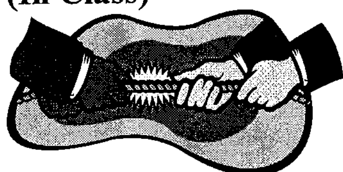
Advanced Placement American Government
Unit X: Civil Liberties and Civil Rights
(Wilson Chapter 5 and Chapter 6

Monday 3/13 **Quiz over Ch5, pp. 96-111. (Take Home) Lecture start/Gideon? Landmark Cases Due**

Tuesday 3/14 Collect **Take home quiz** 96-111, **Bill of Rights Lecture/Start Exclusionary Rule/Gideon? Assign Quiz 111-119 (Take Home)**

Wednesday 3/15 Collect 111-119 **Take Home Quiz. Exclusionary Rule "Due Process of Law" Critical Review Due/Discussion by Caleb Nelson (In Class)**



Thursday 3/16 **Fourth Amendment:** Search and Seizure Summary **due**/Discussion/**Guest Speaker? Officer Dross**

Friday 3/17 Quiz **122-138 (Open)/The Hurricane or finish lecture on Bill of Rights.**

Monday 3/20 **Quiz 138-147 (Open)/ The Hurricane**

Wednesday 3/21 **Critical Review**: "Race, Affirmative Action, and the Constitution," by Herbert Hill in Ciglar/Loomis, p. 93.
Class Discussion

Thursday 3/22 **Critical Review**: **"Affirmative Action: The Price of Preference,"** by Shelby Steele in Ciglar/Loomis p. 100 Class Discussion/ Debating with Hill and/or Steele.

Thursday 3/23 **Multiple Choice** Test Ch. 5 and 6. 60 Questions **45 Minutes (Note Card Due)**

Friday 3/24 **AP Essay Exam-** 2 Questions- **45 Minutes.** Questions will be about **4th Amendment** and: **Know Court Cases from readings, associated with both topics.**

SPRING BREAK BABY!!!!! 3/27-3/31

18

Civil Liberties

I. Reviewing the Chapter

A. Chapter Focus

This chapter surveys quite a number of pressure points that have developed in the American political system regarding the liberties of individuals and the government's involvement in protecting or restricting those liberties. Included among these pressure points are national security, federal versus state enforcement of rights, First Amendment freedoms, and criminal law. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Discuss the relationship of the Bill of Rights to the concept of democratic rule of the majority, and give examples of tension between majority rule and minority rights. Explain how the politics of civil liberties may at times become a mass issue, and offer several examples.
2. Describe the conflicts that have arisen between those who claim First Amendment rights and those who are in favor of sedition laws that might restrict freedom of speech. Explain how the Supreme Court attempts to balance competing interests. Describe the various "tests" that the Court has applied.
3. Explain how the structure of the federal system affects the application of the Bill of Rights. How has the Supreme Court used the Fourteenth Amendment to expand coverage in the federal system? Discuss changing conceptions of the due process clause of the Fourteenth Amendment.
4. List the categories under which the Supreme Court may classify "speech." Explain the distinction between protected and unprotected speech, and name the various forms of expression that are not protected under the First Amendment. Describe the test used by the Court to decide the circumstances under which freedom of expression may be qualified.
5. State what the Supreme Court decided in *Miranda* v. *Arizona*, and explain why that case illustrates how the Court operates in most such due process cases.
6. Analyze why the resolution of civil liberties issues involves politics as well as law. Discuss the political factors that influence the Supreme Court when it decides fundamental civil liberties issues.

B. Study Outline

I. The politics of civil liberties
  A. The objectives of the Framers
    1. Limited federal powers
    2. Constitution: a list of dos, not don'ts
    3. Bill of Rights: specific do not's
      a. Not intended to affect states
      b. A limitation on popular rule

- II. Politics, culture, and civil liberties
  - A. Liberties become a major issue for three reasons
  - B. Rights in conflict: Bill of Rights contains competing rights
    1. *Sheppard* case (free press versus fair trial)
    2. *New York Times* and Pentagon Papers (common defense versus free press)
    3. Kunz anti-Jewish speeches (free speech versus public order)
    4. Struggles over rights show same pattern as interest group politics
  - C. Policy entrepreneurs—most successful during crises, especially war, by arousing people
    1. Sedition Act of 1789, during French Revolution
    2. Espionage and Sedition Acts of World War I
    3. Smith Act of World War II
    4. Internal Security Act of 1950, Korean War
    5. Communist Control Act of 1954—McCarthy era
    6. 1968 law on inciting riots—ghetto riots, Vietnam
  - D. Cultural conflicts
    1. Original settlement by white European Protestants produced Americanism
    2. Waves of immigration brought new cultures, conflicts
       - a. Non-Christians offended by government-sponsored creches at Christmas
       - b. English speakers prefer monolingual schools
    3. Differences even within given cultural tradition
- III. Interpreting and applying the First Amendment
  - A. Speech and national security
    1. Original Blackstone view: no prior press censorship
    2. Sedition Act of 1789 followed Blackstone view
    3. By 1917–1919, Congress defines limits of expression
       - a. Treason, insurrection, forcible resistance
       - b. Upheld in *Schenck* via test of "clear and present danger"
       - c. Justice Holmes dissents, saying test not met
    4. Fourteenth Amendment "due process" not applied to states originally
       - a. *Gitlow* elicits "fundamental personal rights"
    5. Supreme Court moves toward more free expression after WWI
       - a. But communists convicted under Smith Act under "gravity of evil"
       - b. By 1957: test of "calculated to incite"
       - c. By 1969 (*Brandenburg*): "imminent" unlawful act
       - d. 1977: American Nazi march in Skokie, Illinois, held lawful
       - e. "Hate" speech permissible but not "hate crime"
  - B. What is speech?
    1. Some forms of speech not fully protected; four kinds
    2. Libel: written statement defaming another by false statement
       - a. Oral statement: slander
       - b. Variable jury awards
       - c. Actual malice needed for public figures
    3. Obscenity
       - a. Twelve years of decisions; no lasting definition
       - b. 1973 definition: patently offensive by community standards of average person
       - c. Balancing competing claims remains a problem
       - d. Localities decide whether to tolerate pornography but must comply with strict rules
       - e. Protection extended: nude dancing only marginally protected
       - f. Indianapolis statute: pornography degrading but court disagreed
       - g. Zoning ordinances upheld
    4. Symbolic speech
       - a. Acts that convey a political message: flag burning, draft card burning
       - b. Not generally protected
       - c. Exception is flag burning: restriction of free speech

IV. Who is a person?
  A. Corporations, etc., usually have same rights as individuals
    1. Boston bank, anti-abortion group, California utility
    2. More restrictions on commercial speech
      a. Regulation must be narrowly tailored and serve public interest
      b. Yet ads have some constitutional protection
    3. Young people may have fewer rights
      a. Hazelwood: school newspaper can be restricted
V. Church and state
  A. The free exercise clause
    1. Relatively clear meaning: no state interference similar to speech
      a. Law may not impose special burdens on religion
      b. But no religious exemptions from laws binding all
      c. Some cases difficult to settle
        (1) Conscientious objection to war, military service
        (2) Refusal to work Saturdays; unemployment compensation
        (3) Refusal to send children to school beyond eighth grade
  B. The establishment clause
    1. Jefferson's view: "wall of separation"
    2. Congress at the time: simply "no national religion"
    3. Ambiguous phrasing of First Amendment
    4. Supreme Court interpretation: "wall of separation"
      a. 1947 New Jersey case
      b. Later struck down school prayer, "creationism," in-school released time, benediction at graduation
      c. But allowed some kinds of aid to parochial schools
      d. Three-part test for constitutional aid
        (1) Secular purpose
        (2) Neither advances nor inhibits religion
        (3) No excessive government entanglement
      e. Recent departures: Nativity scenes, etc.
VI. Crime and due process
  A. The exclusionary rule
    1. Most nations punish police misconduct apart from the criminal trial
    2. United States punishes it by excluding improperly obtained evidence
    3. Supreme Court rulings
      a. 1949: declined to use exclusionary rule
      b. 1961: changed, adopted it in *Mapp* case
  B. Search and seizure
    1. When can "reasonable" searches of individuals be made?
      a. With a properly obtained search warrant with probable cause
      b. Incident to an arrest
    2. What can police search incident to an arrest?
      a. The individual being arrested
      b. Things in plain view
      c. Things under the immediate control of the individual
    3. What of an arrest while driving?
      a. Answer changes almost yearly
      b. Court attempts to protect a "reasonable expectation of privacy"
      c. Privacy in body and home but not from government supervisor
    4. Testing for drugs and AIDS
      a. Mandatory AIDS testing called for, not yet in place
      b. Government drug testing now in courts but private testing OK
      c. Supreme Court: some testing is permissible
        (1) Law enforcement and railroad employees
        (2) Random sobriety checks on drivers
        (3) Key: concern for public safety or national security

C. Confessions and self-incrimination
   1. Constitutional ban originally against torture
   2. Extension of rights in 1960s
      a. *Escobedo*
      b. *Miranda* case—"Miranda rules" to prove voluntary confession

D. Relaxing the exclusionary rule
   1. Positions taken on the rule
      a. *Any* evidence should be admissible
      b. Rule had become too technical to work
      c. Rule a vital safeguard
   2. Supreme Court moves to adopt second position

C. Key Terms Match

Match the following terms and descriptions:

a. clear-and-present-danger test
b. Communist Control Act
c. conscientious objector
d. creationism
e. due process clause
f. establishment clause
g. exclusionary rule
h. free exercise clause
i. freedom of expression
j. freedom of religion
k. good-faith exception
l. Internal Security Act
m. least means
n. libel
o. McCarthyism
p. *Miranda*
q. preferred position
r. prior restraint
s. probable cause
t. "red scare"
u. released time
v. search warrant
w. Sedition Act
x. Smith Act
y. symbolic speech
z. wall-of-separation principle

1. ____ The government suppression of American leftists after the 1917 Bolshevik Revolution in Russia
2. ____ A Federalist bill of 1789 criminalizing the criticism of government
3. ____ A 1940 act criminalizing the advocacy of violent revolution
4. ____ A 1950 act requiring the registration of all communists
5. ____ A 1954 act denying legal rights to the Communist party
6. ____ A Supreme Court formula to legitimate the abridgment of the right of free speech
7. ____ Harming another by publishing defamatory statements
8. ____ A government action to prevent rather than punish certain expressions
9. ____ The supposed superiority of rights of expression over other constitutional rights
10. ____ The use of only minimal measures to restrict potentially dangerous expression
11. ____ The First Amendment clause guaranteeing religious freedom
12. ____ The First Amendment clause prohibiting an official religion.
13. ____ A teaching on the origin of the world found to be religiously inspired
14. ____ A period during the public school day when students get religious instruction
15. ____ The prohibition against the use of illegally obtained evidence in court
16. ____ A written authorization to police officers to conduct a search
17. ____ The legal basis for the issuance of a search warrant
18. ____ A Supreme Court case that led to rules that police officers must follow in warning arrested persons of their rights
19. ____ One who refuses military service on religious or ethical grounds

(continued)

20. ____ Protection against arbitrary deprivation of life, liberty, or property as guaranteed in the Fifth and Fourteenth Amendments

21. ____ Part of the First Amendment protecting freedom of speech, press, assembly, and the right to petition the government

22. ____ Part of the First Amendment protecting the free exercise of religion and the prohibition against an establishment of religion

23. ____ Admission of illegally obtained evidence if illegality results from a technical or minor error

24. ____ Originated during communist witch-hunt in the 1950s, unfair accusations that tarnish a person's reputation

25. ____ An act that conveys a political message, such as burning a draft card to protest the draft

26. ____ An interpretation of part of the First Amendment that prevents government involvement with religion

D. Did You Think That . . . ?

Below are listed a number of misconceptions. You should be able to refute each statement in the space provided, referring to information or argumentation contained in this chapter. Sample answers appear at the end of the Handbook.

