the South's large bloc of electoral votes. All they had to do was ignore segregation, just as their counterparts before the war had sought to ignore slavery.

*The New Deal.* Neither Franklin Roosevelt's winning electoral campaign in 1932 nor his "New Deal" to pull the nation out of the depression overtly championed the cause of African Americans. Both did, however, alter political circumstances in a way that prompted black Americans and Democratic politicians to contemplate their mutual interests. When pressed, Roosevelt refused to battle southern Democratic senators for passage of popular antilynching legislation, privately citing his need to maintain friendly relations with southern Democrats in order to enact his emergency economic policies.<sup>23</sup> Yet the New Deal's even-handed treatment of the black community appealed to African American voters. Many of its programs offered blacks government assistance for the first time since Reconstruction. (Other programs, however, such as Social Security, excluded many low-income occupations that were disproportionately black.) Federal au-

authorities investigated racial discrimination in the distribution of relief aid, especially prevalent in the South, and largely rooted it out. Roosevelt also appointed over a hundred black administrators, some of them to prominent posts. Finally, the Justice Department rejuvenated its long-dormant civil liberties division.

Following the White House initiative, congressional Democrats added nondiscrimination language to a score of public laws creating federal programs. In 1941 Roosevelt issued an executive order banning employment discrimination in federal agencies, and he established the Committee on Fair Employment Practices to enforce nondiscrimination in defense-related industries. These measures, requiring that African Americans be treated as ordinary citizens, represented a major policy breakthrough for America's civil rights policy.

*African Americans and the New Deal Coalition.* During the Roosevelt years, Democratic politicians continued to woo black voters, but from a sufficient distance to allow the Democratic Party to maintain its southern alliance. Nonetheless, hindsight reveals that subtle changes were under way in the political landscape, creating the foundation for later advances in civil rights. First, the twenty years of nearly uninterrupted Democratic control of both the presidency and Congress that began with the Roosevelt administration guaranteed that the Supreme Court and lower federal judiciary would be replenished with judges more sympathetic to civil rights claims. This new look to the courts eliminated a major stumbling block to federal intervention against segregation.<sup>24</sup>

Second, African Americans, who were gradually shifting their party loyalties from the "party of Lincoln" to the "party of Roosevelt," also were migrating from the South, where they could not vote, to northern and midwestern cities, where Democratic political organizations

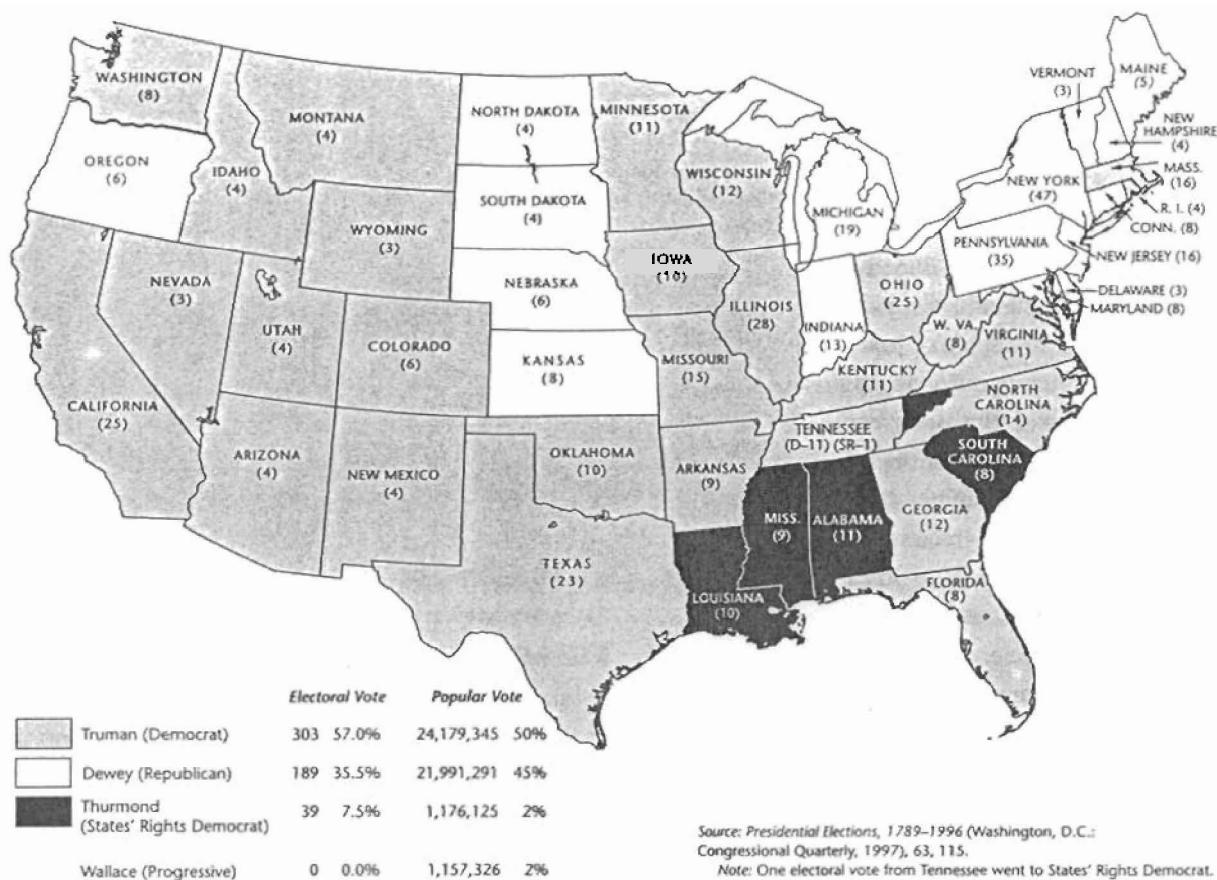
**Table 4-1 Percentage of African Americans in Central Cities of the Twelve Largest Standard Metropolitan Statistical Areas (SMSAs), 1930-1970**

	1930	1940	1950	1960	1970
All 12 SMSAs	7.6	9.0	13.7	21.4	30.8
New York	4.9	6.9	9.8	14.7	23.4
Los Angeles-Long Beach	5.0	6.0	9.8	15.3	21.2
Chicago	7.1	8.3	14.1	23.6	34.4
Philadelphia	11.4	13.1	18.3	26.7	34.4
Detroit	7.8	9.3	16.4	29.2	44.0
San Francisco-Oakland	4.9	4.9	11.8	21.1	32.7
Boston	2.9	3.3	12.3	9.8	18.2
Pittsburgh	8.3	9.3	18.0	16.8	27.0
St. Louis	11.5	13.4	5.3	28.8	41.3
Washington, D.C.	27.3	28.5	35.4	54.8	72.3
Cleveland	8.1	9.7	16.3	28.9	39.0
Baltimore	17.7	19.4	23.8	35.0	47.0

*Source:* Adapted from Leo F. Schneer, Carolyn D. Andre, and Harry Sharp, "Black Suburbanization, 1930-1970," *The Changing Face of the Suburbs*, ed. Barry Schwartz (Chicago: University of Chicago Press, 1976), 80. The figures were transposed to yield data on black percentages.

welcomed them and their votes (Table 4-1).<sup>25</sup> For a century black sharecroppers and tenant farmers had been one of the least mobile population groups in the nation. But World War II (1939-1945) sent many young black males from the segregated Deep South into the armed services where they were stationed in less-racist communities. Other rural black men and women were lured north by high-paying jobs in wartime industry. After the war, farm mechanization continued displacing rural African Americans by rendering labor-intensive farming obsolete. Migration transformed these black citizens from political nonentities into pivotal voters.

The first sign of the changing political fortunes of African Americans came in 1948 when a Democratic president, Harry Truman, openly courted the black vote even at the risk of alienating the South. A faltering, strike-plagued economy appeared to doom the unpopular president to electoral defeat. Desperately searching for a campaign plan that might lead him to victory, Truman's advisers proposed a novel strategy for the Democratic Party: "Unless there are real and new efforts . . . to help the Negro," stated one strategy memo, "the Negro bloc, which,

**Figure 4–2** Presidential Election, 1948

certainly in Illinois and probably in New York and Ohio, does hold the balance of power, will go Republican."<sup>26</sup> This strategy prompted President Truman in the 1948 election year to issue an executive order integrating the armed services, introduce legislation making the Fair Employment Practices Committee a permanent agency, and, most important, follow it with a comprehensive civil rights bill, the first since the end of Reconstruction. Among its numerous provisions, it made racial lynching a federal crime, provided federal guarantees for voting rights, and prohibited employment and housing discrimination. Although supported by most Republicans and

non-southern Democrats, the legislation, predictably, died in the Senate where southern members succeeded in preventing it from coming to a vote.

