Traditional Civil Rights

Inquire: How Can People Protect Themselves if they Cannot Vote?

Overview

"A man without a vote is a man without protection." - President Lyndon B. Johnson

The original struggle for civil rights in America was primarily focused on two groups: women and African Americans. In U.S. history, the struggle for civil rights — and equal rights — has been a two-front war: gaining equal treatment under the law and acquiring equal voting opportunities to protect those rights.

President Johnson’s words point to why voting has been an integral step in American civil rights movements. Where there is no franchise, there will always be an underlying fear that those who can vote will choose to take rights, property, and even freedom away from those who cannot vote.

While complete and unlimited "universal right to vote" is both unnecessary and potentially unwise, guaranteeing voting rights for all U.S. citizens ensures that all voices are heard and no one is left without protection.

Big Question: How have laws and Supreme Court cases historically impacted discriminatory practices in America, and how do they currently affect such practices?

Watch: Controlling the Results by Controlling the Vote and the Choices

Voting is the most important - and powerful - component of democracy. Democracy is defined as government where the people have the last word (as opposed to “dictatorship” where the government is in control). In any government, but especially in a democracy, there is always a struggle for power - decision making power, enforcement power, monetary power, military power, and a seemingly endless combination of the powers of government. The way to control power in a democracy, is to control the elections - control who can vote in an election and/or control who (or what) can be voted for in an election.

In other words, control who can choose, and/or who or what can be chosen.

Originally, under the Constitution, each state decided who could vote and who could not - who was “enfranchised” and who was “disenfranchised”. However, since its ratification in 1788, three Amendments have been added to the Constitution that limit the states’ latitude in conferring or limiting voting rights.
First, the 15th Amendment was ratified in 1870 stating that voting rights cannot be limited or denied “… on account of race, color, or previous condition of servitude.”

Second, the 19th Amendment, added fifty years later in 1920, declares that voting rights cannot be “denied or abridged by the United States or by any State on account of sex.”

Lastly, the 26th Amendment was added fifty-one years later in 1971, and it sets forth that the minimum age for voting cannot be higher than eighteen.

1870 - 1920 - 1971 - almost exactly fifty years apart, which begs the question, will there be a new one in 2020?

Other than these restrictions, are states free to make any rules they want regarding voting logistics, requirements, and even limitations?

The answer is “No”. There is still the 14th Amendment with its requirements of “due process” and “equal protection”. State voting requirements cannot violate these Constitutional guarantees.

There is another dynamic to consider in American politics as well - who shows up at the polls. Voter turnout in America is one of the lowest in the world. In an address before the Canadian Parliament in 1961, President John F. Kennedy quoted Irish political philosopher Edmund Burke, “The only thing necessary for the triumph of evil is that good men do nothing.” While it may be hard to understand why one vote among sixty-five or seventy million votes matters, remember that each one of those 65 million votes is important by itself, and cumulatively. Failing to vote is not inaction; it is making a choice to do nothing. The only way to ensure that the American democratic government stays strong and healthy is for everyone to exercise their right to vote. Doing nothing by not voting leaves control in the hands of those who will vote.

Read: What are Civil Rights and How Do We Identify Them?

Defining Civil Rights

Civil rights are the rights of citizens to political and social freedom and equality guaranteed by the government. These rights ensure that we are treated equally, particularly people belonging to groups that historically have been denied the same rights and opportunities as others. The phrase, “all men are created equal” appears in the Declaration of Independence. The 5th Amendment to the Constitution includes the due process clause that requires the federal government to treat people equally (Bolling v. Sharpe, 347 U.S. 497 (1954)).

Equality is also guaranteed by the 14th Amendment’s Equal Protection Clause, ratified in 1868, which states in part that “No State shall... deny to any person within its jurisdiction the equal protection of the laws.” Together, the 5th and 14th amendments prevent the government, at both the state and federal levels, from treating people unequally.

These clauses mean laws and Constitutional liberties must be applied on an equal basis. Governments are limited in their ability to discriminate, or treat some people differently, unless the unequal treatment is based on a valid reason. For instance, a law that imprisons Asian Americans twice as long as Latinos for the same offense would appear to treat people unequally for no valid reason and might well be
unconstitutional. According to the Supreme Court’s interpretation of the Equal Protection Clause, “all persons similarly circumstanced shall be treated alike” (Bolling v. Sharpe, 347 U.S. 497 (1954)).

Identifying Discrimination

Laws that treat one group of people differently from other groups of people are not always unconstitutional. In fact, the government engages in legal forms of discrimination often. In most states, you must be 18 years old to smoke cigarettes and 21 to drink alcohol; these laws discriminate based on age differences. Additionally, some public colleges or universities, which are government-funded, may require students to have a high school diploma, a particular score on the SAT or ACT, or a GPA above a certain number. This is a type of discrimination because the requirements treat people unequally; people who do not have high school diplomas or high enough GPAs and SAT scores will not be admitted.