1. "Civil rights are a clear standard that can be fully enforced at all times to protect minorities."

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2. "All of the Bill of Rights applies to state officials."

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3. "Flag burning and draft card burning are afforded the same free speech protection under the law."

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4. "The language of the First Amendment clearly requires the separation of church and state."

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E. Data Check

Figure 18.2: Changing Composition of U.S. Immigration, 1901–1989

1. From what region has U.S. immigration increased the most? Next? ________________

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2. From what region has U.S. immigration declined the most? ________________

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3. From what two regions has immigration remained a very small percentage of total U.S. immigration throughout the period covered by these charts? ________________

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II. Practicing for Exams

A. True/False. Read each statement carefully. Mark true statements T. *If any part of the statement is false, mark it* F, *and write in the space provided a concise explanation of why the statement is false.*

_____ 1. School authorities in the United States can legally search students' lockers without asking permission.

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_____ 2. The *New York Times* published the secret Pentagon Papers without government permission.

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_____ 3. The Espionage Act of 1917 was part of the U.S. entry into World War I.

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_____ 4. Oliver Wendell Holmes first enunciated what became known as the clear-and-present-danger test.

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_____ 5. A 1968 act made it illegal to use interstate communications to organize a riot.

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_____ 6. *Brandenburg* in 1969 convicted a Ku Klux Klan member for vaguely threatening future violence.

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_____ 7. The Congress that adopted the Bill of Rights never considered applying it to the state governments.

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_____ 8. *Gitlow* in 1925 announced the Supreme Court's intention to protect "fundamental rights" from state infringement.

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_____ 9. The Supreme Court has consistently allowed obscene materials to be sold to consenting adults.

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_____ 10. The First Amendment requires a wall of separation between church and state.

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_____ 11. States can require members of religions opposed to public schools to send their children to accredited schools until they reach age sixteen.

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_____ 12. The state can give some forms of aid but not others to private religious schools.

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_____ 13. Most governments have rules to punish police officers for illegally obtaining evidence but do not exclude such evidence from courtroom use.

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_____ 14. The Supreme Court continues to cling tenaciously to the exclusionary rule.

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_____ 15. The Supreme Court has given police greater freedom to question juveniles lately.

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B. Multiple Choice. Circle the letter of the response that best answers the question or completes the statement.

1. Which of the following statements about the Bill of Rights is true?
   a. It is part of the Declaration of Independence.
   b. It was part of the original draft of the Constitution.
   c. It was added to the Constitution before ratification.
   d. It was added to the Constitution shortly after ratification.
2. The Framers saw no need for a bill of rights because
   a. in their view civil liberties were a matter for the states, not for the federal government.
   b. they were convinced that in a democratic republic, public opinion was a sufficient protection.
   c. they assumed that the federal government could not do things that it was not explicitly authorized to do.
   d. their chief concern was protecting public order, not guaranteeing rights.
3. In general, high school students have the same rights as adults. An exception is when
   a. their actions are specifically prohibited by the Constitution.
   b. they exercise these rights as individuals rather than as part of a school-sponsored activity.
   c. some form of symbolic speech is involved.
   d. their exercise of these rights impedes the educational process.
4. Civil liberties issues are most likely to be issues of
   a. majoritarian politics.
   b. interest group politics.
   c. client politics.
   d. party politics.
5. The Jeffersonian Republicans believed that the press
   a. should be free from governmental controls.
   b. should be punished by the federal government for slander and defamation.
   c. could be punished by federal courts but only when actual malice was shown.
   d. could be punished by the states for slander and defamation.
6. The debate between the Federalists and the Jeffersonians over the Sedition Act was largely a debate over
   a. the fundamentals of individual liberty.
   b. the role of the press in a democratic republic.
   c. states' rights.
   d. the role of government in the economy.

7. Regarding the relationship between church and state, the First Amendment states that Congress may not make any law prohibiting the free exercise of religion. It also specifically states that
   a. church and state must be clearly separate.
   b. citizens are exempt from laws binding other citizens when the law goes against their religious beliefs.
   c. Congress may not make any law respecting an establishment of religion.
   d. nonsectarian, voluntary, or limited prayer is permissible in public schools.

8. The Framers intended the Bill of Rights to apply to
   a. the states only.
   b. the federal government only.
   c. both the states and the federal government.
   d. private institutions as well as governments.

9. Which of the following would be illegal under current Supreme Court doctrines?
   a. giving secret government documents to the press
   b. showing the movie *Carnal Knowledge*
   c. stating that the violent overthrow of the government would be a good thing
   d. inciting someone to an illegal act

10. The Supreme Court has ruled that which one of the following sorts of symbolic speech is protected by the Constitution?
    a. burning draft cards
    b. burning the flag
    c. making obscene gestures toward a police officer
    d. "sitting in" to disrupt traffic at a draft board

11. The definition of what is obscene and therefore not a form of protected speech
    a. is left almost entirely up to localities.
    b. can be decided by localities but only within narrow limits.
    c. has to be decided by the Supreme Court on pretty much a case-by-case basis.
    d. has to be decided by the Supreme Court on the basis of reasonably clear guidelines.

12. The exclusionary rule is the means by which the Supreme Court implements its decisions in matters of
    a. criminal due process.
    b. freedom of speech.
    c. establishment of religion.
    d. civil liberties generally.

13. Instead of using the exclusionary rule, our courts might do as European courts do and
    a. refuse to include illegally obtained evidence at the trial.
    b. ignore the legality or illegality of the method used to obtain the evidence.
    c. levy civil or criminal penalties against law-enforcement officers who obtain evidence illegally.
    d. refuse to hear cases tainted with official illegality.

14. In the *Miranda* case the Supreme Court ruled that for a confession to be considered voluntary, the suspect
    a. must not be subject to coercion.
    b. must not be subject to undue coercion.
    c. must be told that he or she need not talk to police.
    d. must have his or her lawyer present.

15. The display of an odious symbol, such as a swastika or a burning cross, has been deemed by the Supreme Court to be
    a. punishable as a hate crime.
    b. an unconstitutional act.
    c. protected by the Constitution.
    d. not a case for Supreme Court review.

16. The leading entrepreneur of the "red scare" around the time of World War I was
   a. Joseph McCarthy.
   b. A. Mitchell Palmer.
   c. Theodore Roosevelt.
   d. Woodrow Wilson.

17. The text cites a number of cases involving religious issues that the Supreme Court refused to hear. The lower court decisions
   a. at least for now, are the law.
   b. are automatically reversed.
   c. await further appeal.
   d. remain subject to reversal at the discretion of the Court of Appeals.

18. Blackstone argued that the press should be free
   a. from any restrictions whatsoever.
   b. only when it published the truth.
   c. from censorship prior to publication.
   d. from libel laws regarding government officers.

19. The effect of the clear-and-present-danger rule seems to have been to
   a. clarify the law but not keep anyone from prison.
   b. greatly clarify and expand the scope of free expression.
   c. make guarantees of freedom of expression as binding on state as on federal officials.
   d. bring the process of incorporation to its logical conclusion.

20. *Libel* is defined as
   a. stating something untrue about another person.
   b. an oral statement defaming another person.
   c. a written statement defaming another person.
   d. maliciously intending to defame a public official.

C. Essay: Practice writing extended answers to the following questions. These will test your ability to integrate and express the ideas that you have been studying in this chapter.

1. List several eras in which U.S. governments have enacted laws aimed at taking away the civil liberties of certain Americans. Are these eras always associated with war? Discuss whether the government is usually the friend or the enemy of free expression.

2. Summarize the history of the incorporation process. Do you believe that the process is complete today, or can you imagine its going further in the future?

3. What competing claims has the Supreme Court typically weighed in dealing with obscenity cases? Why do you believe that it has had such difficulty in arriving at lasting standards?

4. What are the ambiguities in the establishment clause on religion, and what problems have these created for the courts over the years?

III. Applying What You've Learned

The text discusses numerous civil liberties issues and explains how each is protected through the Supreme Court's interpretations of the Bill of Rights. To determine your comprehension of the material, consider the facts of cases presented in the courts and derive the appropriate conclusion on the following issues:

1. Speech and national security: During a demonstration against the war in Vietnam involving rioting, police order student protesters to leave. A student replies that they will return later to take the street. The student is arrested for advocating an illegal act.

Result and explanation: ___

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2. Libel: *Hustler* magazine published a parody of an advertisement depicting the Reveren[d] Jerry Falwell. The ad, which indicated in small letters that it was not to be taken seriously, presented a phony interview with Falwell in which he discussed his first sexual encounter—with his mother. Because the ad was untrue, Falwell sued for libel.

   Result and explanation: ___

   ___

   ___

3. Free exercise of religion: A Jewish military officer was discharged for wearing a yarmulke, which could fit under his hat, while on duty. The reason for the dismissal was that he had violated the uniform dress code. The officer claimed an excessive burden on the practice of his religion.

   Result and explanation: ___

   ___

   ___

4. Confession and self-incrimination: A man suspected of participating in a crime was called on the phone and requested to appear at the police station voluntarily to answer questions. On his arrival, the man was not informed of his Miranda rights and made incriminating statements. He claimed the statements could not be used against him in court because the police failed to read him his rights.

   Result and explanation: ___

   ___

   ___

19

Civil Rights

I. Reviewing the Chapter

A. Chapter Focus

This chapter focuses on the two most intense and protracted struggles for civil rights in recent times: that of blacks and that of women. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Contrast the experience of economic interest groups with that of black groups in obtaining satisfaction of their interests from the government. Indicate why in most circumstances the black movement involved interest group rather than client politics. Describe the strategies used by black leaders to overcome their political weaknesses, and explain why the civil rights movement has become more conventional in its strategy in recent years.
2. Summarize the legal struggles of blacks to secure rights under the Fourteenth Amendment, and state how the Court construed that amendment in the civil rights cases and in *Plessy* v. *Ferguson*. Discuss the NAACP strategy of litigation, and indicate why it was suited to the political circumstances. Summarize the rulings in *Brown* v. *Board of Education* and compare them with those in *Plessy* v. *Ferguson*.
3. Discuss the rationale used by the Supreme Court in ordering busing to achieve desegregation. Explain the apparent inconsistency between *Brown* and *Charlotte-Mecklenburg*. State why these decisions are not really inconsistent, and explain why the courts chose busing as an equitable remedy to deal with de jure segregation.
4. Trace the campaign launched by blacks for a set of civil rights laws. Explain why they used nonviolent techniques. Discuss the conflict between the agenda-setting and the coalition-building aspects of the movement. Demonstrate how civil rights advocates could overcome sources of resistance in Congress.
5. Describe the differences between the black civil rights movement and the women's movement. List the various standards used by the courts in interpreting the Fourteenth Amendment, and explain how these standards differ depending on whether blacks or women are involved.
6. Explain why ratification of the Equal Rights Amendment proved impossible, despite strong congressional and popular support.