At the Democratic Party's national convention in the summer of 1948, liberal northern Democrats pressed fellow delegates to adopt a strong civil rights platform. Southern delegates became outraged and bolted from the meeting. In the fall these "Dixiecrats," as they were called, ran their own candidate under the States' Rights Party banner and pulled several southern states' electoral votes away from the Democratic ticket (Figure 4–2). The defection also served to remind national Democrats that

the South could be taken for granted only so long as the party left segregation alone. Despite losing this traditional stronghold, Truman won the election.

As for the Truman administration's 1948 attempts to enact a civil rights law, the defeat of the legislation, like that of the Wilmot Proviso a century earlier, presaged a victory down the road, by identifying a political rationale for northern politicians to attack southern tyranny. With the New Deal, the Democratic Party had begun to attract activist liberals and union leaders who were ideologically committed to civil rights. Like Republican abolitionists a hundred years earlier, these activists were an important constituency of their party, more important than their numbers alone would attest.<sup>27</sup> But not until Democratic presidential candidates realized that the black vote might offset the potential southern losses did the party's politicians have a collective stake in advancing civil rights. Similarly, not until northern congressional Democrats discovered that speaking out against segregation in the South won them a receptive audience among recent arrivals from that region did a congressional majority committed to breaking up segregation begin to coalesce.

#### *Emergence of a Civil Rights Coalition: The 1950s*

The 1950s saw only modest advances in civil rights, but a new coalition was setting the stage for action. Success required both renewed support for civil rights from the Republican Party and profound shifts within the Democratic Party, whose elected leaders historically had been hostile to the cause of African Americans. Two landmark events of the 1950s stand out: the historic *Brown v. Board of Education of Topeka* decision and the Civil Rights Act of 1957, the first such law in eighty-two years.<sup>28</sup> Although important, both events proved more influential in identifying the issues and cleavages for the next decade than in yielding real gains in civil rights.

**The NAACP's Litigation Strategy:** In 1909 the National Association for the Advancement of Colored People (NAACP) began to defend African Americans throughout the South and to challenge the legal structure of segrega-

tion. Of its landmark victories during these early years, one of its most important came in 1944, when it persuaded the Supreme Court in *Smith v. Allwright* to throw out white primary laws.<sup>29</sup> The Court ruled that because race was the explicit criterion for discrimination, such laws violated the Fifteenth Amendment.

Throughout the Deep South, however, many barriers to black registration had been put in place, and the removal of one did not appreciably improve conditions. In fact, nowhere in the South was the electoral potential of the black vote close to being realized. Long-standing Supreme Court doctrine requiring that plaintiffs prove a law's discriminatory *intent* rather than simply demonstrate a bias in its *effect* frustrated the NAACP's efforts to dismantle other racial barriers. For example, in trying to eradicate mechanisms like the poll tax which also disenfranchised poor whites, the NAACP could not satisfy the Court's tough requirements.

In the 1940s the NAACP launched a second line of attack against Jim Crow laws, this time targeting segregated public education. Since *Plessy v. Ferguson* in 1896, the federal judiciary had upheld segregation in the South, but the "separate but equal" doctrine contained in the *Plessy* ruling proved to be an easy target for challenges. The soft underbelly of segregation was the word "equal." Nowhere in the South did the separate facilities for African Americans equal those for whites.

The NAACP began with challenges to the most blatant disparities and gradually brought to the Supreme Court the more subtle forms of inequality inherent in segregated education. Since many states did not provide black graduate and professional schools and black residents were shut out of both public and private white facilities, the NAACP had a relatively easy time convincing the Court of the inequality of separating the races in this instance. Then, the NAACP successfully attacked segregated schools where separate facilities existed but were patently unequal in the education offered students. Less conspicuous forms of inequality were taken on next. In a 1950 decision the Court accepted the argument that intan-



Southern opponents usually were able to avoid integration of public schools through the use of legal subterfuges. Occasionally, however, confrontations occurred. In 1957 President Dwight Eisenhower had to enlist his commander-in-chief authority and deploy federal troops to usher black students into all-white Little Rock Central High School in Arkansas.

gible factors such as faculty reputation and alumni prestige contributed to educational inequality.

Having established that "separate but equal" could be unconstitutional, the NAACP launched a frontal assault on *Plessy*. The opportunity came in 1950 when Oliver Brown of Topeka, Kansas, violated local segregation laws by trying to enroll his daughter, Linda, in a white neighborhood public school. Representing the NAACP, future Supreme Court justice Thurgood Marshall took up Brown's case. Four years later the Supreme Court ruled in *Brown v. Board of Education of Topeka*. Writing for a unanimous Court, Chief Justice Earl Warren argued that education is the foundation of good citizenship and thus constitutes "a right which must be made available to all on equal terms." Stipulating that racial segregation "generates a feeling of inferiority as to [black children's] status in

the community that may affect their hearts and minds in a way unlikely ever to be undone," Chief Justice Warren concluded, "separate educational facilities are inherently unequal." With this 1954 ruling, *Plessy*, the principal legal prop of Jim Crow, crumbled.

The *Brown* decision had broad legal ramifications. It had been argued as a class-action suit on behalf of all citizens similarly denied access to white public schools. The next year the Court empowered lower federal courts to hear segregation cases and oversee the desegregation of public schools with "all deliberate speed."<sup>50</sup> Over the decade after *Brown*, hundreds of school desegregation cases were filed in the federal courts.

Yet even this flurry of litigation did not end segregation. Efforts to implement *Brown* encountered all of the problems associated with enforcing judicial rulings. The decision was met by massive resistance across the South. Acting as if the nation were still governed by the Articles of Confederation, some state legislatures boldly asserted that public education lay beyond the national government's jurisdiction and that they would ignore the Court's "illegal" decision. When this bluff failed, state politicians devised more imaginative blocking tactics. In Virginia, public schools were closed and "private" ones, created with state financing, opened in the vain hope that the new schools would be exempt from the *Brown* ruling. When these and other legal tricks were exhausted, state officials simply defied black parents and federal marshals sent to implement a desegregation ruling. The Supreme Court itself intervened in 1957, ordering the city of Little Rock, Arkansas, to enroll black students in all-white Central High School. When Arkansas governor Orval Faubus and school officials failed to comply, President Dwight Eisenhower sent in U.S. Army troops to escort black students to their new school.

The last bulwark of segregation's defense was tokenism—perhaps the most successful dilatory tactic of all. A school district would admit a handful of black students and then rush to federal court claiming compliance. Civil rights lawyers may have won many cases during this

era, but their clients had little success in gaining access to "whites only" schools. In 1962, eight years after *Brown*, less than one-half of 1 percent of black students in the South were attending desegregated schools.

*The 1957 Civil Rights Act: Rehearsal for the 1960s.* The year 1957 was ripe with political opportunity for the Democrats. With Republican two-term president Dwight Eisenhower ineligible for reelection in 1960, the Senate was full of ambitious Democrats grooming themselves for a presidential bid. John Kennedy of Massachusetts, Stuart Symington of Missouri, and Hubert Humphrey of Minnesota would later declare their candidacies and campaign actively in the 1960 presidential primaries. Other, less-daring Senate colleagues could barely contain their aspirations for the top spot. Among them was Democratic majority leader Lyndon Johnson from Texas.

Daring or not, all would-be Democratic candidates had to demonstrate their abilities to appeal to a national constituency that now included substantial numbers of black voters in the large, vote-rich industrial states. For Johnson, a southerner, this requirement posed a serious problem. How could this Texan establish his credentials with African Americans and therefore be taken seriously by the northern Democratic Party leaders who controlled the nomination?