How can federal, state, and local governments legally discriminate in these circumstances when the equal protection clause states that everyone must be treated equally under the law? The answer to legal discrimination lies in the purpose of a discriminatory practice. In most cases, when courts are deciding whether discrimination is unlawful, the government only has to demonstrate it has a good reason for discriminating. Unless the person or group challenging the law can prove otherwise, the courts will generally decide the discriminatory practice is allowed. This is called the rational basis test; as long as there is a reason for treating some people differently that is “rationally related to a legitimate government interest,” the discriminatory act, law, or policy is legal.

For example, since letting people that are blind operate cars would be dangerous to others on the road, the law forbidding them to drive is reasonably justified on the grounds of safety; thus, it is legal even though it discriminates against a group of people.

However, the courts are much more skeptical when it comes to other forms of discrimination. Because of the United States’ history of discrimination against people of non-white ancestry, women, and members of ethnic and religious minorities, the courts apply more stringent rules to policies, laws, and actions that discriminate on the basis of race, ethnicity, gender, religion, or national origin (United States v. Carolene Products Co., 304 U.S. 144 (1938)).

Discrimination based on gender or sex is generally examined with a test called intermediate scrutiny. The standard of intermediate scrutiny was first applied by the Supreme Court in Craig v. Boren (1976) and again in Clark v. Jeter (1988); these cases both focused directly on gender-based discriminatory practices. Intermediate scrutiny requires the government to demonstrate that discriminatory practices based on sex or gender are “substantially related to an important governmental objective.” This puts the burden of proof on the government to demonstrate why unequal treatment is justifiable, rather than on the individual who alleges that unfair discrimination has taken place. As a result, while some laws that treat men and women differently are upheld, usually they are not. For instance, military women are now allowed to serve in all combat roles, but the courts have continued to allow the Selective Service System (the draft) to register only men and not women (Rostker v. Goldberg, 453 U.S. 57 (1981)).

Discrimination against members of racial, ethnic, or religious groups or those of various national origins is reviewed to the greatest degree by the courts, generally with a test called strict scrutiny. Under strict scrutiny, the burden of proof is on the government to demonstrate that there is a compelling governmental interest in treating people from one group differently from those who are not part of that group — the law or action can be “narrowly tailored” to achieve the goal in question and should use the “least restrictive means” available to achieve that goal (Johnson v. California, 543 U.S. 499 (2005)). In other words, if there is a non-discriminatory way to accomplish the goal in question, a discriminatory practice will be prohibited. In the modern era, laws and actions that are challenged under strict scrutiny
have rarely been upheld. Strict scrutiny, however, was the legal basis for the Supreme Court upholding the legal internment of Japanese Americans during World War II, in which approximately 115,000 Japanese Americans were held in internment camps. Under strict scrutiny, the Supreme Court ruled in Korematsu v. United States (1944) that protecting against espionage was a compelling governmental interest and so the discrimination was legal.

Identifying Civil Rights Issues

Looking at America’s past, it’s easy to identify civil rights issues — those of the Civil Rights Movement, the Suffragette movement, banning desegregation, etc. Yet, looking into the future is much harder. Few people 50 years ago would have identified LGBTQ rights as an important civil rights issue or predicted it would become one. Yet, on June 28, 1969, a police raid of the gay bar at the Stonewall Inn in New York City and the riots that followed launched the modern LGBTQ Civil Rights Movement. Similarly, in past decades, the rights of those with disabilities, particularly mental disabilities, were often ignored by the public. Many people with disabilities were institutionalized and given little further thought, and within the past century, it was common for people with mental disabilities to be subject to forced sterilization. Today, most view this treatment as barbaric.

How can we identify new civil rights issues as they emerge and distinguish between genuine claims of discrimination and claims by those who have merely been unable to convince a majority to agree with their viewpoints? For example, how do we decide if 12-year-olds are unfairly discriminated against because they are not allowed to vote?

One model for identifying true discrimination follows this analytical process:

1. **Which group?** First, identify the group of people who are facing discrimination.
2. **Which right(s) are threatened?** Second, what right or rights are being denied to members of this group?
3. **What do we do?** Third, what can the government do to bring about a fair situation for the affected group? Is proposing and enacting such a remedy realistic?

Reflect

Poll: Voter ID’s: Stopping Voter Fraud or Voter Restriction?

In the United States, there is a rising movement among states to require stricter voter ID proof, including some states which require voters to have a state-issued photo ID in order to vote.