B. Study Outline

I. Introduction
   A. Civil rights issue
      1. Group is denied access to facilities, opportunities, or services available to other groups
         a. Usually along ethnic or racial lines

2. Issue is whether differences in treatment are "reasonable"
    a. Some differences are: progressive taxes
    b. Some are not: classification by race subject to "strict scrutiny"

II. The black predicament
  A. Perceived costs of granting black rights not widely shared
    1. Concentrated in small, easily organized populations
    2. Interest-group politics versus lower-income whites
    3. Blacks at disadvantage in interest group politics because they were not able to vote in many areas
  B. Majoritarian politics worked against blacks
    1. Lynchings shocked whites, but little was done
    2. General public opinion was opposed to black rights
    3. Those sympathetic to granting black rights opposed the means
  C. Progress depended on
    1. Finding more white allies or
    2. Shifting policy-making arenas
  D. Civil rights movement both
    1. Broadened base by publicizing grievances
    2. Moved legal struggle from Congress to the courts

III. The campaign in the courts
  A. Ambiguities in the Fourteenth Amendment
    1. Broad interpretation: Constitution color-blind
    2. Narrow interpretation: equal legal rights
    3. Supeme Court adopted narrow view in *Plessy* case
  B. "Separate but equal"
    1. NAACP campaign objectives in education through courts
      a. Obviously unequal schools
      b. Not so obviously unequal schools
      c. Separate schools inherently unequal
  C. Can separate schools be equal?
    1. Step 1: obvious inequalities
      a. Lloyd Gaines
      b. Ada Lois Sipuel
    2. Step 2: deciding that a separation creates inequality in less obvious cases
      a. Heman Sweatt
      b. George McLaurin
    3. Step 3: making separation inherently unequal
      a. 1950 strategy to go for integration
    4. *Brown* v. *Board of Education* (1954)
      a. Implementation
        (1) Class action suit
        (2) All deliberate speed
      b. Collapse of resistance in 1970s
    5. The rationale
      a. Detriment to pupils by creating sense of inferiority
      b. Social science used because intent of Fourteenth Amendment unclear; needed unanimous decision
    6. Desegregation versus integration
      a. Ambiguities of *Brown*
        (1) Unrestricted choice or integrated schools?
        (2) De jure or de facto segregation?
      b. 1968 rejection of "freedom of choice" plan settles matter; actual mixing
      c. *Charlotte-Mecklenburg*, 1971
        (1) Proof of intent to discriminate
        (2) One-race school creates presumption of intent
        (3) Remedies can include quotas, busing, redrawn lines
        (4) Every school not required to reflect racial composition of school system

d. Some extensions to intercity busing
e. Busing remains controversial
(1) Some presidents oppose but still implement it
(2) Congress torn in two directions
f. 1992 decision allows busing to end if segregation caused by shifting housing patterns

IV. The campaign in Congress
A. Mobilization of opinion by dramatic event to get on agenda
1. Sit-ins and freedom rides
2. Martin Luther King, Jr.
3. From nonviolence to long, hot summers
B. Mixed results
1. Agenda-setting success
2. Coalition-building setbacks—methods seen as law breaking
C. Legislative politics
1. Opponents' defensive positions
a. Senate Judiciary Committee controlled by southern Democrats
b. House Rules Committee controlled by Howard Smith
c. Senate filibuster threat
d. President Kennedy reluctant
2. Four developments broke deadlock
a. Public opinion change
b. Violent white reactions of segregationists became media focus
c. Kennedy assassination
d. 1964 Democratic landslide
3. Five bills pass, 1957–1968
a. 1957, 1960, 1965: voting rights laws
b. 1968: housing discrimination law
4. 1964 civil rights bill: the high point—employment, public accommodations
a. Broad in scope, strong enforcement mechanisms
b. Johnson moves after Kennedy assassinated
c. Discharge petition, cloture invoked
5. Effects since 1964
a. Dramatic rise in black voting
b. Mood of Congress shifted: pro–civil rights
(1) 1988 overturn of Reagan veto of bill that extended federal ban on discrimination in education

V. Women and equal rights
A. Supreme Court's "reasonableness standard"
1. Less stringent than racial "suspect classification": reasonableness test
2. Gender-based differences prohibited by courts
a. Age of adulthood
b. Drinking age
c. Arbitrary employee height-weight requirements
d. Mandatory pregnancy leaves
e. Little League exclusion
f. Jaycees exclusion
g. Unequal retirement benefits
3. Gender-based differences allowed by courts
a. All-boy/all-girl schools
b. Widows' property tax exemption
c. Delayed promotions in Navy
d. Statutory rape
B. The military
1. *Rostker* v. *Goldberg* (1981): Congress may draft men only
2. Secretary of Defense in 1993 allows women in air and sea combat
C. The ERA

1. Prompt ratification appeared likely in 1972
2. In trouble by 1974–1975
3. Stalled by 1978 at thirty-five states of thirty-eight needed
4. Dead by 1982, despite congressional extension
5. Reasons for defeat
    a. Draft issue: women in combat
    b. Workplace protection eroded

D. Abortion
1. Until 1973 regulated by states
2. 1973: *Roe* v. *Wade*
    a. Struck down Texas ban on abortion
    b. Woman's freedom to choose protected by Fourteenth Amendment ("right to privacy")
        (1) First trimester: no regulations
        (2) Second trimester: no ban but regulations to protect health
        (3) Third trimester: abortion ban
    c. Critics claimed life begins at conception
        (1) Fetus entitled to equal protection
        (2) Supporters said no one can say when life begins
        (3) "Pro-life" versus "pro-choice"
    d. Hyde Amendment (1976): no federal funds for abortion
    e. Gag order on abortion referrals imposed under Bush, removed under Clinton
3. 1973–1989: Supreme Court withstood attacks on *Roe* v. *Wade*
4. 1989: Court upheld Missouri law restricting abortion
5. *Casey* decision lets *Roe* stand but permits more restrictions: twenty-four-hour wait, parental consent, pamphlets

VI. Women and the economy
A. After ERA defeat, a split in women's movement grew
1. Press for equal rights as ultimate objective, or
2. . . . Make economic status top priority over legal status
3. Urgency of second position arose from new economic circumstances
4. These circumstances led to new objectives: woman's economic equity
    a. Government-funded day care
    b. Enforcement of child support from divorced spouse
    c. Pregnancy leave
    d. Comparable worth
        (1) Pay by ranking of job's intrinsic difficulty
        (2) Used in several places now; problematic

VII. Affirmative action
A. Equality of results
1. Racism and sexism overcome only by taking them into account in designing remedies
2. Equal rights not enough; people need benefits
3. Affirmative action should be used in hiring

B. Equality of opportunities
1. Reverse discrimination to use race or sex as preferential treatment
2. Laws should be color-blind and sex neutral
3. Government should only eliminate barriers

C. Targets or quotas?
1. Issue fought out in courts
    a. No clear direction in Supreme Court decisions
    b. Court is deeply divided
        (1) Affected by conservative Reagan appointees
    c. Law is complex and confusing
        (1) *Bakke*: numerical minority quotas not permissible
        (2) But Court ruled otherwise in later cases

2. Emerging standards for quotas and preference systems
   a. Must be "compelling" justification
   b. Must correct an actual pattern of discrimination
   c. Must involve actual practices that discriminate
   d. Federal quotas are to be given deference
   e. Voluntary preference systems are easier to justify
   f. Not likely to apply to who gets laid off
3. Congressional efforts to defend affirmative action not yet successful
4. "Compensatory action" (helping minorities catch up) versus "preferential treatment" (giving minorities preference, applying quotas)
   a. Public supports former but not latter
   b. In line with American political culture
      (1) Support for individualism
      (2) Support for needy

C. Key Terms Match

Match the following terms and descriptions:

a. affirmative action
b. aliens
c. *Bakke*
d. *Brown* v. *Board of Education*
e. civil rights
f. comparable worth
g. compensatory action
h. de facto segregation
i. de jure segregation
j. equality of opportunity
k. equality of results
l. ERA
m. freedom of choice
n. Hyde Amendment
o. Jim Crow
p. Martin Luther King, Jr.
q. NAACP
r. nonviolent civil disobedience
s. NOW
t. *Plessy* v. *Ferguson*
u. preferential treatment
v. reasonableness
w. Reconstruction

1. ____ A legal distinction that the Supreme Court scrutinizes especially closely
2. ____ Post–Civil War era when southern laws protected blacks' freedoms
3. ____ A Supreme Court decision upholding state-enforced racial segregation
4. ____ The standard under which the Court once upheld racial segregation
5. ____ The term for laws forcing second-class status on blacks
6. ____ A black interest group active primarily in the courts
7. ____ A Supreme Court decision declaring segregated schools inherently unequal
8. ____ Segregation created by law
9. ____ Segregation that exists but that was not created by law
10. ____ A school integration plan mandating no particular racial balance
11. ____ An early nonviolent leader in black civil rights
12. ____ Offering the races an equal chance at desired things
13. ____ Distributing desired things equally to the races
14. ____ The standard by which the Court judges gender-based classifications
15. ____ A ruling that held that Congress may draft men but not women
16. ____ A ruling that declared all state laws prohibiting abortion unconstitutional
17. ____ Legislation that barred the use of federal funds for nearly any abortion

(continued)

x. reverse discrimination
y. *Roe* v. *Wade*
z. *Rostker* v. *Goldberg*
aa. separate-but-equal doctrine
bb. strict scrutiny
cc. suspect classification

18. ____ A leading feminist organization
19. ____ A proposed amendment to the Constitution, defeated by 1982
20. ____ The doctrine of equal pay for substantially equal work
21. ____ The use of race or sex to give preferential treatment to blacks or women
22. ____ Helping disadvantaged people catch up, usually by giving them extra education, training, or services
23. ____ Giving minorities preference in hiring, promotions, college admissions, and contracts
24. ____ Designing remedies for overcoming racism and sexism by taking race and sex into account
25. ____ A Supreme Court ruling stating that a college may not use an explicit numerical quota in admitting minorities but could "take race into account"
26. ____ Any persons who are not U.S. citizens
27. ____ The rights of citizens to vote, receive equal treatment before the law, and share benefits of public facilities
28. ____ A philosophy of peaceful violation of laws considered unjust and accepting punishment for the violation
29. ____ The standard by which the Supreme Court judges classifications based on race: they must have a compelling public purpose

D. Did You Think That . . . ?

Below are listed a number of misconceptions. You should be able to refute each statement in the space provided, referring to information or argumentation contained in this chapter. Sample answers appear at the end of the Handbook.

1. "The judiciary has always protected the rights of blacks."

____

____

____

2. "*Brown* rested solely on psychological data that indicated that blacks who were segregated felt inferior, and therefore their education suffered."

____

____

____

3. "The Supreme Court has had the full cooperation of Congress in implementing its decisions."

____

____

____

Due Process of Law: The Exclusionary Rule

Reprinted below is an article from *The Public Interest* by Caleb Nelson entitled "The Paradox of the Exclusionary Rule." ~~Read the article and then (a) write a thesis statement in one or two sentences for Nelson's article, (b) list the evidence Nelson cites to support his thesis, (c) summarize Nelson's proposed alternative to the exclusionary rule, and (d) write a brief essay taking a position for or against Nelson's proposed alternative.~~

The paradox of the exclusionary rule

Caleb Nelson

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

In 1914, one hundred and twenty-three years after the ratification of the Fourth Amendment, the Supreme Court declared that the Amendment was "of no value" if unconstitutionally seized evidence could be used in federal courts. The Court held all such evidence inadmissible.

This exclusionary rule was entirely the invention of the Court, not the Framers. Indeed, only thirty-five years later the Court confessed that the rule was not a necessary corollary of the Constitution; in 1949, though it decided that the Fourteenth Amendment applies the Fourth Amendment to the states, it nonetheless refused to impose the exclusionary rule on state courts. In 1961, however, the Court again changed its mind extending the "constitutionally required" rule to the states in the landmark case of *Mapp v. Ohio.*

Much has been made of the extent to which the exclusionary rule frustrates justice by forcing the release of obviously guilty criminals. To all such criticism, civil libertarians have responded that the occasional release of the guilty is the price of liberty, and that the exclusionary rule protects everyone—innocent and guilty alike—from overly intrusive policemen. The debate over the rule has thus centered on how to balance the competing claims of justice and freedom.