Johnson's vehicle into the national arena was the 1957 Civil Rights Act, which he introduced.<sup>21</sup> This strategy was not lost on his southern colleagues who wanted to boost his presidential bid over those of the northern liberals Humphrey and Kennedy. And so they blessed the legislation the only way these agents of segregation reasonably could—by refraining from vigorous opposition and, in a few cases, by abstaining in the final floor vote. This message was reinforced by the passage of another, slightly less anemic voting rights bill in the spring of 1960, only weeks before many of these senators would head for the Democratic presidential nominating convention. Although Johnson lost the Democratic presidential nomination to Kennedy, he did succeed in winning the consolation prize—the vice-presidential nomination. And ever mind-

ful of the black vote, Johnson and his colleagues oversaw enactment of yet another minority voting rights law during the summer before the 1960 presidential election.

With passage of the Civil Rights Act of 1957, the first civil rights law since Reconstruction, men and women who felt their right to vote had been denied for reasons of race could now file suit in federal court. But the prospect of expensive litigation and the provision that defendants—say, a local voter registrar—would be entitled to a jury trial proved such a formidable barrier that the NAACP and similar civil rights organizations filed suits designed only to establish widespread voting discrimination. To no one's surprise, few, if indeed any, black citizens gained the vote by virtue of this limited law. The significance of the 1957 Civil Rights Act, then, lay in what it represented politically rather than in any real gains it produced for black Americans. For the first time, Democratic congressional leaders committed themselves to passing a civil rights bill. These early civil rights laws represented a transition, not so much for African Americans seeking full citizenship but rather for the Democratic Party.

John Kennedy's narrow victory in 1960 reminded Democrats once again that winning the presidency without the South was virtually impossible. Even majority control of Congress would be jeopardized if more southern politicians decided—as a few in fact had—to disassociate themselves with northern Democrats and change parties. But even if the party accepted these risks and took up the cause of civil rights, it still lacked sufficient votes to enact the kinds of policies necessary to dismantle segregation. To jettison the party's southern wing by embracing civil rights and then fail to deliver would constitute political suicide.

Yet during the 1960s Democratic presidents Kennedy and Johnson and their congressional colleagues took this precarious course. The party leadership broke with the South and committed the nation to an activist civil rights policy before it was politically safe to do so. Why? Because doing nothing suddenly became the riskier strategy. A civil rights movement based on demonstrations and protest

was generating a groundswell of support throughout the nation that the Democratic Party, which controlled Congress and the presidency, could not ignore. Failure to deal with this issue would have jeopardized the political relations of many Democrats with their core supporters. Then, in the 1964 election, an event rarer than Halley's comet occurred: the emergence of a dominant governing coalition in Washington. The Democrats won both the presidency and a large majority of seats in both chambers of Congress. Like a comet, it did not last long, but while present it burned bright. The result was half a decade of legislation followed by vigorous enforcement to dismantle segregation and voting discrimination. Finally, the national government had decided to finish Reconstruction and assume responsibility for every citizen's civil rights.

### *The Civil Rights Movement: 1960s*

In the years leading up to the early 1960s, the civil rights movement, led by the NAACP, followed a strategy designed more to influence judges than politicians. This strategy had garnered some impressive court victories, but success at the bar had not translated into real gains in civil rights. Entering the 1960s, the civil rights movement took a new course—public protests directed against segregation and the authorities who administered it and, ultimately, toward influencing public opinion and, in turn, Congress and the president.

In December 1955 a black seamstress, Rosa Parks, refused to surrender her seat on a city bus in Montgomery, Alabama, to a white patron and move to the back of the vehicle. In doing so, she launched the historic Montgomery bus boycott, which became the model for later boycotts. In 1960 the first "sit-in" was held when several black college students in Greensboro, North Carolina, occupied seats in a local restaurant reserved for whites and refused to move until they were served or arrested.

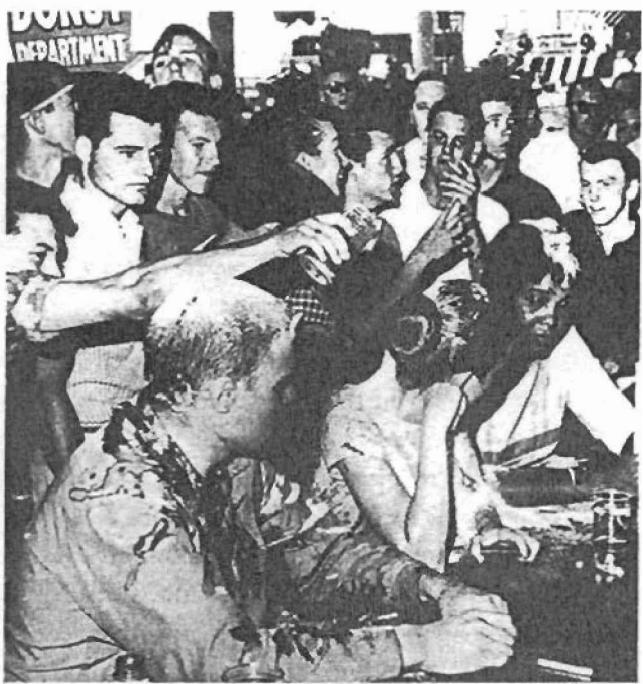
Realizing that they needed protection if injured or arrested, demonstration participants began to look for stronger organization and leadership.<sup>12</sup> As the arena shifted from litigation to protest, a new class of leaders



Rosa Parks, whose refusal to move to the back of a city bus in December 1955 touched off the historic Montgomery, Alabama, bus boycott, is fingerprinted by Montgomery deputy sheriff D. H. Lackey. Her courageous act and subsequent arrest triggered massive demonstrations in the city and a boycott of local public transportation and white businesses. These events led eventually to the dismantling of local segregation policies and stimulated other acts of civil disobedience elsewhere.

emerged—men and women who were attuned more to popular persuasion than to judicial appeals. The most important of these leaders was the Reverend Martin Luther King Jr. He had gained national recognition helping to coordinate the Montgomery bus boycott and would serve as leader of the civil rights movement for most of the 1960s. During those years, King and his organization, the Southern Christian Leadership Conference (SCLC), spearheaded demonstrations throughout the South.

King's strategy of nonviolent resistance may have been inspired by the Indian leader Mahatma Gandhi (1869–1948), but his political pragmatism was a page out of James Madison's playbook. Ultimately, King reasoned,



The scene is Jackson, Mississippi, where the local lunch crowd is drenching lunch counter demonstrators with mustard and ketchup. Such demonstrations occurred throughout the South in the 1960s. Most of the participants were local black and northern white college students.

rights would be won not in the courts through reasoned argument but in legislatures through direct engagement with opponents whose interests were at stake. "Needless fighting in lower courts," King argued, is "exactly what the white man wants the Negro to do. Then he can draw out the fight."<sup>33</sup> If African Americans were to realize their rights, he knew they would have to claim them.

Civil rights demonstrations began in earnest in 1960, and over the next six years almost 2,500 were held, with many receiving national news coverage.<sup>34</sup> One of the most important, held in the spring of 1963 in Birmingham, Alabama, provided the stimulus for passage of a landmark in American history, the Civil Rights Act of 1964. It forced a reluctant Democratic Party to commit itself to an aggressive civil rights policy.

*The Birmingham Demonstration.* In early 1963 Presi-

dent Kennedy proposed a new civil rights bill that perpetuated the Democrats' historical straddle of its warring factions. But, pleading for patience from King and other leaders, Kennedy argued that Congress should enact his less-controversial social programs before tackling segregation. Civil rights leaders suspected that his real motivation was to keep the South in the Democratic column in the upcoming 1964 election. And they had their own strategic reasons for impatience. Demonstrations were turning violent, and events were only partially under their control. If King and the other leaders were to keep the movement directed toward civil disobedience and peaceful protest, they needed to start producing results.

The selection of Birmingham as a venue for protest reflected the broad strategic purpose of the demonstrations. Segregation was no worse there than in many other cities throughout the Deep South. But Birmingham did have a local police chief, Eugene "Bull" Connor, who was notorious for his intolerance and rough treatment of civil rights demonstrators. He would provide the nation with a graphic display of the institutional violence that could be marshaled to enforce segregation. As the nation watched on network television, Connor filled his jails with two thousand marchers, who were arrested for not having a parade permit. The local law enforcement officers then resorted to police dogs and fire hoses to disperse peaceful demonstrators, including children barely old enough to go to school.

The Birmingham demonstrations succeeded when the city's business community agreed to sit down with the protesters and negotiate. But, more important, protesters had created a national crisis that President Kennedy could not ignore. For years the monthly Gallup Poll had asked its national sample of respondents to name the most important problem facing the country. Until the Montgomery bus boycott in 1956, civil rights had never figured prominently in responses to this query. From April to July 1963, however, the percentage of respondents mentioning civil rights shot up from 30 to nearly 50 percent.

