

Chapter One

The Preamble



The Preamble to the Constitution

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

POLITICS: the process by which groups make decisions. Although the term is generally applied to behavior within governments, politics is observed in all human group interactions.

POWER: The ability of one person to get another person to do act in accordance with your wishes and intentions.

AUTHORITY: The exclusive right to exercise supreme political power over a group of people or geographic region.

LEGITIMACY: acceptance by the citizens that their state has the right to pass and enforce rules.

GOVERNMENT: the organization that has the accepted authority to make laws, adjudicate disputes, and that has a monopoly of authorized force to enforce its decisions.

WHAT IS GOVERNMENT?

PURPOSES OF GOVERNMENT

- Maintain order
- Provide public services
- Regulate the economy

TYPES OF GOVERNMENT

- Autocracy
- Unitary
- Presidential
- Oligarchy
- Federal
- Parliamentary
- Republic
- Confederal
- Democracy

Political Philosophy

- Thomas Hobbes – *Leviathan*
 - *Men are selfish and greedy*
 - *Social contract is between government and people*
- John Locke – Two Treatises
 - Social contract is between the people
 - Government is created by the people
- Charles Montesquieu – The Spirit of the Laws
 - *Seperation of powers: executive, judicial, legislative*
- Jean Jacques Rousseau – *The Social Contract*
 - Right and duty of revolution
- Adam Smith – *The Wealth of Nations*
 - People should be free to do as they wish
 - Government should be small and limited

The Colonial Mind

1776

- Believed that men seek power because they are ambitious, greedy and easily corrupted.
- Feared a ‘tyranny of the majority’
- Believed in a higher law embodying *inalienable* natural rights:
 - Life
 - Liberty
 - Property

Chapter Two

The Constitution



CONSTITUTION

The system of fundamental laws and principles that prescribes the nature, functions, and limits of a government or another institution

CONSTITUTION

- statement of ideals
- establishes basic structure of government
- defines and limits governments powers and duties
- supreme law of country

Strengths of the Articles of Confederation

- First written constitution
- First National Union
- Neutral negotiating forum for states
- Successes:
 - Land Ordinance 1785 standardized weights and measures
 - Northwest Ordinance 1787 to survey new territories, define admission of new states, and allow for state sovereignty on issue of slavery
 - Jay Treaty 1785 added Florida territory and opened up Mississippi to trade

Weaknesses of the Articles of Confederation

- **Confederal**
 - Sovereignty, independence retained by states
- **Parliamentary**
 - No Executive or Judicial
- **Unicameral**
 - Delegates to Congress picked, paid for by state legislatures
- **One vote in Congress for each state**
 - Nine of thirteen votes in Congress required for any measure
 - All thirteen states' consent necessary for any amendments
- Congress did NOT have power to tax, print money, or regulate commerce
- Army small and dependent on independent state militias
- Territorial disputes between states led to open hostilities

Chapter Two

Section Three

The Constitution



State Constitutions

Pennsylvania

- Most democratic
- Universal Suffrage
- Popular election
- One Year Terms
- Unicameral
- Executive Council

Massachusetts

- Weak government
- Christian Property owners
- Separation of Powers
- Executive Veto
- Appointed Judges

The Virginia Plan

- Replace Articles
- Unitary/Federal
- Presidential
 - Executive and Judicial indirectly elected by legislature
- Bicameral?
 - One house directly by the people based on population; one house chosen indirectly by first based on population
- Council of Revision
 - Indirectly elected as a second House with veto power over state laws

The New Jersey Plan

- Amend Articles
- Federal/Confederal
- Parliamentary
 - Executive indirectly elected by Legislature; Judicial chosen by Executive
- Unicameral
 - Indirectly elected by the state legislatures
- Council of Revision
 - Selected by Executive, approved by Legislature veto power over Federal laws

The Connecticut Compromise

– Federal

- All powers not explicitly given to the Federal government belong to the people and the states

– Presidential

- Executive indirectly elected by electoral college
- States set election laws
- Judicial nominated by Executive; approved by Senate

– Bicameral

- House of Representatives directly elected based on population
- Senate two per state indirectly elected by state legislatures

– The *Greatest Compromise?*

- House of Representatives Apportionment: 3/5 Compromise
- Congress could not prohibit slave trade before 1808
- Fugitive Slave Clause

Key Principles of US Government

- **FEDERALISM**
 - power divided between national and state governments
- **REPUBLIC**
 - Popular rule, but not direct democracy
 - Majority rule
- **SEPARATION OF POWERS**
 - Veto, override, appointment/approval, judicial review?
- **AMENDMENT**
 - Proposed 2/3d in Congress; 2/3ds of State legislatures
 - Approved 3/4ths of states in legislatures or conventions