But in fact no balance need be struck in order to assess the rule; civil libertarians should join law-and-order advocates in demanding its abolition. Growing evidence suggests that the exclusionary rule, in addition to freeing criminals, also encourages judges to undermine individual rights. As many legal scholars have suggested, a close look at Supreme Court cases of the past two decades indicates that the rule's existence is causing a steady constriction in the effective scope of the Fourth Amendment, as the Court condones questionable police behavior rather than suppress crucial evidence. The irony is unmistakable: just as the 1914 Court twisted the Constitution to invent the exclusionary rule, so the modern Court invents legal theories to circumvent the rule, unintentionally but inevitably eroding the very rights that the rule was created to protect.

The exclusionary rule and crime

The Court's motives are clear. Within ten years of *Mapp*, researchers had begun to argue that the exclusionary rule was responsible for the release of many hardened criminals. The most influential early work was that of University of Chicago professor Dallin Oaks, whose 1970 law-review article summarizing past studies and announcing new data instantly attracted widespread attention. Professor Oaks examined twelve sample days in the proceedings of two Chicago courts and found that motions to suppress evidence were filed in 34 percent of the narcotics prosecutions and 36 percent of the concealed-weapons prosecutions. Two-thirds of the weapons motions and 97 percent of the narcotics motions were granted. Every single case in which the motion was successful was subsequently dismissed, since crimes of possession cannot be prosecuted when the illegal objects are not available as evidence. Thus the exclusionary rule ensured that a third of Chicago's narcotics cases and a quarter of Chicago's weapons cases were never tried.

Chicago was perhaps atypical—proponents of the exclusionary rule charged that the city's police willfully and routinely violated the Constitution—but researchers in other jurisdictions agreed with Oaks that the exclusionary rule doomed many criminal prosecutions. In California (where at the time the rule was slightly stronger than elsewhere because of provisions in the state constitution) a National Institute of Justice study concluded that many cases involving illegal searches were rejected for prosecution before ever reaching a suppression hearing. Between 1976 and 1979, for instance, almost three thousand felony drug cases in California were not prosecuted because of search-and-seizure problems; what is more, nearly half of the defendants who were not prosecuted in 1976 or 1977 because of such problems were rearrested within two years on new charges. Another analysis of California data estimated that up to 7.1 percent of all felony drug arrests may have been released because of the exclusionary rule. Other researchers suggested that prosecutors, rather than risk the suppression of their key evidence, often accept lenient plea bargains.

Proponents of the rule responded with a 1979 study conducted by the General Accounting Office, which found that only 1.1 percent of all federal criminal defendants were freed by the suppression of evidence. But there is reason to believe that the exclusion of evidence causes more trouble in state courts than in federal courts, because crimes of possession tend to be state crimes.

In any event, everyone agreed that regardless of percentages, the exclusionary rule frees a large number of criminals. As studies of the rule's effects began to pile up and as the rule's defenders left the Court, the justices became less willing to apply the rule.

Erosion of the rule

Dallin Oaks's article quickly attracted the Supreme Court's attention. In a 1970 dissent, then-Chief Justice Warren Burger relied on it extensively to conclude that the Court should reverse direction: "Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."

Indeed, as early as 1965 when the Court refused to apply *Mapp* retroactively, the majority arrived at its decision by weighing the social costs of applying the rule against the social benefits. In the following years, the Court used this

balancing test extensively and the scales tipped increasingly against the suppression of evidence. The turning point was the 1974 case of *United States v. Calandra*, in which the Court reverted (again) to the position that the exclusionary rule is not mandated by the Constitution. "In sum," the Court concluded, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Notwithstanding the Court's prior rhetoric, the use of illegally seized evidence "work[s] no new Fourth Amendment wrong," and hence the rule is properly "restricted to those areas where its remedial objectives are thought most efficaciously served."

The Court was certainly correct that there is no "personal constitutional right" to the suppression of evidence. The problem is that there is a personal constitutional right to be free from unreasonable searches and seizures, and under current practice its scope is largely determined by the scope of the exclusionary rule.

Aside from the rule, there are two major formal checks on policemen: the internal disciplinary apparatus of their departments, and the threat of civil or criminal actions against them. The exclusionary rule's existence hampers both of these mechanisms, but especially the first. If evidence gathered by questionable means might be needed in a trial, police departments have reason to refrain from punishing the investigating officers, or at least to delay for years. To discipline them before the case is conclusively settled would be to admit that the evidence was illegally seized and should be suppressed.

Civil suits and criminal charges can sometimes be brought against offending policemen. But the law is constructed properly enough, so that policemen who unknowingly overstep their authority in a good cause are not held personally accountable; the threat of direct legal sanctions applies only to willful violations of the Fourth Amendment, and hence such sanctions are almost never imposed. Yet the effectiveness of even this last-ditch measure is currently linked to the exclusionary rule. Under the current system, when courts decide against excluding unconstitutionally seized evidence, juries may be more inclined to absolve the offending policemen.

To at least some extent, then, courts now must choose between condemning police misconduct and punishing criminals. As the principal mechanism to enforce the Fourth Amendment, the exclusionary rule reacts to one injustice by countenancing another: in Cardozo's famous words, "the criminal is to go free because the constable has blundered." Even when the rule is applied, the constable himself rarely suffers any direct punishment—except the guilty knowledge that his misconduct has freed a criminal to prey once more on society.

This system makes little sense, and so since *Calandra* the Court has steadily narrowed the exclusionary rule. It began by holding the rule inapplicable in certain special proceedings such as grand-jury hearings and civil actions, citing the societal costs imposed by a rule that "deflects the truthfinding process and often frees the guilty." And the Court soon began to erode the rule in criminal trials themselves.

In *U.S. v. Ceccolini* (1978), for instance, the Court went against a long history of suppressing evidence gathered on the basis of unconstitutionally obtained information, by permitting the testimony of a witness whose identity was discovered in an unconstitutional search. In December 1974 a police officer had entered the shop of a florist named Ceccolini to chat with the sales clerk. He noticed an envelope on the drawer of the store's cash register, and saw some

money protruding from it. For no apparent reason, and without any authorization, he opened the envelope and sorted through its contents, observing that it contained betting slips as well as money. He asked the clerk about the envelope, and she told him that the store's owner had asked her to give it to someone. The policemen notified federal gambling investigators, who obtained the cooperation of the sales clerk; on the basis of her testimony, Ceccolini was convicted of perjury. The lower federal courts invoked the exclusionary rule to set aside the conviction, but the Supreme Court reversed this decision. It reasoned that since the policeman was not investigating gambling offenses when he examined the envelope, suppressing the clerk's testimony "could not have the slightest deterrent effect" on similarly situated policemen.

Despite this claim, under *Ceccolini* policemen have a positive incentive to conduct idle unconstitutional searches. As long as they are not investigating particular crimes or expecting to acquire evidence—in other words, as long as they are merely nosing around instead of acting upon probable cause—they might uncover useful witnesses. It is probably true that the social costs of suppressing testimony in cases like *Ceccolini* would outweigh the benefits. This fact, however, argues for the abolition of the rule and the creation of a more fine-tuned mechanism to deter police misconduct.

Yet rather than reach this conclusion, the Court has simply continued its *ad hoc* use of the balancing test to avoid suppressing evidence. In *Nix v. Williams* (1984), for example, the court sidestepped abolition by establishing a new exception to the exclusionary rule: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." Under the *Nix* doctrine, once a lawful search with a high probability of success has been started, police can ignore constitutional requirements in order to accelerate the process, with only the notoriously ineffective threat of civil suits to give them pause. The suppression of evidence is at least as likely to deter this kind of misconduct as it is to deter any other violation; to judge by appearances, the majority created the inevitable-discovery exception because it badly wanted to admit the challenged evidence—the corpse of a ten-year-old girl murdered by the defendant. As Justice Stevens admitted in his concurring opinion, "There can be no denying that the character of the crime may have an impact on the decisional process."

It is true that the Court, even after *Calandra*, has sometimes ruled that unconstitutionally seized evidence in a murder trial should have been suppressed. But *Nix* shows that when the balancing test suggests a plausible exception to the exclusionary rule, the Court is eager to admit the challenged evidence. Lower courts are often even quicker to scuttle the rule.

The good-faith exception

Judicial hostility to the exclusionary rule is sensible, but as long as the rule exists this hostility will lead to reductions in the effective scope of the Fourth Amendment. Consider, for example, the "good faith" exception to the rule, created in *U.S. v. Leon* (1984). The *Leon* majority catalogued the various ways in which the exclusionary rule frustrates justice, paying particular attention to the California studies about the number of criminals freed by the rule. Although the Court observed that other researchers had found the rule not to interfere substantially with the search for truth, it argued that "the small percentages with which they deal mask a large absolute number of felons who are released

because the cases against them were based in part on illegal searches or seizures." Applying a cost-benefit analysis, the Court held that evidence seized by police acting "in objectively reasonable reliance" on a warrant issued by a "detached and neutral magistrate" should be admissible in trial, even if the warrant later fails judicial scrutiny.

The Court soon indicated that the issuing magistrate need not be remotely competent in order to meet the good-faith standard. On May 5, 1979, a brutally murdered body was discovered in a vacant lot in Boston. In the course of their investigation, police discovered probable cause to search the home of one Osborne Sheppard. Unable to find any unused warrant applications, they altered a previously used form and presented it (with an explanation) to a judge; he made some changes of his own and assured the police that the revised warrant gave them ample authority to search Sheppard's house for evidence of murder. In the house police found bloodstains on the floor, various blood-stained articles of men's and women's clothing, and a wig later identified as the victim's. But the warrant authorized police to look only for "any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance . . ." Apparently no one—policeman or judge—had actually read the warrant at any point during the editing process. Nonetheless, in a decision released on the same day as *Leon*, the court held in *Massachusetts v. Sheppard* that police reliance on the warrant was "objectively reasonable" even though the police did not know what it said.

The Court extended the good-faith standard in *Illinois v. Krull* (1987), holding that evidence seized in objectively reasonable reliance on a statute authorizing warrantless searches should not be suppressed even if the statute is later found to be unconstitutional. Again, the Court justified this decision by appealing to the balancing test, citing "the substantial social costs exacted by the exclusionary rule." Recently President Bush has asked Congress to create a general good-faith exception to the rule.

The President and the Court are doubtless correct that society is better served by an exclusionary rule with the good-faith exception than by one without it. But the exception is no panacea. While a policeman who truly believes himself authorized to conduct a search would never have been deterred by the exclusionary rule, the good-faith exception undercuts a broader kind of deterrence: its existence discourages police departments from training their agents in constitutional practice.

As many critics have observed, the good-faith exception is a defense tailor-made for policemen who are not fond of civil liberties. Officers who knowingly violate the law of search and seizure will have few moral scruples against perjuring themselves to convince judges of their good faith. If they succeed, they face no punishment.

In addition, the good-faith exception eliminates any possibility that the exclusionary rule will deter magistrates and legislatures from authorizing unconstitutional searches. Under *Leon*, searches and seizures based on warrants that are only facially valid, and that are issued on some minimal showing of cause, are effectively just as acceptable as searches and seizures based on truly valid warrants. (Indeed, under *Sheppard* the warrant need not even be facially valid, as long as the police reasonably think that it is.) The bright side is that warrants can be issued only one at a time; *Krull* permits a state legislature to give blanket authorization for unconstitutional searches, as long as an average person moderately familiar with Supreme Court holdings would

not instantly recognize the statute's unconstitutionality. Under the current exclusionary rule, the Fourth Amendment no longer protects against searches and seizures that are unreasonable, but only against searches and seizures that are egregious.

Searches of third parties

Sometimes it does not even do that.