Suddenly, continued accommodation of southern



Protestors parading down the streets of Birmingham, Alabama, in 1963 were bent on focusing national attention on their cause. The local police were quite accommodating. To the horror of television viewers, police dogs and water hoses were used forcefully on protestors, demonstrating the brutality with which segregation was enforced.

Democrats imposed significant political costs on Kennedy. To fail to act might irreparably damage his reputation among black voters who had provided the margin of victory in critical states in 1960 and might well again in any bid for reelection. These events, orchestrated by the civil rights movement, made the president into a reluctant champion of its cause. But the Democratic Party's predicament remained. Shortly after a televised address to the nation unveiling the new civil rights legislation, Kennedy invited movement leaders to the White House to plan legislative strategy. The president explained to the group the bind they had put him in:

This is a very serious fight. The Vice-President [Lyndon Johnson] and I know what it will mean if we fail. I have just seen a new poll—national approval of the administration has fallen from 60 to 47 per cent. We're in this up to the neck. The worst trouble of all would be to lose the fight in the Congress. We'll have enough trouble if we win; but, if we win, we can deal with those. A good many programs I care about may go down the drain as a result of this—we may go down the drain as a result of this—so we are putting a lot on the line.

Democrats were about to commit to a strong civil rights program without having the means to succeed.<sup>33</sup>

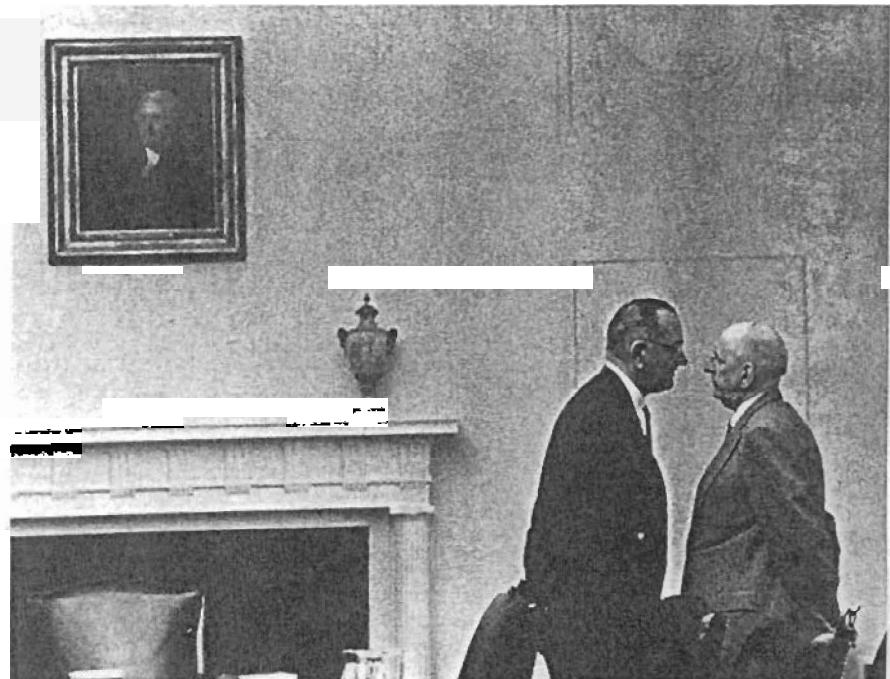
*The Democratic Party's Commitment to Civil Rights.* On June 11, 1963, President Kennedy addressed the nation, proclaiming his full support for the aspirations of African Americans and announcing a major revision of the civil rights bill then before Congress. The courts would no longer determine violations; for the first time federal agencies could independently identify discrimination and impose remedies. Although this new proposal was far weaker than what King and his colleagues had asked for, they accepted it as a solid step in the right direction.

Five months later Kennedy was assassinated, and Vice President Lyndon Johnson succeeded to the presidency. At the time, a strengthened version of the legislation, which had passed the House of Representatives on a bipartisan vote, was predictably stalled in the Senate.<sup>34</sup> Southern senators did not have enough votes to defeat the legislation outright, but they appeared able to filibuster it indefinitely (see Chapter 6, Congress).

Within a few days of assuming the presidency, Johnson addressed a joint session of Congress and a nationwide television audience to announce that a strong civil rights law would be the nation's memorial to the fallen president. This proclamation set the stage for a struggle in Washington. The outcome would make 1964 a year of historic successes for both civil rights and the Democratic Party.

*The 1964 Civil Rights Act.* Once Johnson persuaded Senate Republicans to join northern Democrats in breaking the southern filibuster, the Senate promptly passed the

For years Georgia senator Richard Russell and other southerners had blocked civil rights legislation with the threat of a filibuster. New president Lyndon Johnson, however, was not deterred in his push for civil rights legislation. Here, two weeks after President John Kennedy's assassination, Johnson warns his Senate mentor to stand aside or be run down.

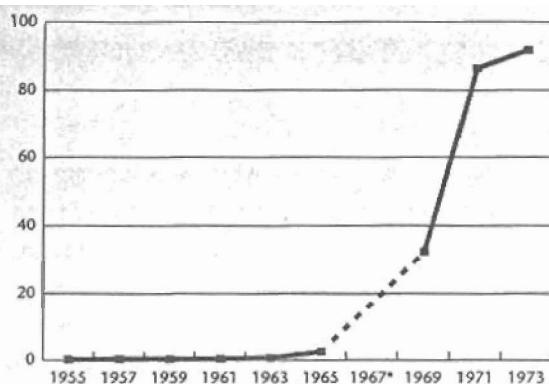


## POLITICS → POLICY

### The 1964 Civil Rights Act and Integration of Public Schools

One of the most effective provisions of the 1964 Civil Rights Act authorized the Department of Health, Education and Welfare to withhold federal grants from school districts that failed to integrate their schools. No longer could southern school boards hide behind token desegregation and endless visits to the federal courts. The effects were quick and dramatic: within a year more black children were admitted to formerly all-white schools than in the entire decade after the 1954 *Brown v. Board of Education of Topeka* decision. Within ten years over 90 percent of black children in the South were attending integrated schools.

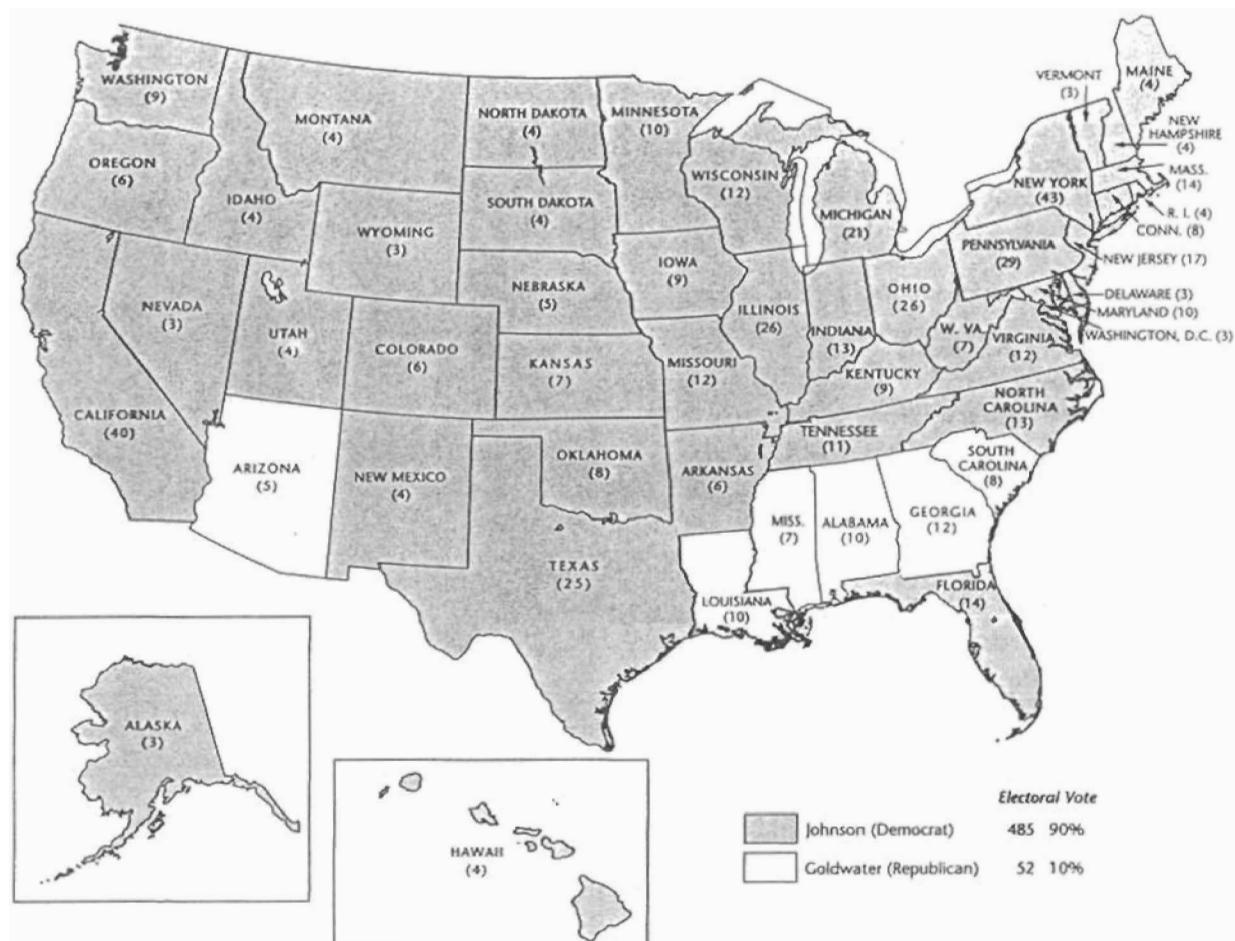
Percentage of All Southern Black Schoolchildren Attending School with Whites, 1955–1973