Proponents of these laws claim they are necessary to stop voter fraud. They claim that obtaining a photo ID is no more difficult than obtaining a driver’s license or other forms of identification and argue that the vital importance of voting in the U.S. demands we require this as we require a driver’s license to drive. As voting is one of the country’s most sacred rights, those in favor point to cases of voter fraud that undermine our voting process.

Opponents claim these are discriminatory laws aimed at keeping voters from lower socioeconomic backgrounds from voting due to the complications, hassle, and inconvenience of obtaining a state-issued photo ID. They point out that low-income Americans are disproportionately people of color, and that for an hourly wage earner to take time to acquire such an ID is much harder and potentially not possible without risking one’s job or income. As such, photo ID requirements may affect whether low-income Americans and people of color are able to vote, again a right held dear in the United States. They argue that voter
fraud is very rare, almost nonexistent, but the disenfranchisement of people due to tighter voter ID laws is common.

At this time, Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, and Wisconsin have strict photo ID requirements. Arizona and Ohio have strict non-photo ID requirements. Alabama, Florida, Idaho, Louisiana, Michigan, Rhode Island, South Dakota, and Texas have non-strict photo ID requirements. Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Missouri, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, Utah, and Washington have non-strict non-photo ID requirements. And, California, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, West Virginia, Wyoming, and Washington D.C. require no ID to vote at ballot box.

What do you think? Using the three-pronged test set forth at the end of the Read section above, do you think voter ID laws are discriminatory?

- Yes, I think the voter ID laws are discriminatory.
- No, I do not think the voter ID laws are discriminatory.

Expand: Affirmative Action: Vital for Equality or Outdated Entitlement?

Discover

One of the major controversies regarding race and civil rights in the United States today is related to **affirmative action**: the practice of ensuring that members of historically disadvantaged or underrepresented groups have equal access to opportunities in education, the workplace, and government contracting. The term affirmative action originated during the Civil Rights Movement and has continued to face controversy ever since.

The Civil Rights Act of 1964 prohibited discrimination in employment, and Executive Order 11246, issued in 1965, forbade employment discrimination within the federal government and for contractors and subcontractors who received government funds. The order also required contractors to take "affirmative action" to ensure against employment discrimination by implementing plans to increase participation of women and people of color in the workplace.

African Americans, as well as other groups of people in the U.S., have been subject to discrimination in the past and present, limiting their opportunities to compete on a level playing field with those who do not face discriminatory challenges or their effects (*Phyler v. Doe*, 457 U.S. 202 (1982); *F. S. Royster Guano v. Virginia*, 253 U.S. 412 (1920)). Affirmative action programs are based on this understanding and stress equal rights rather than equal opportunities.

American public opinion is largely split on affirmative action, though as of 2016 more Americans opposed than favored it. This is often most true when people view affirmative action as an act of reverse discrimination — where individuals from a majority or advantaged group are discriminated against — as in situations when people who are less qualified (or perceived to be less qualified) are hired or admitted to programs over others because of their minority status.

Prior to 1980, the federal government passed requirements that all state and local governments, as well as any institutions who received federal support or assistance, must include affirmative action provisions.
in their policies. The University of California at Davis (UC Davis) created such policies for its medical school admittance procedures, reserving 16 of 100 spaces for minorities. A white, male applicant, Allan Bakke, sued after being rejected for two straight years when he discovered that his Medical College Admissions Test (MCAT) scores were significantly higher than the mean scores of those admitted. Bakke claimed UC Davis denied him equal protection of the law and that he had been discriminated against because of his race (Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)).

The Supreme Court agreed, and ruled in the decision Regents of the University of California v. Bakke (1978) that Bakke must be admitted to the UC Davis Medical School. However, while the Supreme Court stated the school could not set aside places for members of particular racial groups, UC Davis could use race or ethnicity as an element in admissions.

After Regents of the University of California v. Bakke, the Supreme Court ruled in Adarand Constructors, Inc. v. Peña (1995) that federal programs classifying people by race, even for the purpose of expanding and creating opportunities for minorities, must be analyzed under strict scrutiny.

In 2003, the Supreme Court reaffirmed the Regents of the University of California v. Bakke decision in Grutter v. Bollinger (2003), which said that race or ethnicity could be taken into account as one of several factors in admitting a student to a college or university, but schools could not set a specific quota of minority students.

Affirmative action was again reassessed in Fisher v. University of Texas (2013, 2016). In Fisher v. University of Texas (2013, known as Fisher I), University of Texas student Abigail Fisher sued UT’s race-based admissions policy as inconsistent with Grutter v. Bollinger. The Court stated that UT’s policy was allowed, so long as it remained narrowly tailored and not quota-based. However, the case was also returned to lower courts to decide whether it passed strict scrutiny. The case returned as Fisher II (2016), which was decided by a 4–3 majority. It allowed race-based admissions, but required that the utility of such an approach had to be re-established on a regular basis.