In 1972 an IRS agent asked private detective Normal Casper to investigate people who had bank accounts at the Castle Bank in the Bahamas. Casper devised a plan, approved by the agent, to get access to bank records. He introduced one of the bank officers to Sybol Kennedy, a female private investigator who had an apartment in Miami. On January 15, 1973, the bank officer went to the apartment, dropped off some baggage, and took Kennedy to dinner. While they were out, Casper entered the apartment with a key given him by Kennedy, took the bank officer's briefcase, and handed it over to the IRS agent. Under the agent's guidance, the papers in the briefcase were photocopied, as an operative kept tabs on the couple to make sure that the briefcase was returned before being missed. Acting on information found in the briefcase, investigators discovered that Jack Payner, one of the bank's American depositors, had falsified his 1972 tax return.

In the ensuing case of *U.S. v. Payner* (1980), the Supreme Court observed that "[n]o court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this 'briefcase caper.'" But it held that Payner had no standing to suppress the illegally seized documents, because his own Fourth Amendment rights had not been violated; it was the bank officer's briefcase, not his, that was rifled. Since the bank officer had committed no crime, he was in no position to benefit from the exclusionary rule. Hence the Court's analysis robbed the rule of any possible value in deterring illegal searches of the possessions of innocent third parties.

The logic in *Payner* was nothing new; from 1969 on, the Court has held that Fourth Amendment rights cannot be vicariously asserted. But during the heyday of the exclusionary rule, standing rights were much broader than they are now; the Court granted "automatic standing" under the Fourth Amendment to all people charged with crimes of possession, and it also accorded standing to everyone "legitimately on the premises" that were searched. As the Court became aware of the social costs of this doctrine, however, it gradually replaced these standing rules with the standard applied in *Payner*. Ever since a 1980 case in which the Court refused to suppress evidence unconstitutionally seized from the apartment of the mother of an accused thief, defendants have had to prove both a possessory interest in the evidence seized and a legitimate expectation of privacy in the area searched in order to have standing under the Fourth Amendment. In the words of the *Calandra* majority, the Court's dissatisfaction with the broad standing rules "is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." Yet the Court has never explained why criminals deserve more protection from unreasonable searches and seizures than innocent third parties.

The potential for police abuse is obvious. Indeed, according to the lower court in *Payner*, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct

an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . . ." While the Supreme Court was probably correct to find that the costs of the broad standing rules outweigh the benefits, the new standing limitations are a second-best solution.

Erosion of the Fourth Amendment

Even though erosion of the exclusionary rule, under the current system, reduces the effective scope of the Fourth Amendment, there is a bright side; it paves the way for the rule to be abolished entirely. There is no bright side to the other method that the Court has used to avoid suppressing relevant evidence: eroding the Fourth Amendment itself.

Consider two cases involving questionable searches of automobiles—one decided several years before the Court began trying to circumvent the exclusionary rule; the other, several years after.

The first case is *Preston v. U.S.* (1964). Late one night in Newport, Kentucky, police were alerted to the fact that "three suspicious men acting suspiciously" had been sitting in a parked car for five hours in a business dictrict. Four officers went to investigate, and received no satisfactory explanation from the men. Although one of the men had legally bought the car on the previous day, he could produce no title to it, and between them the three men had only twenty-five cents. The men were arrested for vagrancy, and police had the car towed to a garage. After the men had been booked, officers searched the car without a warrant, and found two guns. The officers returned to the station, where one was told to go back and search the locked trunk as well. Getting into the trunk by removing the back seat, he found nylon masks, rope, and a counterfeit license plate. These items were later used in a federal trial to convict Preston and his companions of conspiracy to rob a federally insured bank. Although the Supreme Court was willing to assume that the police officers had the right to search the car at the time of the arrest (either to protect themselves or because they had reason to think that the car had been stolen), it held the actual searches unconstitutional because they were "too remote in time and place to have been made as incidental to the arrest." The Court therefore suppressed the evidence that the policemen had unearthed.

The second case is *Cady v. Dombrowski (1973).* Chester Dombrowski was a Chicago policeman. On the morning of September 11, 1969, he rented a car and drove from Chicago to Wisconsin. That night, after drinking heavily, he had an accident in the rented car. When police arrived to help, he told them that he was on the Chicago police force; the Wisconsin officers believed that Chicago policemen are required to carry their weapons even when they are off-duty. Although the Wisconsin policemen observed that Dombrowski was drunk, they did not attempt to find his weapon at the time. They merely had the car towed to a private garage, where they left it unattended. Dombrowski accompanied the officers back to their station, where he was finally arrested for driving while intoxicated. He was taken to a hospital for overnight observation. Several hours after the arrest, a policeman went to the garage to look for Dombrowski's gun. While searching the rented car without a warrant, the policeman found various bloodstained articles in the trunk. After confronting Dombrowski with this evidence, the police learned through his attorney that there was a body on the farm of Dombrowski's brother. Largely on the basis of evidence found in the car, Dombrowski was convicted of first-degree murder in the death of the man whose bloody corpse was subsequently discovered. A federal appellate court later held that the evidence had been illegally seized and should have been

suppressed, but the Supreme Court reversed this decision, holding the search constitutional.

This decision seems flatly to contradict *Preston*. The search's ostensible justification—the possibility that Dombrowski's car contained a legal but lethal weapon, which someone might steal or accidently fire—was seriously undermined by the fact that the police had seen fit to leave the car unguarded for hours. But in any event, the *Preston* Court based its decision on the fact that at the time of the search "there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime[,] . . . [n]or . . . was there any danger that the car would be moved out of the locality or jurisdiction." The same was clearly true in *Dombrowski*. Indeed, unlike the petitioner in *Preston*, Dombrowski was not even in his car when he was arrested, nor was there any reason to believe that the car contained evidence of a crime.

Given a choice between imprisoning a murderer and reprimanding the police for a search that was far from flagrantly unconstitutional, the *Dombrowski* Court certainly made the right decision. It may well be, in fact, that the *Preston* standard gives police too little leeway in enforcing the law. But for better or for worse, civil libertarians should realize that without the exclusionary rule the Court would probably have stuck to its *Preston* analysis. Instead, in the years following *Dombrowski*, it has steadily limited the Fourth Amendment protections that Americans enjoy in their cars.

While it is obviously impossible to say how Fourth Amendment law would have developed in the absence of the exclusionary rule, there can be no denying that the rule's existence gives judges at all levels a powerful incentive to condone questionable police actions. Proponents of the rule, however, counter that without the exclusionary rule, Fourth Amendment claims would never by litigated, and the Fourth Amendment rights that we now enjoy might never have been articulated.

While rights do ebb and flow with the Supreme Court's "interpretation" of the Constitution, this flux is not necessarily desirable. But in any event, the Supreme Court's commitment to the good-faith standard may well make further definition of the Fourth Amendment less likely than it would be without any exclusionary rule at all. In cases that meet the good-faith standard, judges need not reach subtle search-and seizure issues; in cases that fail the good-faith test, the constitutional violations are sufficiently flagrant that judges have no opportunity to explore gray areas.

The Court, moreover, has recently used the balancing test to excuse itself from judging Fourth Amendment claims. On the same day that it released its *Leon* decision, for instance, it held that the exclusionary rule does not apply to deportation proceedings. The Court based its decision largely on the fact that the Immigration and Naturalization Service (INS) has its own mechanisms to deter its agents from violating the Fourth Amendment; hence the marginal additional deterrence that might result from application of the exclusionary rule is not worth the social costs. To some degree, then, the Court has ceded to the INS the right to develop its own body of Fourth Amendment law.

An alternative to the exclusionary rule

The Court's frequent invocation of the balancing test shows its powerful aversion to freeing criminals in order to defend Fourth Amendment rights. But if the exclusionary rule were abolished in favor of a sensible mechanism for

directly punishing offending policemen, the Court's present dilemma would be resolved. As long as the sanctions were subject to judicial review, the Court could still pass on Fourth Amendment claims, without the distorting presence of the exclusionary rule.

Perhaps the best alternative to the exclusionary rule that has yet been proposed is the creation of independent boards to review charges of official misconduct and to impose direct punishments. Allegations of police abuses could be brought before these boards by independent prosecutors, since regular prosecutors might hesitate to press charges against the policemen on whom their careers depend. The policemen, in turn, would be represented by lawyers. Although police perjury would still pose problems, good-faith violations would no longer have to go entirely unpunished; the board could fine the offending officers' departments and order them to step up their training efforts. More flagrant offenses could result in direct sanctions against the officers themselves.

Not only would this system end the exclusionary rule's distortion of constitutional law, but it would also improve the deterrence of official misconduct. Under the current system, the punishment for illegal searches falls on society, not the police. Although post-*Mapp* policemen are probably better trained and more aware of the Fourth Amendment than were their counterparts of the fifties, there is no guarantee that offending officers will ever find out about convictions lost because of the suppression of evidence, let alone learn the reasons behind the suppression. Nor, for that matter, is there any guarantee that they would care if they did find out; some police departments still base officers' performance ratings on their arrest totals, and pay less attention to how many of their arrestees are subsequently convicted. The review-board scheme would solve these problems.

In addition, since the boards would be able to consider illegal searches that turned up no evidence, they could extend the protections of the Fourth Amendment to the innocent as well as to the guilty. The boards would also be empowered to deal with police actions aimed solely at keeping the peace or at confiscating weapons and drugs; the exclusionary rule, by contrast, applies only when police are interested in prosecution. Direct sanctions against offending officers or their departments would be much more likely than the exclusionary rule to deter the few rogue policemen who willfully violate the Fourth Amendment.

The vast majority of policemen, who honestly try to follow the Constitution's commands, would also be better served by a system of direct sanctions. Currently, Fourth Amendment law is so convoluted that even experienced lawyers often do not know whether particular searches are likely to be upheld by the courts. Without the incentive to draw fine lines in order to admit evidence, judges could restore some order to their Fourth Amendment rulings. If search-and-seizure law were simpler, well-meaning officers would find it easier to obey the judiciary's Fourth Amendment standards.

Critics of direct sanctions assert that policemen would hesitate to conduct even lawful searches for fear of being brought before a review board to face the charges of vengeful criminals; too much deterrence of police is more dangerous to society than too little deterrence. But this argument ignores one of the principal advantages of the review-board scheme. While the suppression of evidence is an all-or-nothing response, the boards can make their punishments proportional to the offenses, thereby avoiding both underdeterrence and overdeterrence.

There will always be some tension between investigating crimes and protecting rights. If reform of the exclusionary rule gives judges less reason to restrict Fourth Amendment rights, it may hinder law enforcement. But to the extent that it makes the system more intelligible, it could both help policemen and make rights more secure. A rational legal system is a goal that both law-and-order advocates and civil libertarians should support.

Yet it is a goal that the exclusionary rule frustrates. Based on the decisions of his colleagues on the bench, D.C. Circuit Judge Malcolm Wilkey once wrote: "If one were diabolically to attempt to invent a device designed slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." There is no reason for the Court to retain an artificial rule that impedes justice and distorts constitutional law when the rule's purpose can be better served by more sensible alternatives.[8]

[8]Caleb Nelson, "The Paradox of the Exclusionary Rule," *The Public Interest* No. 96, (Summer 1989): 117–129.

Fourth Amendment: Search and Seizure

It is certain than any discussion of constitutional rights will quickly turn to the Fourth Amendment, and protection from an unreasonable search or arrest. The amendment itself is very short, simply saying that a person has a right to be protected from unreasonable government intrusion into their "person, papers, or effects," and that for the government to arrest someone or to search their person or "place," they must have a warrant that is based on probable cause, and properly issued.

This reading focuses on search and seizure, and thus only deals with a portion of a person's Fourth Amendment rights. However, this is a vital portion, since any evidence that results from an illegal search or seizure can be challenged and ruled inadmissible. Without this evidence, charges often must be dropped, even when it is clear that the accused committed a crime. Consequently, it is very important to know what is required for a search to be legal. These requirements have been developed over the years from case law stemming from challenges to the admissibility of evidence.