Source: Gerald N. Rosenberg, *Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991), 50–51.

\*Dashed line indicates missing data for 1967.

**Figure 4-3** Presidential Election, 1964.



Source: Presidential Elections, 1789-1996 (Washington, D.C.: Congressional Quarterly, 1997), 67.

Civil Rights Act of 1964. This law, which was substantially stronger than the legislation President Kennedy had introduced, authorized the national government to end segregation in public education and public accommodations.

The Democratic administration's high-profile sponsorship of the civil rights law set the stage for civil rights to emerge as a decisive campaign issue in the 1964 presidential election. The Republican Party in Congress traditionally had been more supportive of civil rights than the Democrats, but in 1964 it began to veer sharply away from

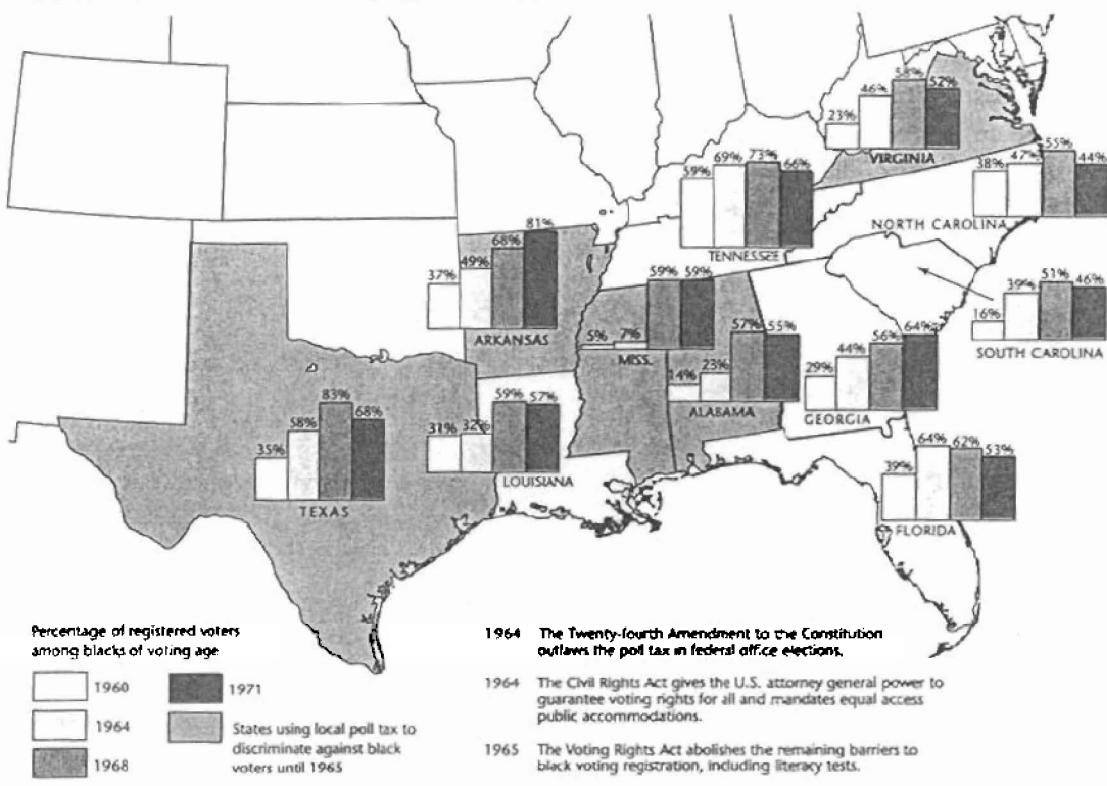
its long-standing support. At their national convention in the summer of that year, Republicans chose Barry Goldwater of Arizona as their presidential candidate. Goldwater was one of the few senators outside the South to oppose the 1964 civil rights bill. When the Democrats convened to nominate the incumbent president Johnson, they underlined the party differences on this issue by seating delegates who challenged segregationist Democrats and by selecting Sen. Hubert Humphrey, a long-standing, vocal proponent of civil rights, as Johnson's running mate.

Rarely have the major parties staked out such divergent positions on so important an issue. As a result, public awareness of the parties' positions on the race issue was uncharacteristically high. Earlier surveys had found respondents equally divided on their views about which political party most favored school integration, but during the 1964 election campaign respondents had no difficulty identifying the Democrats, by a nine-to-one margin.<sup>17</sup>

The outcome of the election was the largest presidential landslide in history. The Democrats also racked up huge majorities in the congressional elections. Goldwater won five states in the Deep South and his home state of Arizona (Figure 4-3). With over 95 percent of black voters preferring Johnson, the Democratic and Republican Parties swapped constituencies in the South.<sup>18</sup> When the new Congress convened in 1965, northern Democrats domi-

## MAJOR EVENTS IN THE CIVIL RIGHTS MOVEMENT, 1955–1968

December 1955	Blacks in Montgomery, Alabama, begin boycott of city buses in protest of segregated seating.
September 1, 1957	Central High School in Little Rock, Arkansas, engulfed in turmoil as the governor calls out Arkansas National Guard to prevent enrollment of nine black students. President Dwight Eisenhower forced to send in federal troops to restore order.
February 1, 1960	Wave of "sit-ins" touched off across the South by four students in Greensboro, North Carolina, who are refused service at a segregated lunch counter.
May 4, 1961	"Freedom rides" begin as blacks try to occupy "whites only" sections of interstate buses. U.S. marshals ultimately are called in to settle violent reaction to black efforts.
September 30, 1962	Federal troops are used to quell a fifteen-hour uprising by University of Mississippi students protesting the enrollment of a single black student, James Meredith. Two students are killed. (Televised live across the nation.)
April 1963	Demonstrations begin in Birmingham, Alabama. Local authorities use fire hoses and police dogs to disperse demonstrators.
August 28, 1963	March on Washington by over 200,000 blacks and whites. The Reverend Martin Luther King Jr. delivers his "I Have A Dream" speech, and "We Shall Overcome" becomes the anthem of the civil rights movement.
September 1963	Demonstrations begin in St. Augustine, Florida, to protest the arrest and detention of seven students. Blacks boycott several northern schools in protest of de facto segregation. Four black children are killed in bombing of Birmingham, Alabama, church.
June 1964	Three civil rights workers, two white and one black, working to register black voters are killed in Mississippi. Murderers include sheriff's deputies.
July 1964	First in a wave of ghetto riots breaks out in New York City's Harlem.
January 1965	King organizes protest marches in Selma, Alabama. Marches end in violent attacks by police.
August 11, 1965	Black riots erupt in Watts section of Los Angeles. Four thousand rioters are arrested; thirty-four are killed.
June 6, 1966	James Meredith suffers gunshot wound in march across Mississippi. March continues under "Black Power" slogan.
Summers 1966 and 1967	Riots and violent demonstrations occur in cities across the nation.
April 4, 1968	Martin Luther King Jr. assassinated in Memphis, Tennessee.