Some questions around affirmative action remain unresolved and are still evolving. Affirmative action opponents point out that many beneficiaries are ethnic minority students from relatively affluent backgrounds, while many white and Asian American students who grew up in poverty are not given the same benefits despite facing handicaps due to socioeconomic status. Further, they argue it has been more than 60 years since the Brown v. Board of Education decision in 1954, and more than 50 years since the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. They contend that this passage of time has leveled the playing field and ask why there should be any policies requiring “equal results” for entire generations of minorities that have had “equal opportunities” in education.

Those in support of affirmative action counter that de facto segregation remains to this day in American schools and many majority black schools are the ones with the fewest resources. Thus, “equal opportunities,” in schools have not been enforced so there must be “equal results,” policies. Additionally, affirmative action helps increase diversity at schools and workplaces that still remain fairly homogenous. Many in favor of affirmative action do not believe it is a perfect policy, but do believe it adds equity to our society.

What do you think — should affirmative action policies be legal?
Lesson Toolbox

Additional Resources and Readings

Civil Rights & Liberties: Crash Course Government #23
- A Crash Course video on civil rights and liberties
  https://youtu.be/kbwsF-A2sTg

Affirmative Action: Crash Course Government and Politics #32
- A Crash Course video about the controversial nature of affirmative action
  https://youtu.be/gJgQR6xiZGs

HBO's 'Newsroom' — GOP Photo ID Voter Restrictions for Minorities Like Dorothy Cooper
- A clip from the HBO TV Drama, The Newsroom, showing a character disputing voter ID laws
  https://youtu.be/GIGhSo7zMVg

Why Are Voter ID Laws So Controversial? FRONTLINE Answers Your Questions
- A PBS Frontline video including a discussion on whether voter ID laws are necessary
  https://youtu.be/vKhfuLjhADE

Timeline of Affirmative Action Milestones
- Accumulated by Borgna Brunner and Beth Rowen for encyclopedia Infoplease, this timeline notes influential legal cases and laws concerning affirmative action
  https://www.infoplease.com/spot/timeline-affirmative-action-milestones

Lesson Glossary

civil rights: the rights of citizens to political and social freedom and equality

Equal Protection Clause: a part of the 14th Amendment that guarantees citizens "the equal protection of the laws" under state governments; took effect in 1868

discrimination: the unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age, or sex

rational basis test: a test courts use to determine a statute's constitutionality, in which the challenged law must be rationally related to a legitimate government interest

intermediate scrutiny: a test courts use to determine a statute's constitutionality, in which the challenged law must further an important governmental interest, and must do so by means that are substantially related to that interest

strict scrutiny: a test courts use to determine a statute's constitutionality, in which the court presumes a policy to be invalid unless the government can demonstrate a compelling interest to justify it. The strict scrutiny standard of judicial review is based on the equal protection clause of the 14th Amendment

affirmative action: the policy of favoring members of a disadvantaged group who suffer or have suffered from discrimination within a culture; it usually provides for equal results rather than equal opportunities

Regents of the University of California v. Bakke (1978): Supreme Court Case in which the Court ruled that universities could not set quotas for members of particular racial groups, but they could use race or ethnicity as an element in admissions

Grutter v. Bollinger (2003): Supreme Court Case in which the Court reaffirmed that universities could take race or ethnicity into account as one of several factors in admitting a student but could not set a specific quota of minority students
Adarand Constructors, Inc. v. Peña (1995): Supreme Court Case in which the Court ruled that federal programs classifying people by race, even for the purpose of expanding and creating opportunities for minorities, must be analyzed under strict scrutiny.

Fisher v. University of Texas (2013, 2016): Supreme Court Case in which the Court ruled that race-based admissions are legal, but that the utility of such an approach has to be re-established on a regular basis.

**equal results:** generally entails reducing or eliminating material inequalities between individuals or households in a society, through a transfer of income or wealth from wealthier to poorer individuals or adopting other measures to promote equality of condition (i.e. affirmative action policies).

**equal opportunities:** policies and practices in employment and other areas that do not discriminate against persons on the basis of race, color, age, sex, national origin, religion, or mental or physical disability, but do not necessarily result in equality.

Korematsu v. United States (1944): Supreme Court Case in which the Court ruled that protecting against espionage was a compelling governmental interest for discriminating against Japanese Americans, maintaining the legality of Japanese internment camps.

Check Your Knowledge

1. Strict Scrutiny is a test courts use to determine a statute’s constitutionality.
   A. True
   B. False

2. Before 1980, the federal government passed requirements that all state and local governments must include affirmative action provisions in their policies.
   A. True
   B. False

3. Affirmative action programs are based on this understanding and stress equal opportunities rather than equal rights.
   A. True
   B. False

Answer Key:

Citations

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