First, the Fourth Amendment protects only against searches conducted by government agents, not against searches by private persons. Secondly, in order to be protected there must be a reasonable expectation of privacy. In order to have a reasonable expectation of privacy a person must have standing, that is, the item searched must be their home, or they must own or have a right to possession of the item being searched. Additionally, the item searched cannot be something that is considered to be public, such as a person's handwriting, the sound of a person's voice, telephone numbers dialed, bank records, and a number more. These are not protected. Also there are limits on the items that can be sought in a search. A legal search can only seek the instruments of crime, the fruits of a crime, contraband, and/or evidence of a crime. Finally, the scope of the search is further limited by the manner in which it is conducted. The rule of law is that the search cannot be done by means that shock the conscience.

Almost all searches require a search warrant. A warrant can be obtained when a qualified officer applies to a magistrate or judge who has jurisdiction. Under the Fourth Amendment, a judge can issue a warrant when it is based on probable cause. Probable cause is enough facts and circumstances to make a reasonable person believe that sizable items are in that place or on that person. Probable cause does not have to meet the same standards as evidence to be presented in court. It can be hearsay, or even based on an anonymous informant. The judge is to base the decision to grant a warrant on the totality of the circumstances. In addition to being based on probable cause, a warrant must specify the place to be searched and the items to be seized. If the warrant is to search an office building, it must specify which office. Also, a warrant could not be issued for "criminal evidence" but would rather have to specify something like "ink, plates, paper and other evidence of counterfeiting."

Once issued, a warrant must be executed, normally as soon as possible. Only the police can execute a warrant. Many warrants must be executed during daylight hours to reduce the danger of incident, and many warrants have time limits of ten days or less in which to be executed. Except in special circumstances where a no-knock entry has been authorized to protect the police or

prevent the destruction of evidence, the police must knock, identify themselves, and state that they have a warrant to conduct a search. They cannot use force to enter unless refused admittance. During the search, police are restricted to the specifications of the warrant in terms of where to search and what to look for, but are authorized to seize items not specified in the warrant if the items are *contraband or criminal* instruments. During the search the police may detain the people at the premises, but may not search them unless they have probable cause for an arrest of the person searched.

There are exceptions to the requirement of a warrant, but it is important to note that a warrantless search must have a specific reason why a warrant was not obtained. Fundamentally, there are six acceptable reasons for warrantless searches. First, the police may conduct a search when making a arrest. It must be a legal, custodial arrest and the search is limited to the person, and the areas within the reach of the person being arrested.

Secondly, there are circumstances where the police may search an automobile without a warrant. These circumstances are that the police must have probable cause to believe that the automobile has contraband, or criminal instruments, or the fruits of a crime in it. These searches are allowed because of the mobility of the place to be searched, and because the courts have ruled that a person has a lower expectation of privacy in a vehicle than in a home. Additionally, police may search vehicles if it is necessary for the public safety.

The third exception to the warrant requirement is the plain view exception. Basically, this holds that the police do not need a warrant when they accidently discover evidence of a crime or contraband that is in plain view. The main limitation is that the police must have a legitimate reason to be in the place where they make the discovery. In this case police do not need absolute knowledge of a crime or evidence of a crime, they only need a reasonable suspicion or belief.

The fourth exception is the stop and frisk exception. This holds that a police officer can stop a person for reasons of identification and preliminary questioning on the basis of a reasonable suspicion instead of probable cause, provided they can explain that suspicion. This is a much lower standard than probable cause since it does not require facts and circumstances. Additionally, the police may "frisk" this person if they have reason to believe that the person may be armed and dangerous. Again, probable cause is not required. This search is limited to a pat-down of the outer clothing for weapons. Items that indicate criminal activity, but could not be used as a weapon, would not be admissible.

The fifth exception to the warrant requirement comprises emergency exceptions. One emergency exception is when the police are in hot pursuit of a dangerous person. In this case the search is limited to what is necessary to prevent escape or resistance. The police may pursue a suspect into a private dwelling without a warrant, if in hot pursuit. Another emergency exception is called "evanescent evidence" for situations where the evidence may disappear if the police wait to get a warrant. An example might be a sample of blood to be checked for alcohol. The third category is other types of emergencies such as a search for a bomb or entering a burning building.

The sixth and final exception is consent. The limitation on this is that the consent must be voluntary and intelligent, that is, the person must understand that he/she is giving consent to the search. Of special interest is the fact that when two or more people have equal right to a property, such as sharing a car, either party may consent to a search and evidence found could be used against

the other. This only applies to property used in common. A person sharing an apartment could not consent to a search of a roommate's locked dresser. Also of interest is the fact that the courts have held that a person does not have to be warned that they have the right to refuse consent.

These are the basics of the Fourth Amendment provisions concerning search and seizure. This is only a part of the area of law that deals with the Fourth Amendment, since there has been no discussion of arrest, detention, electronic surveillance, border searches, administrative searches by government officials other than the police, searches by schools, etc. It is an interesting area of law, and people constantly wonder if a particular search is legal under the Fourth Amendment. The answer lies in the case law developed when the admissibility of evidence is challenged.

Source: Whitebread, *Gilbert Law Summaries*, 8–30.

Summary Questions

1. What is wrong with the idea of "separate but equal" facilities? Could this notion ever have some merit?
2. Could the Court have speeded the process of desegregation by handing down a more detailed ruling on how the *Brown* decision was to be implemented? What kinds of problems would such a ruling have faced?
3. *Brown v. Board of Education* concerned legal (de jure) desegregation. Have the courts been as capable of dealing with de facto segregation, such as that produced by housing patterns? Why or why not?

Debate on Affirmative Action

3.6

Race, Affirmative Action and the Constitution

Herbert Hill

Other than abortion, it is unlikely that any contemporary civil rights/liberties dispute has engendered as much anger and indignation as that over affirmative action. The very idea of seeking to assist entire categories of the historically disadvantaged seems to work against the American ideal of equal treatment for all. At the same time, no one can seriously contend that generations of American minorities—and especially African-Americans—have been subject to broad discrimination. How, then, are we to reconcile our ideal of a "color-blind" society with the harsh realities of slavery, segregation, and discrimination?

For Herbert Hill the answer is straightforward: We should adopt strong affirmative action policies that mandate quotas and/or timetables. "There must be," he writes, "some benchmark, some tangible measure of change." Not only does this position far exceed what Republican presidents Reagan and Bush have seen as an acceptable notion of affirmative action; it surpasses the standards of many liberal Democrats within the Congress, which in 1991 passed a bill that would formally outlaw quotas.

Herbert Hill is a professor of Afro-American studies and industrial relations at the University of Wisconsin–Madison.

♦ ♦ ♦ Under the original Constitution, a system of slavery based on race existed for many generations, a system that legally defined black people as property and declared them to be less than human. Under its authority an extensive web of racist statutes and judicial decisions emerged over a long period. The Naturalization Law of 1790 explicitly limited citizenship to "white persons," the Fugitive Slave Acts of 1793 and 1850 made a travesty of law and dehumanized the nation, and the Dred Scott Decision of 1857, where Chief Justice Taney declared that blacks were not people but "articles of merchandise," are but a few of the legal monuments grounded on the assumption that this was meant to be a white man's country and that all others had no rights in the law.

With the ratification of the 13th, 14th, and 15th Amendments in 1865, 1868 and 1870 respectively and the adoption of the Civil Rights Acts of 1866, 1870 and 1875, a profoundly different set of values was asserted. This new body of law affirmed that justice and equal treatment were not for white persons exclusively, and that black people, now citizens of the nation, also were entitled to "the equal protection of the laws."

The Civil Rights Amendments and the three related Acts proclaim a very different concept of the social order than that implicit in the "three-fifths" clause contained in Section 2 of Article 1 of the Constitution. A concept that required the reconstruction of American society so that it could be free of slavery, free of a racism that was to have such terrible long-term consequences for the entire society.

The struggle to realize the great potential of the Reconstruction amendments to the Constitution, the struggle to create a just, decent and compassionate society free of racist oppression, is a continuing struggle that has taken many different forms in each era since the Reconstruction Period and one that continues today. In our own time the old conflict between those interests intent on perpetuating racist patterns rooted in the past and the forces that struggle for a society free of racism and its legacy continues in the raging battle for and against affirmative action.

During the late 1950's and early 1960's, as a result of direct confrontation with the system of state imposed segregation, together with the emergence of a new body of constitutional law on race, a hope was born that the legacy of centuries of slavery and racism would finally come to an end. But that hope was not yet to be realized. The high moral indignation of the 1960's was evidently but a passing spasm which was quickly forgotten.

A major manifestation of the sharp turning away from the goals of justice and equality is to be found in the shrill and paranoid attacks against affirmative action. The effort to eliminate the present effects of past discrimination, to correct the wrongs of many generations was barely underway when it came under powerful attack. And now, even the very modest gains made by racial minorities through affirmative action are being erased, as powerful institutions try to turn

the clock of history back to the dark and dismal days of a separate and unequal status for black Americans.

Judging by the vast outcry, it might be assumed that the remedy of affirmative action to eliminate racist and sexist patterns has become as widespread and destructive as discrimination itself. And once again, the defenders of the racial *status quo* have succeeded in confusing the remedy with the original evil. The term "reverse discrimination," for example, has become another code word for resisting the elimination of prevailing patterns of discrimination.

The historic dissent of Justice John Marshall Harlan in the 1883 decision of the Supreme Court in the Civil Rights Cases defines the constitutional principle requiring the obligation of the government to remove all the "badges and incidents" of slavery. Although initially rejected, the rationale of Harlan's position was of course vindicated in later Supreme Court decisions, as in *Brown* v. *Board of Education* in 1954 and *Jones* v. *Mayer* in 1968, among others.

The adoption by Congress of the Civil Rights Act of 1964 further confirmed this constitutional perception of the equal protection clause of the 14th Amendment and reinforced the legal principle that for every right there is a remedy. I believe that what Justice Harlan called the "badges and incidents" of slavery include every manifestation of racial discrimination, not against black people alone, but also against other people of color who were engulfed by the heritage of racism that developed out of slavery.

In this respect, I believe that an interpretation of the law consistent with the meaning of the 13th and 14th Amendments to the Constitution holds that affirmative action programs carry forth the contemporary legal obligation to eradicate the consequences of slavery and racism. In order to do that, it is necessary to confront the present effects of past discrimination and the most effective remedy to achieve that goal is affirmative action. Mr. Justice Blackmun in his opinion in *Bakke** wrote, ". . . in order to get beyond racism, we must first take account of race. There is no other way."

By now it should be very clear, that the opposition to affirmative action is based on narrow group self-interest rather than on abstract philosophical differences about "quotas," "reverse discrimination," "preferential treatment" and the other catch-phrases commonly raised in public debate. After all the pious rhetoric equating affirmative action with "reverse discrimination" is stripped away, it is evident that the opposition to affirmative action is in fact the effort to perpetuate the privileged position of white males in American society.

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* Allan Bakke was an applicant to the medical school of the University of California–Davis in 1972 and 1973. Although well qualified, he was denied admission on the basis of a quota system that reserved 16 of 100 places in each class for disadvantaged applicants. He sued the university for admission, and the case eventually went to the Supreme Court. In a 5–4 ruling, the Court upheld Bakke's position. At the same time, the Court noted that the admissions process could take race into account, but not with strict quotas. Bakke graduated from the Davis medical school in 1982.

In his dissent in *Bakke*, Justice Thurgood Marshall wrote, "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot."

I propose to examine some important aspects of the historical process so aptly described by Mr. Justice Marshall. A major recomposition of the labor force occurred in the decades after the Civil War. By the end of the 19th century the American working class was an immigrant working class and European immigrants held power and exercised great influence within organized labor. For example, in 1900, Irish immigrants or their descendants held the presidencies of over fifty of the 110 national unions in the American Federation of Labor. Many of the other unions were also led by immigrants or their sons, with Germans following the Irish in number and prominence, while the president of the AFL was a Jewish immigrant. Records of labor organizations confirm the dominant role of immigrants and their descendants in many individual unions and city and state labor bodies throughout the country at the turn of the century and for decades later.