**Figure 4-4** African-American Voting Rights, 1960–1971

Source: Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952–1984* (Praeger Publishers, Westport, CT, 1987), 97. Copyright © 1987 by Harold W. Stanley. Used with permission.

nated both chambers. Even some border states elected Democrats who were moderate supporters of civil rights and who were prepared to support national policies that would dismantle segregation.

*The Voting Rights Act of 1965.* Every civil rights law enacted since 1957 had addressed voting rights, but throughout much of the South black registration remained the exception rather than the rule. Only 7 percent of eligible black citizens in Mississippi were registered in 1964; in Alabama the figure was 20 percent. Each of these civil rights laws had the same fatal flaw: they required individuals to prove discrimination in court. Black leaders thus pressed the White House to authorize federal agencies to guarantee the right to vote by taking over voter registration or directly supervising local officials, just as the 1964 Civil

Rights Act had authorized government action against segregation in education and public accommodations.

Responding to their pleas, Johnson, who was preparing a huge package of social legislation known as his Great Society program, asked King and other leaders to "give the nation a chance to catch its breath" on civil rights. After all, African Americans would be well served, Johnson argued, by his new social programs in employment, education, and health care. But for movement leaders, this was asking too much. Never before had there been such large, sympathetic majorities in the House of Representatives and the Senate. For the first time since the early days of Reconstruction, opponents of civil rights lacked a veto. In Johnson and the Democratic members of Congress, the movement leaders had politicians who had been elect-

ed largely on their commitment to civil rights. From recent experience, they knew precisely what was needed to motivate this legislative juggernaut into action.

The demonstrations in Selma, Alabama, in the spring of 1965 closely paralleled those in Birmingham in 1963. Brutal local law enforcement—club-wielding police on horseback, attack dogs, and liberal use of powerful fire hoses—yielded vivid television images of the official violence that enforced segregation. Another echo of Birmingham was that civil rights leaders knew they had succeeded when President Johnson went on prime-time television to introduce new civil rights legislation.

Ignoring the howls of southern senators, Congress passed and the president promptly signed the Voting Rights Act of 1965. The law was aggressive—the legislators who drafted it knew that virtually everyone it added to the registration rolls would soon be voting Democratic. Its main provision authorized the Department of Justice to suspend restrictive electoral tests in southern states that had a history of low black turnout. In these states the Justice Department could (and did) send federal officers into uncooperative communities to register voters directly. The states also had to obtain clearance from the Justice Department before changing their election laws. While the Antifederalist Patrick Henry might have turned over in his grave at his first sight of the Voting Rights Act and federal registrars entering his home state of Virginia, the policy was perfectly consistent with Madison's proposed national veto over objectionable state laws.

Few laws have ever achieved their goals more dramatically or quickly (Figure 4-4). Registration soared, yielding some dramatic effects. For the first time politicians from these states began paying attention to the views of their

**Table 4-2 Black Federal, State, and Local Officeholders, 1970–1997**

Office	1970	1980	1990	1997
Members of Congress and state legislatures	179	365	465	646
City and county officials	715	2,807	4,481	5,052
Judges, sheriffs, and other law enforcement officers	213	528	769	996
Boards of education	362	1,214	1,655	1,962
<b>Total</b>	<b>1,469<sup>a</sup></b>	<b>4,914<sup>b</sup></b>	<b>7,370</b>	<b>8,656<sup>c</sup></b>

Source: Information supplied by the Joint Center for Political and Economic Studies, Washington, D.C.

a. Nine states had no black elected officials: Idaho, Maine, Montana, New Hampshire, North Dakota,

Oregon, South Dakota, Utah, and Vermont.

b. No black elected officials were identified in six states: Idaho, Montana, North Dakota, Utah, Vermont, and Wyoming.

c. Total includes one statehood senator and one statehood representative from the District of Columbia.

black constituents. In 1970, when several southern senators polled their colleagues about opposing an extension of the voting rights law, they found little enthusiasm. Democratic conservative Herman Talmadge of Georgia, who at one time could have been counted on, begged off: "Look, fellows, I was the principal speaker at the NAACP conference in my state last year." And South Carolina Democrat Ernest Hollings was direct: "I'm not going home to my state and explain a filibuster to black voters."<sup>39</sup> Moreover, Table 4-2 traces the new class of politicians emerging to represent this large, rapidly growing, and residentially concentrated constituency. From 1970 to 1997, the number of black elected officials at all levels of government grew from 1,469 to 8,656.

The 1965 Voting Rights Act was, then, a culminating achievement of the civil rights movement of the 1960s. But during the second half of the decade events began to change the way African Americans and whites looked at civil rights. In the summer of 1965 a two-week riot, in which thirty-four people were killed, exploded in the black neighborhood of Watts in Los Angeles. Over the next few summers similar riots would erupt in other cities including Oakland and Detroit. Late in 1965 the Vietnam War began to replace civil rights demonstrations on tele-

## Key Provisions of Federal Civil Rights Legislation

### Civil Rights Act, 1957

Established U.S. Commission on Civil Rights to investigate the status of civil rights in the country. Made it a federal crime to attempt to prevent a person from voting.

### Civil Rights Act, 1960

Increased sanctions against abridging or denying the right to vote. Permitted federal government to appoint "referees," under the jurisdiction of the courts, to register voters denied the right to vote by a pattern or practice of discrimination.

### Civil Rights Act, 1964

**Voting:** By equating a sixth-grade education with literacy, the act made it more difficult to disenfranchise blacks through literacy tests.

**Public accommodations:** Barred discrimination on basis of race, color, religion, or nationality in restaurants, service stations, theaters, transportation, and hotels with five rooms or more. Empowered attorney general to initiate suits.

**Schools:** Authorized attorney general to bring suit against segregated schools. Also permitted federal government to withhold funds from segregated schools.

**Employment:** Barred discrimination on the basis of race, color, religion, nationality, or sex in a range of employment practices. Established Equal Employment Opportunity Commission to enforce this provision.

### Voting Rights Act, 1965

Permitted appointment, under Civil Service Commission, of voting examiners in place of local registrars in all

areas where less than 50 percent of those eligible to vote actually voted in the 1964 presidential election. Use of literacy tests and similar mechanisms suspended.

### Age Discrimination Act, 1967

Prevented employment discrimination based on age for workers 40–65 years old. Later amended to prevent mandatory retirement.

### Fair Housing Act, 1968

Outlawed refusal to rent or sell housing on grounds of race or religion, but exempted citizens who rented or sold their homes without using a real estate agent.

### Rehabilitation Act of 1973

Instituted affirmative action programs for employers to hire "qualified handicapped individuals" and barred discrimination solely on the basis of a handicap.

### Civil Rights Restoration Act, 1988

Applied anti-sex discrimination standards to all institutions' programs if the institution received federal funding.

### Civil Rights Act of 1991

Gave victims of intentional discrimination based on sex, religion, or disability the right to sue for monetary damages. (Victims of racial discrimination had had this right since a Reconstruction-era law.)

vision news, and the vocal opposition of some civil rights leaders to the war sapped support in Washington. Reflecting its waning enthusiasm for civil rights, Congress defeated a fair housing bill in 1966. (A somewhat weaker law was passed two years later, however.) Then, in 1968, Martin Luther King Jr. was assassinated in Memphis, Tennessee, after leading a march in behalf of striking sanitation workers. Riots erupted in cities throughout the na-

tion. Shortly thereafter, "law and order" replaced civil rights as the mantra of political campaigns throughout the United States.

### *The Era of Remedial Action: The 1970s to the Millennium*

The civil rights movement may have lost momentum, but the advances continued. Over the next thirty years,

## POLITICS →

## THE BUSING CONTROVERSY

In the 1970s the enforcement of fair housing laws was at best only a partial remedy for preventing future discrimination. Even with aggressive federal action, segregated neighborhoods would persist for years and with them the continued racial segregation of schools. Then, in an effort to rectify the legacy of residential segregation for public education, the federal bureaucracy and courts adopted a policy of achieving racial integration by busing students to schools outside their neighborhoods. Americans, however, were not happy with this solution. Throughout the 1970s and 1980s busing



scored at or near the top in public opinion surveys as the national policy most upsetting Americans.

In recent years school busing has declined in both the numbers of students affected and its importance as a political issue. Replacing it as a controversy is affirmative action—another emphasis on “equal outcomes” over “equal opportunity.” To implement affirmative action, government and the private sector try to compensate individuals for the effects of past discrimination.

legislation (including the Fair Housing Act of 1968) shifted the responsibility for identifying and eradicating abuses from the injured individuals and the courts to the federal bureaucracy. Once the Department of Health, Education and Welfare (HEW) assumed control, the pace of desegregation increased sharply. In redelegating principal enforcement authority from the courts to the bureaucracy, Congress and the presidency “redefined” discrimination in a way that made it much easier for the federal agencies to administer civil rights policy. Rather than having to investigate and prove a specific discriminatory act that prevented African Americans from enjoying their rights, the government could focus instead on the “outcome” of local practices. The underrepresentation of African Americans on voter registration rolls, in apartment rentals, in schools, in employment, and the like were enough to es-

tablish a reasonable suspicion of discrimination for which the government could apply a remedial solution.

In the 1980s and 1990s civil rights enforcement moved beyond the South to include all government and private actions that yielded indicators of discrimination. A favorite target of federal investigators was schools. In fact, when these officials searched for evidence of discrimination in black versus white enrollment figures, they netted many schools outside the South where segregation arose not from school policies, but as a byproduct of discriminatory housing laws that kept neighborhoods, and consequently the neighborhood schools, segregated.<sup>40</sup> (This *de facto* segregation is distinguished from *de jure* segregation, which is that mandated by law as it was in the South.) When the courts, the Department of Justice, and HEW decided jointly to force school districts to bus stu-

**Table 4-3** Public Attitudes toward Affirmative Action (percent)

Question		Blacks	Whites	Total
Do you favor government financing for job training for minorities to help them get ahead in industries where they are underrepresented?	Yes	95	64	69
	No	3	29	24
Is it necessary to have laws to protect minorities against discrimination in hiring and promotion?	Yes	88	65	69
	No	9	31	27
Do you favor special education programs to assist minorities in competing for college admissions?	Yes	82	59	63
	No	11	31	28
Should affirmative action programs be ended now, phased out over the next few years, or continued for the foreseeable future?	Ended now	1	13	12
	Phased out	17	45	40
	Continued	80	35	41
Should preference in hiring and promotion be given to blacks to make up for past discrimination?	Yes	62	31	35
	No	23	57	52
As a result of affirmative action, do you think less-qualified people are hired and promoted and admitted to college at least some of the time, or hardly ever or never?	At least some	67	81	79
	Hardly ever/never	28	13	15

Source: New York Times/CBS Poll, December 6–9, 1997. Cited in Sam Howe Verhovek, "In Poll, Americans Reject Means but Not Ends of Racial Diversity," New York Times, December 14, 1997.

dents to sometimes distant schools for the sake of integration, the measure produced waves of public protests. Indeed, busing proved to be one of the most controversial civil rights policies of the modern era (see box "The Busing Controversy").

The government, then, had found straightforward solutions for redressing discrimination in voting rights and schools: it enrolled black voters and redirected students to new schools. But what about past discrimination in employment? The government could not simply tell its own agencies or private businesses to hire an equal number of minorities. Instead, it resorted to a policy of *affirmative action*. This policy requires any employers or government agencies that have practiced discrimination to compensate minorities by giving them special consideration in

their selection for employment and education. Affirmative action is most controversial when applied to government contracting, university admission rules to increase minority enrollments, and employment policies to promote minority presence and advancement in business and the professions. Early efforts at affirmative action, quickly rejected by both the federal courts and the American public, involved the use of quotas—that is, setting aside a certain share of admissions, government contracts, and jobs for those population groups that presumably had suffered from past discrimination.

Although the Supreme Court has consistently rejected the use of quotas, apparently it is prepared to allow some consideration of an applicant's membership in a disadvantaged group. In 1987, for example, the Court ruled that

sex could be considered along with other criteria in promotion decisions. This decision appeared to permit affirmative action even in realms where evidence of past discrimination was absent.<sup>41</sup> But even without quotas, affirmative action remains highly controversial. The results of the national survey reported in Table 4-3 indicate that a healthy majority of both white and black respondents favor special assistance for minorities subjected to past discrimination, but a majority of whites draw the line at affirmative action.

Indeed, that controversy is playing out in the Supreme Court as well. Over the past few years the Court has looked askance at any form of preferential treatment. In 1995 a narrow majority employed decisive language in *Adarand Constructors, Inc. v. Pena* to rule that affirmative action policies tailored to produce broad, equal outcomes across groups violated the Constitution's equal protection provisions. Instead, only those affirmative action policies "narrowly tailored" to achieve a "compelling government interest" would be countenanced.<sup>42</sup> Since *Adarand*, the Court has displayed unusual consistency in voiding affirmative action policies. (This finding accounts for efforts of civil rights groups to settle the Piscataway discrimination case and head off another Court verdict against affirmative action.) In 1996 the Court refused to review a case in which a federal court of appeals had voided race as a criterion for admission to the University of Texas Law School and in doing so rejected the state's claim that it had a "compelling interest" to produce minority lawyers.<sup>43</sup> More generally, this ruling undermined frequent claims by colleges and universities that they could enlist race and other criteria to achieve "diversity" on campus. In 1997 the Court continued this policy course by refusing to review an appeals court decision that upheld the constitutionality of a 1996 California proposition to end affirmative action. By a vote of 54-46 percent, Californians had added Proposition 209 to the state's constitution. It banned the use of "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." Among civil rights groups and their opponents, debate over the value and constitutionality of affirmative action continues.

### The Legacy of the Civil Rights Movement for Women, Gays, and Other Groups

Although race remained a prominent civil rights issue in the 1970s, the civil rights movement began to branch out to include women, the elderly, the disabled, homosexuals, and virtually every ethnic minority. The new directions civil rights have taken over the past several decades have deep roots, however, in the two-hundred-year struggle of African Americans for civil rights. It paved the way politically for these new efforts, both in honing the techniques of demonstrations and protest and in creating a receptive audience in the news media and American public opinion. But, most important, the black civil rights movement built a foundation of federal laws, judicial precedents, and administrative regulations that could be easily extended to other groups.

In the American constitutional system several hurdles must be cleared to establish a particular right for a particular group. First, a right must be recognized as such by those who make and enforce the law. Universal suffrage, for example, would appear to be an essential feature of any republic aspiring to be a democracy. Yet until ratification of the Fifteenth Amendment in 1870, the Constitution left the decision of who voted up to the states. Over the nineteenth century the states added and subtracted all kinds of qualifications—property, literacy, advance registration, and even whether one's grandfather had voted. Each unenfranchised group had to establish its right to vote: white males without property did so in state electoral reforms (1820s and 1830s), African Americans in the Fifteenth Amendment (1870), women in the Nineteenth

Amendment (1920). American Indians in a 1924 federal law, and young adults from eighteen to twenty-one in the Twenty-sixth Amendment (1971).

The second hurdle to establishing rights is enforcement. The sordid history of black civil rights demonstrates that unless the political will exists to implement constitutional amendments extending civil rights, the amendments may amount to little more than hollow declarations. African Americans may have won the "right" to vote in 1870, but for those in the South, winning the vote itself would take another century.

In recent years, then, activists seeking to establish and implement rights for women and other minorities have found their way paved by the slow, painstaking efforts of African Americans. The black civil rights movement established valuable precedents and administrative structures that could be easily transferred to other rights claimants.

### **Equal Rights for Women**

Women established their right to vote nearly a century after they organized and began promoting their cause. Long before abolitionists were advancing the vote for African Americans, the early feminists, later calling themselves suffragettes, were campaigning for the vote. (Many also were active in the abolition movement.) Yet despite their efforts, "sex" was excluded from the Fifteenth Amendment, and none had the vote until 1869 when the territory of Wyoming passed the first women's suffrage law. Gradually, fourteen other states added women to the electorate. In 1919 Congress sent the Nineteenth Amendment to the states, and the next year it was ratified. Despite the half-century gulf between these constitutional amendments, the association between black and women's civil rights is evident in the wording of the two texts:

#### **AMENDMENT XV (Ratified February 3, 1870)**

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

**Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

#### **AMENDMENT XIX (Ratified August 18, 1920)**

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Unlike African Americans, however, women experienced little delay between principle and reality. Although voting registration varied across states, women's registration rates approached three-quarters of men's less than a decade after ratification of the Nineteenth Amendment. Within a few years women were voting regularly at a rate slightly below that of men.