For the immigrant worker loyalty was to the ethnic collective, and it was understood that advancement of the individual was dependent upon communal advancement. Participation in organized labor was a significant part of that process, and many of the dramatic labor conflicts of the 19th and 20th centuries were in fact ethnic group struggles. For blacks, both before and after emancipation, the historical experience was completely different. For them, systematic racial oppression was the basic and inescapable characteristic of the society, north and south, and it was the decisive fact of their lives. The problems of the white immigrant did not compare with the oppression of racism, an oppression that was of a different magnitude, of a different order.

Initially isolated from the social and economic mainstream, white immigrants rapidly came to understand that race and ethnic identity was decisive in providing access to employment and in the eventual establishment of stable communities. For white immigrant workers assimilation was achieved through group mobility and collective ethnic advancement that was directly linked to the work place. The occupational frame of reference was decisive.

Wages, and the status derived from steady work, could only be obtained by entering the permanent labor force, and labor unions were most important in providing access to the job market for many groups of immigrant workers. In contrast to the white ethnics, generations of black workers were systematically barred from employment in the primary sectors of the labor market, thereby denied the economic base that made possible the celebrated achievements and social mobility of white immigrant communities.

An examination of briefs *amicus curiae* filed in the Supreme Court cases involving affirmative action reveals the active role these two historically interre-

lated groups, white ethnics and labor unions, have played in the repeated attacks against affirmative action. With some few exceptions, this has been the pattern from *De Funis* in 1974 and *Bakke* in 1978 to the most recent cases. Given the context in which this issue evolved, the historical sources of the opposition to affirmative action are not surprising.

The nineteenth-century European migrations to the United States took place during the long age of blatant white supremacy, legal and extralegal, formal and informal, and as the patterns of segregation and discrimination emerged north and south, the doors of opportunity were opened to white immigrants but closed to blacks and other non-whites. European immigrants and their descendants explain their success as the result of their devotion to the work ethic, and ignore a variety of other factors such as the systematic exclusion of non-Caucasians from competition for employment. As white immigrants moved up in the social order, black workers and those of other non-white races could fill only the least desirable places in a marginal secondary labor market, the only places open to them.

The elimination of traditional patterns of discrimination required by the Civil Rights Act of 1964 adversely affected the expectations of whites, since it compelled competition with black workers and other minority group members where none previously existed. White worker expectations had become the norm and any alteration of the norm was considered "reverse discrimination." When racial practices that have historically placed blacks at a disadvantage are removed to eliminate the present effects of past discrimination, whites believe that preferential treatment is given to blacks. But it is *the removal of the preferential treatment traditionally enjoyed by white workers at the expense of blacks as a class* that is at issue in the affirmative action controversy.

In many different occupations, including a variety of jobs in the public sector such as in police and fire departments, white workers were able to begin their climb on the seniority ladder precisely because non-whites were systematically excluded from the competition for jobs. Various union seniority systems were established at a time when racial minorities were banned from employment and union membership. Obviously blacks as a group, not just as individuals, constituted a class of victims who could not develop seniority status. A seniority system launched under these conditions inevitably becomes the institutionalized mechanism whereby whites as a group are granted racial privileges.

After long delay and much conflict, a new comprehensive body of law is emerging that has a significant potential and gives hope to women and racial minorities in the labor force.

On March 25, 1987, in *Johnson v. Transportation Agency*, the Supreme Court issued its fifth affirmative action ruling within an eleven-month period. In *Johnson*, the Court upheld a voluntary affirmative action plan for hiring and promoting women and minorities adopted by the Transportation Agency of Santa Clara County, California. *Johnson* firmly supports the conclusion that

affirmative action is a valid remedy to eliminate discrimination in public sector employment.

- In *United States* v. *Paradise*, the Court upheld a lower court's decision requiring the Alabama Department of Public Safety to promote one black state trooper for each white promoted until either 25 percent of the job category was black or until an acceptable alternative promotion plan was put into place.
- *Wygant* v. *Jackson Board of Education*, in which the Court struck down a provision in a collective bargaining agreement which provided that, in the event of teacher layoffs, the percentage of minority personnel laid off would be no greater than the percentage of minority personnel employed by the Jackson, Michigan, school system at the time of the layoffs. However, a majority of the Court agreed that voluntary affirmative action plans by public employers are constitutional in some instances.
- *Local 28 of the Sheet Metal Workers International Association* v. *EEOC*, in which the Court upheld a lower court's order requiring a New York construction union to adopt an affirmative action plan, including a special fund to recruit and train minority workers and a 29 percent minority membership goal. This decision was the culmination of almost forty years of struggle in state and federal courts to end the racist practices of this AFL-CIO affiliate. Other cases involving unions in the building trades have a similar history and after years of litigation are still pending in Federal courts. (See for example, *Commonwealth of Pennsylvania and Williams* v. *Operating Engineers, Local 542*, 347 F. Supp. 268, E. D. PA. 1979.)
- *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, in which the Court upheld a consent decree which contained promotion goals for minorities and other affirmative action provisions in settlement of a job discrimination suit by minority firefighters.

The adverse decision in *Wygant* notwithstanding, these decisions of the Supreme Court in conjunction with the Court's 1979 decision in *Steelworkers* v. *Weber* make it very clear that the principle of affirmative action applied in several different contexts is well established in the law and recognized as an effective and valid remedy to eliminate traditional discriminatory employment practices. But the opponents of affirmative action continue their attacks. Powerful forces, through a well-orchestrated propaganda campaign, based upon misrepresentation and the manipulation of racial fears among whites continue their efforts to perpetuate discriminatory practices. In this, they have been aided and abetted again and again by the Reagan Administration, the most reactionary administration on civil rights in the 20th century.

In reviewing the attacks upon affirmative action, it is necessary to note the disingenuous argument of those who state that they are not against affirmative action, but only against "quotas." Affirmative action without numbers, whether

in the form of quotas, goals, or timetables, is meaningless; there must be some benchmark, some tangible measure of change. Statistical evidence to measure performance is essential. Not to use numbers is to revert to the era of symbolic gesture or, at best, "tokenism."

White ethnic groups and many labor unions frequently argue that affirmative action programs will penalize innocent whites who are not responsible for past discriminatory practices. This argument turns on the notion of individual rights and sounds very moral and highminded. But it ignores social reality. It ignores the fact that white workers benefited from the systematic exclusion of blacks in many trades and industries. As has been repeatedly demonstrated in lawsuits, non-whites and women have been denied jobs, training and advancement not as individuals but as a class, no matter what their personal merit and qualification. Wherever discriminatory employment patterns exist, hiring and promotion without affirmative action perpetuate the old injustice.

Before the emergence of affirmative action remedies, the legal prohibitions against job discrimination were for the most part declarations of abstract morality that rarely resulted in any change. Pronouncements of public policy such as state and municipal fair employment practice laws were mainly symbolic, and the patterns of job discrimination remained intact. Because affirmative action programs go beyond individual relief to attack long-established patterns of discrimination and, if vigorously enforced by government agencies over a sustained period can become a major instrument for social change, they have come under powerful and repeated attack.

As long as Title VII litigation was concerned largely with procedural and conceptual issues, only limited attention was given to the consequences of remedies. However, once affirmative action was widely applied and the focus of litigation shifted to the adoption of affirmative action plans, entrenched interests were threatened. And as the gains of the 1960's are eroded, the nation becomes even more mean-spirited and self-deceiving.

Racism in the history of the United States has not been an aberration. It has been systematized and structured into the functioning of the society's most important institutions. In the present as in the past, it is widely accepted as a basis for promoting the interests of whites. For many generations the assumptions of white supremacy were codified in the law, imposed by custom and often enforced by violence. While the forms have changed, the legacy of white supremacy is expressed in the continuing patterns of racial discrimination, and for the vast majority of black and other non-white people, race and racism remain the decisive factors in their lives.

The current conflict over affirmative action is not simply an argument about abstract rights or ethnic bigotry. In the final analysis it is an argument between those who insist upon the substance of a long-postponed break with the traditions of American racism, and those groups that insist upon maintaining the valuable privileges and benefits they now enjoy as a consequence of that dismal history.

Summary Questions

1. How does Hill's argument on affirmative action relate to Levy's contentions (see Chapter 13) that it is impossible and inadvisable to seek out the framers' "original intent"?
2. In seeking jobs after college, should minority graduates be given preference over nonminorities, even those who have never practiced discrimination? How does Hill justify granting such a preference?

Affirmative Action: The Price of Preference

Shelby Steele

Affirmative action policies may well place nonminorities at a disadvantage, but many analysts believe these rules hurt the very individuals they are intended to help. In obtaining a job or admission to a prestigious university, a minority individual may never know whether skin color (or sex or ethnic origin) or merit was the key factor in the employment or admission decision. Thus, such minority achievements are tainted with the implication that standards were lowered to achieve racial (or gender or ethnic) parity. Although many black conservatives voiced such sentiments during the 1980s, this perspective received the most attention with George Bush's appointment of Clarence Thomas to the Supreme Court in 1991.

Shelby Steele, an English professor at San Jose State University, has become a prominent spokesperson for a critical approach to affirmative action. Steele acknowledges past and even present discriminatory practices in American society, but he sees the solution offered by affirmative action as worse than the problem it seeks to address. The difficulty lies in the "implied inferiority" embedded in the preferences granted by affirmative action. Even if blacks believe this implication of inferiority is unjustified, they understand that many whites will

Shelby Steele is an English professor at San Jose State University in California. This excerpt is adapted from *The Content of Our Character: A New Vision of Race in America* (St. Martin's Press, 1990).

interpret affirmative action similarly. Steele offers no easy answers here. He argues for better education, more job training, safer neighborhoods, and increased financial assistance for college for the disadvantaged, but does not explain how this will occur—to say nothing of how it will ultimately achieve the goals pursued by affirmative action. Steele's analysis differs sharply from that of Herbert Hill. Is there any meaningful middle ground in this controversy?

In a few short years, when my two children will be applying to college, the affirmative-action policies by which most universities offer black students some form of preferential treatment will present me with a dilemma. I am a middle-class black, a college professor, far from wealthy, but also well removed from the kind of deprivation that would qualify my children for the label "disadvantaged." Both of them have endured racial insensitivity from whites. They have been called names, have suffered slights and have experienced first hand the peculiar malevolence that racism brings out of people. Yet they have never experienced racial discrimination, have never been stopped by their race on any path they have chosen to follow. Still, their society now tells them that if they will only designate themselves as black on their college applications, they will probably do better in the college lottery than if they conceal this fact. I think there is something of a Faustian bargain in this.

Of course many blacks and a considerable number of whites would say that I was sanctimoniously making affirmative action into a test of character. They would say that this small preference is the meagerest recompense for centuries of unrelieved oppression. And to these arguments other very obvious facts must be added. In America, many marginally competent or flatly incompetent whites are hired every day—some because their white skin suits the conscious or unconscious racial preference of their employers. The white children of alumni are often grandfathered into elite universities in what can only be seen as a residual benefit of historic white privilege. Worse, white incompetence is always an individual matter, but for blacks it is often confirmation of ugly stereotypes. Given that unfairness cuts both ways, doesn't it only balance the scales of history, doesn't this repay, in a small way, the systematic denial under which my children's grandfather lived out his days?