The extension of other civil rights guarantees to women clearly rode the coattails of the civil rights movement. In fact, discrimination based on sex was included in the 1964 Civil Rights Act. Its presence in the act, however, stemmed from a political miscalculation. Initially the legislation included language covering discrimination based only on religion, national origin, and race. Southern opponents proposed and voted to add sex to this list, certain that it would decrease overall support for and ultimately defeat the civil rights bill. This strategy of weighing the legislation down with controversial provisions backfired, however, when Congress accepted their amendment and proceeded to pass the legislation.

The surprising legislative victory did not lead to immediate enforcement, however, even though the 1964 law created an enforcement mechanism—the new Equal Employment Opportunity Commission (EEOC)—authorized to investigate and file suits against racial discrimination in the workplace. With one early EEOC commissioner calling the sex discrimination policy "a fluke," the commission initially balked at enforcing the employment discrimination protections for women. But the agency revised its orientation after a successful political campaign focused national attention on employment discrimination against women. Today, claims of sexual discrimination

and harassment in the workplace outnumber all others filed with and investigated by this commission.

The National Organization for Women (NOW) was formed in 1966 in direct reaction to the EEOC's refusal to take up their cause. Organized along the same lines as the NAACP, NOW initially pursued a litigation strategy, which met with mixed success. So, to establish a stronger legal foundation, NOW and other feminist organizations dusted off the Equal Rights Amendment (ERA) which had been introduced in Congress in 1923 and every year thereafter with tepid enthusiasm. The amendment gave Congress the authority to implement the following statement: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Using many of the same tactics honed by the civil rights movement—demonstrations, televised appeals, Washington rallies, and intensive lobbying—NOW and other feminist organizations won over a sympathetic public. The mostly male members of Congress were not far behind. After languishing for years, ERA was sent to the states in 1972 by a vote of 354–24 in the House of Representatives and 84–8 in the Senate. The early response in the states was equally favorable. Within the first year twenty-two of thirty-eight states needed for ratification had indicated their approval. By 1978 thirty-five of the required thirty-eight states had ratified the amendment, but no more would. ERA hit a brick wall called the abortion issue (discussed more fully in Chapter 5).<sup>44</sup> Thus instead of pitting men against women, as the Nineteenth Amendment had done earlier in the century, ERA was fought between feminist and antiabortion women's groups. As the amendment became contentious, public support waned. By 1981 less than half of voters still endorsed the amendment in the states that had not yet ratified it.<sup>45</sup> The time available for ratifying the ERA expired on June 30, 1982.

The feminist forces may have lost the battle over ERA, but they appear to have won the war. In 1972 Congress en-



In November 1977, former First Lady Betty Ford (center right) and First Lady Rosalynn Carter (center left) took to the hustings to promote the Equal Rights Amendment. Despite their efforts, the amendment failed, largely a victim of the growing debate over abortion rights.

acted Title IX of the Higher Education Act, which prohibits funding for schools and universities that discriminate against women, including in the size of their inter-collegiate sports programs. Years later, in the Civil Rights Act of 1991, Congress strengthened employment discrimination claims by requiring employers to demonstrate that unequal hiring and compensation practices do not reflect gender discrimination.

In recent years sex has eclipsed race in setting the civil rights agenda. The courts, Congress, and the state legislatures devote significant shares of their sessions to policies governing relations between the sexes in the workplace. Sexual harassment is the most prominent example of unsettled civil rights law. Other issues are comparable pay for comparable work and hiring and promotions policy.

### **Gay Rights**

The favorable "rights" climate has encouraged other groups to come forward, particularly the LGBT (lesbian, gay, bisexual, and transgender) community. But civil rights claims remain murky for homosexuals. There is no "gay rights" policy as such—no federal statutes or Supreme



The Americans with Disabilities Act may have been signed by President George Bush in 1990, but its scope—who should be considered "disabled"—was far from settled. In 1999 the Supreme Court heard three cases initiated by workers denied jobs based on their medical conditions. The Court ruled in all three that people with physical impairments who can function normally when they wear glasses or take medication cannot in general be considered disabled and therefore are not covered by the act's protection against job discrimination.

Court decisions have incorporated homosexuals into the inclusive 1964 Civil Rights Act or any other law. In fact, in 1995 Congress voted down legislation that would have incorporated sexual preference into existing employment rights laws. Some states have extended job protection and "hate crime" protections to homosexual men and women. Other states, however, have sought explicitly to exclude sexual orientation as a category subject to discrimination protection. After many cities in Colorado, for example, passed broadly worded ordinances banning discrimination against homosexuals, Colorado voters passed a state constitutional amendment in 1992 striking down these antidiscrimination laws. Ironically, in 1996, when the Supreme Court in turn struck down the Colorado amendment, it

established the only federal statement on gay rights. The Court ruled by 6–3 that the Colorado law violated the equal protection clause of the Constitution by singling out gays as unworthy of protections.<sup>46</sup>

#### *Emerging Rights: The Disabled, the Elderly, Parents*

The advances in civil rights over the past half-century have been extraordinary in both the kinds of privileges that have come under this rubric and the variety of groups in American society that have sought its protections. For example, in addition to women and gays the disabled have won significant victories. Perhaps the largest was the 1990 passage of the Americans with Disabilities Act, which bars discrimination in employment, transportation, public accommodation, and telecommunication against persons with physical and mental disabilities.

Not to be outdone, the elderly, led in part by one of America's largest interest groups, the American Association of Retired Persons (AARP), have successfully sought national legislation ending the once-prevalent practice of mandatory retirement age. And other groups are waiting on the sidelines, mustering support for their forays into the civil rights arena. Even parents—especially divorced ones who do not have custody of their children and parents of children with disabilities—have begun to draft their own bills of rights. And so the politics of civil rights will continue, building on its painful legacy.

#### Challenging Tyranny

This historical survey of civil rights in America has revealed selfless men and women pressing the case for their fellow citizens who were suffering injustice. But this history also has revealed that these efforts did not suffice. Just as James Madison argued in *Federalist No. 10*, civil rights advanced only when a large national majority fully took control of the national government and challenged tyranny in the states. The politicians who assembled these broad national coalitions were keen political strategists. Abraham Lincoln and the Republican Party rode into

office advocating "Free Soil, Free Labor, Free Men," not eradication of slavery. Nonetheless, their political success allowed them to conduct a costly and bloody war to preserve the Union and abolish slavery.

From the 1880s through the 1950s neither party could muster a majority even within their party, much less the government, in behalf of civil rights for African Americans. Consequently, the cause languished, and generations of African Americans were doomed to lifetimes ruled by segregation's strict regimen. Then, in the 1960s, the Democratic Party rode the crest of public opinion generated by the civil rights movement. The 1964 election gave Democrats the presidency and huge majorities in both chambers of Congress. They enacted strong new civil rights policy and enforced it. Advances in civil rights since those years have rested on a firm foundation of laws and institutions spawned by these historic events.

What does the difficult history of the civil rights movement say about the operation of America's political system? The struggle for civil rights has seriously tested the politics of self-interest. Yet all of the strategic politicians who worked to advance the cause of black civil rights offer a more sanguine depiction of political ambition than the one James Madison presented in *Federalist No. 51*. Whereas Madison viewed competing ambitions as performing a limited, but vital, service of neutralizing politicians who might be inclined to serve themselves more than their constituencies, the history of civil rights portrays these same ambitious politicians as transforming moral justice into public policy. David Wilmot, Abraham Lincoln, Lyndon Johnson, and others assembled coalitions of self-interested constituencies behind policies that have rapidly evolved to secure the civil rights of all Americans.

### Key Terms

- |                         |                            |
|-------------------------|----------------------------|
| affirmative action / 89 | civil rights / 90          |
| civil liberties / 91    | de facto segregation / 117 |

de jure segregation / 117	reverse discrimination / 89
grandfather clause / 101	segregation / 100
Jim Crow laws / 100	separate but equal doctrine / 101
literacy test / 101	suffragettes / 120
poll tax / 100	white primary / 100
quotas / 118	

### Suggested Readings

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