In theory, affirmative action certainly has all the moral symmetry that fairness requires. It is reformist and corrective, even repentant and redemptive. And I would never sneer at these good intentions. Born in the late 1940's in Chicago, I started my education (a charitable term, in this case) in a segregated school, and suffered all the indignities that come to blacks in a segregated society. My father, born in the South, made it only to the third grade before the white man's fields took permanent priority over his formal education. And though he educated himself into an advanced reader with an almost professorial authority, he could only drive a truck for a living, and never earned more than $90 a week in his

entire life. So yes, it is crucial to my sense of citizenship, to my ability to identify with the spirit and the interests of America, to know that this country, however imperfectly, recognizes its past sins and wishes to correct them.

Yet good intentions can blind us to the effects they generate when implemented. In our society affirmative action is, among other things, a testament to white good will and to black power, and in the midst of these heavy investments its effects can be hard to see. But after 20 years of implementation I think that affirmative action has shown itself to be more bad than good and that blacks—whom I will focus on in this essay—now stand to lose more from it than they gain.

In talking with affirmative-action administrators and with blacks and whites in general, I found that supporters of affirmative action focus on its good intentions and detractors emphasize its negative effects. It was virtually impossible to find people outside either camp. The closest I came was a white male manager at a large computer company who said, "I think it amounts to reverse discrimination, but I'll put up with a little of that for a little more diversity." But this only makes him a half-hearted supporter of affirmative action. I think many people who don't really like affirmative action support it to one degree or another anyway.

I believe they do this because of what happened to white and black Americans in the crucible of the 1960's, when whites were confronted with their racial guilt and blacks tasted their first real power. In that stormy time white absolution and black power coalesced into virtual mandates for society. Affirmative action became a meeting ground for those mandates in the law. At first, this meant insuring equal opportunity. The 1964 civil-rights bill was passed on the understanding that equal opportunity would not mean racial preference. But in the late 60's and early 70's, affirmative action underwent a remarkable escalation of its mission from simple anti-discrimination enforcement to social engineering by means of quotas, goals, timetables, set-asides and other forms of preferential treatment.

Legally, this was achieved through a series of executive orders and Equal Employment Opportunity Commission guidelines that allowed racial imbalances in the workplace to stand as proof of racial discrimination. Once it could be assumed that discrimination explained racial imbalances, it became easy to justify group remedies to presumed discrimination rather than the normal case-by-case redress.

Even though blacks had made great advances during the 60's without quotas, the white mandate to achieve a new racial innocence and the black mandate to gain power, which came to a head in the very late 60's, could no longer be satisfied by anything less than racial preferences. I don't think these mandates, in themselves, were wrong, because whites clearly needed to do better by blacks and blacks needed more real power in society. But as they came together in affirmative action, their effect was to distort our understanding of racial discrimination. By making black the color of preference, these mandates have reburdened

society with the very marriage of color and preference (in reverse) that we set out to eradicate.

When affirmative action grew into social engineering, diversity became a golden word. Diversity is a term that applies democratic principles to races and cultures rather than to citizens, despite the fact that there is nothing to indicate that real diversity is the same thing as proportionate representation. Too often the result of this, on campuses for example, has been a democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not yet been achieved in reality. Here again, racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that covers the blemish of disparity—a full six years after admission, only 26 to 28 percent of blacks graduate from college.

Racial representation is not the same thing as racial development. Representation can be manufactured; development is always hard earned. But it is the music of innocence and power than we hear in affirmative action that causes us to cling to it and to its distracting emphasis on representation. The fact is that after 20 years of racial preferences the gap between median incomes of black and white families is greater than it was in the 1970's. None of this is to say that blacks don't need policies that insure our right to equal opportunity, but what we need more of is the development that will let us take advantage of society's efforts to include us.

I think one of the most troubling effects of racial preferences for blacks is a kind of demoralization. Under affirmative action, the quality that earns us preferential treatment is an implied inferiority. However this inferiority is explained—and it is easily enough explained by the myriad deprivations that grew out of our oppression—it is still inferiority. There are explanations and then there is the fact. And the fact must be borne by the individual as a condition apart from the explanation, apart even from the fact that others like himself also bear this condition. In integrated situations in which blacks must compete with whites who may be better prepared, these explanations may quickly wear thin and expose the individual to racial as well as personal self-doubt. (Of course whites also feel doubt, but only personally, not racially.)

What this means in practical terms is that when blacks deliver themselves into integrated situations they encounter a nasty little reflex in whites, a mindless, atavistic reflex that responds to the color black with negative stereotypes, such as intellectual ineptness. I think this reflex embarrasses most whites today and thus it is usually quickly repressed. On an equally atavistic level, the black will be aware of the reflex his color triggers and will feel a stab of horror at seeing himself reflected in this way. He, too, will do a quick repression, but a lifetime of such stabbings is what constitutes his inner realm of racial doubt. Even when the black sees no implication of inferiority in racial preferences, he knows that whites do, so that—consciously or unconsciously—the result is virtually the same. The

effect of preferential treatment—the lowering of normal standards to increase black representation—puts blacks at war with an expanded realm of debilitating doubt, so that the doubt itself becomes an unrecognized preoccupation that undermines their ability to perform, especially in integrated situations.

I believe another liability of affirmative action comes from the fact that it indirectly encourages blacks to exploit their own past victimization. Like implied inferiority, victimization is what justifies preference, so that to receive the benefits of preferential treatment one must, to some extent, become invested in the view of one's self as a victim. In this way, affirmative action nurtures a victim-focused identity in blacks and sends us the message that there is more power in our past suffering than in our present achievements.

When power itself grows out of suffering, blacks are encouraged to expand the boundaries of what qualifies as racial oppression, a situation that can lead us to paint our victimization in vivid colors even as we receive the benefits of preference. The same corporations and institutions that give us preference are also seen as our oppressors. At Stanford University, minority-group students—who receive at least the same financial aid as whites with the same need—recently took over the president's office demanding, among other things, more financial aid.

But I think one of the worst prices that blacks pay for preference has to do with an illusion. I saw this illusion at work recently in the mother of a middle-class black student who was going off to his first semester of college: "They owe us this, so don't think for a minute that you don't belong there." This is the logic by which many blacks, and some whites, justify affirmative action—it is something "owed," a form of reparation. But this logic overlooks a much harder and less digestible reality, that it is impossible to repay blacks living today for the historic suffering of the race. If all blacks were given a million dollars tomorrow it would not amount to a dime on the dollar for three centuries of oppression, nor would it dissolve the residues of that oppression that we still carry today. The concept of historic reparation grows out of man's need to impose on the world a degree of justice that simply does not exist. Suffering can be endured and overcome, it cannot be repaid. To think otherwise is to prolong the suffering.

Several blacks I spoke with said they were still in favor of affirmative action because of the "subtle" discrimination blacks were subject to once they were on the job. One photojournalist said, "They have ways of ignoring you." A black female television producer said: "You can't file a lawsuit when your boss doesn't invite you to the insider meetings without ruining your career. So we still need affirmative action." Others mentioned the infamous "glass ceiling" through which blacks can see the top positions of authority but never reach them. But I don't think racial preferences are a protection against this subtle discrimination; I think they contribute to it.

In any workplace, racial preferences will always create two-tiered populations composed of [the] preferred and unpreferred. In the case of blacks and whites, for instance, racial preferences imply that whites are superior just as they imply that

blacks are inferior. They not only reinforce America's oldest racial myth but, for blacks, they have the effect of stigmatizing the already stigmatized.

I think that much of the "subtle" discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action marks blacks with. In this sense, preferences make scapegoats of the very people they seek to help. And it may be that at a certain level employers impose a glass ceiling, but this may not be against the race so much as against the race's reputation for having advanced by color as much as by competence. This ceiling is the point at which corporations shift the emphasis from color to competency and stop playing the affirmative-action game. Here preference backfires for blacks and becomes a taint that holds them back. Of course one could argue that this taint, which is after all in the minds of whites, becomes nothing more than an excuse to discriminate against blacks. And certainly the result is the same in either case—blacks don't get past the glass ceiling. But this argument does not get around the fact that racial preferences now taint this color with a new theme of suspicion that makes blacks even more vulnerable to discrimination. In this crucial yet gray area of perceived competence, preferences make whites look better than they are and blacks worse, while doing nothing whatever to stop the very real discrimination that blacks may encounter. I don't wish to justify the glass ceiling here, but only suggest the very subtle ways that affirmative action revives rather than extinguishes the old rationalizations for racial discrimination.

I believe affirmative action is problematic in our society because we have demanded that it create parity between the races rather than insure equal opportunity. Preferential treatment does not teach skills, or educate, or instill motivation. It only passes out entitlement by color, a situation that in my profession has created an unrealistically high demand for black professors. The social engineer's assumption is that this high demand will inspire more blacks to earn Ph.D's and join the profession. In fact, the number of blacks earning Ph.D's has declined in recent years. Ph.D's must be developed from preschool on. They require family and community support. They must acquire an entire system of values that enables them to work hard while delaying gratification.

It now seems clear that the Supreme Court, in a series of recent decisions, is moving away from racial preferences. It has disallowed preferences except in instances of "identified discrimination," eroded the precedent that statistical racial imbalances are prima facie evidence of discrimination, and, in effect, granted white males the right to challenge consent degrees that use preference to achieve racial balances in the workplace. Referring to this and other Supreme Court decisions, one civil-rights leader said, "Night has fallen . . . as far as civil rights are concerned." But I am not so sure. The effect of these decisions is to protect the constitutional rights of everyone, rather than to take rights away from blacks. Night has fallen on racial preferences, not on the fundamental rights of black Americans. The reason for this shift, I believe, is that the white mandate

for absolution from past racial sins has weakened considerably in the 1980's. Whites are now less willing to endure unfairness to themselves in order to grant special entitlements to blacks, even when those entitlements are justified in the name of past suffering. Yet the black mandate for more power in society has remained unchanged. And I think part of the anxiety many blacks feel over these decisions has to do with the loss of black power that they may signal.

But the power we've lost by these decisions is really only the power that grows out of our victimization. This is not a very substantial or reliable power, and it is important that we know this so we can focus more exclusively on the kind of development that will bring enduring power. There is talk now that Congress may pass new legislation to compensate for these new limits on affirmative action. If this happens, I hope the focus will be on development and anti-discrimination, rather than entitlement, on achieving racial parity rather than jerry-building racial diversity.

But if not preferences, what? The impulse to discriminate is subtle and cannot be ferreted out unless its many guises are made clear to people. I think we need social policies that are committed to two goals: the educational and economic development of disadvantaged people regardless of race and the eradication from our society—through close monitoring and severe sanctions—of racial, ethnic or gender discrimination. Preferences will not get us to either of these goals, because they tend to benefit those who are not disadvantaged—middle-class white women and middle-class blacks—and attack one form of discrimination with another. Preferences are inexpensive and carry the glamour of good intentions—change the numbers and the good deed is done. To be against them is to be unkind. But I think the unkindest cut is to bestow on children like my own an undeserved advantage while neglecting the development of those disadvantaged children in the poorer sections of my city who will most likely never be in a position to benefit from a preference. Give my children fairness; give disadvantaged children a better shot at development—better elementary and secondary schools, job training, safer neighborhoods, better financial assistance for college and so on. A smaller percentage of black high school graduates go to college today than 15 years ago; more black males are in prison, jail or in some other way under the control of the criminal-justice system than in college. This, despite racial preferences.

The mandates of black power and white absolution out of which preferences emerged were not wrong in themselves. What was wrong was that both races focused more on the goals of those mandates than on the means to the goals. Blacks can have no real power without taking responsibility for their own educational and economic development. Whites can have no racial innocence without earning it by eradicating discrimination and helping the disadvantaged to develop. Because we ignored the means, the goals have not been reached and the real work remains to be done.

Summary Questions

1. Can past discrimination against minorities be addressed by present policies that give preferences to these groups? Should such policies be adopted?
2. How do affirmative action policies affect the ways minorities view themselves? Do these alleged psychological injuries justify abandoning the entire notion of affirmative action?