Four Categories of Powers

- **Enumerated powers:** given to national government exclusively; include power to print money, declare war, make treaties, conduct foreign affairs
- **Reserved powers:** given to states exclusively; include power to issue licenses and to regulate commerce wholly within a state
- **Concurrent powers:** shared by both national and state governments; include collecting taxes, building roads, borrowing money, having courts
- ***Implied Powers***
 - *The ‘elastic’ clause was included into the Constitution to allow flexibility. Congress was granted the right to make all laws which they deemed necessary and proper to do their job.*

Interpretations of the Constitution

- **Strict interpretation**
 - *The strict interpretation of the constitution meant that it was to be followed exactly to the word, a philosophy adopted by Jefferson.*
- **Loose interpretation:**
 - *Hamilton believed in a loose interpretation, or that powers implied within the Constitution should be included in the new government to fit changes over time.*

The Anti-federalists

Patrick Henry, Sam Adams, George Mason

- Liberty could be secure only in small republics
 - Nation needed a loose confederation of states with most of the power wielded by the state legislatures where the citizens could physically abuse the legislators
 - Tyranny of the majority and minority rights
- There should be restrictions on a strong national government
 - Bill of Rights

The Federalists

John Jay, Alexander Hamilton, James Madison

- Federalist Papers 10 and 51
 - Coalitions were more likely to be moderate because they would represent a diversity of interests
 - Governments should be somewhat distant from the passions of the people
- No bill of rights was necessary as most rights were already guaranteed in Constitution or in State Bill of Rights
 - Habeas corpus
 - No ex post facto
 - Trial by jury
 - Full faith and credit
 - Separation of church and state

The Federalist Papers

James Madison

- Federalist Paper 10
 - Problem with Democracy is factionalism, tyranny of the majority
 - Solutions
 - Eliminate democracy through monarchy
 - Establish a Republic or representative democracy with a strong national government
- Federalist Paper 51
 - Problem with strong central government is again the problem of tyranny
 - Solutions
 - Federalism
 - Separation of powers

CHAPTER 13

Article I



CONGRESS

Congress

- The intent of the Framers:
 - To oppose the concentration of power in a single institution
 - To balance large and small states
 - Bicameralism
 - House of Representatives and Senate
 - To avoid the tyranny of the majority, or populism
- They expected Congress to be the dominant institution

Section 1:

This section provides for a **BICAMERAL** legislature, consisting of a

- **HOUSE OF REPRESENTATIVES and SENATE.**

The House of Representatives:

- **Elected for 2 year terms from districts with equal populations**
- **Minimum age is 25**
- **All revenue bills (taxes and spending) must originate in the House**
- **Sole power of impeachment**
- ***Override presidential veto with 2/3rds vote***

The Senate

- **2 Senators per state, one vote each**
- **Senate term is 6 years**
- 1/3 of senate elected every 2 years
- Elected by state
- Must be 30, US citizen, resident for 9 years, and residing in state
- Vice President presides over the senate
- Sits as jury in impeachment cases
- Advises and consents to treaties and Presidential appointments

Enumerated powers:

- **TAX**
- **BORROW MONEY**
- **REGULATE COMMERCE**
- **COIN MONEY**
- **GIVE PATENTS**
- **DEFINE AND PUNISH CRIMES ON HIGH SEAS**
- **DECLARE WAR**
- **MAINTAIN NAVY AND ARMY**
- **CALL UP MILITIA**

What clause allows Congress to go beyond its enumerated powers?

- **NECESSARY AND PROPER CLAUSE**

What are four powers denied to Congress?

- **RESTRICT SLAVE TRADE TIL 1808**
- **SUSPEND HABEAS CORPUS UNLESS PUBLIC SAFETY**
- **NO ATTAINDER (GROUP GUILTY WITHOUT TRIAL)**
- **NO EX POST FACTO LAW**
- **NO INTERSTATE TARIFFS**
- **NO PREFERENTIAL TREATMENT TO ANY STATE**
- **NO TITLES OF NOBILITY**

EXPLICIT LIMITATIONS OF THE POWERS OF THE STATES

- **Cannot make treaties**
- Cannot declare war
- Cannot coin Money;
- Cannot pass any Bill of Attainder
- cannot pass ex post facto Law
- Cannot grant any Title of Nobility.

Congress



- Vote is for the candidate, not the party
- Members primarily represent districts or states, not parties.
- Party discipline is limited
- Members do not choose the chief executive—voters elect president
- Power is decentralized and members are independent
- Members' principal work is representation, negotiation, and passing laws
- Members have a great deal of power, high pay and significant staff resources

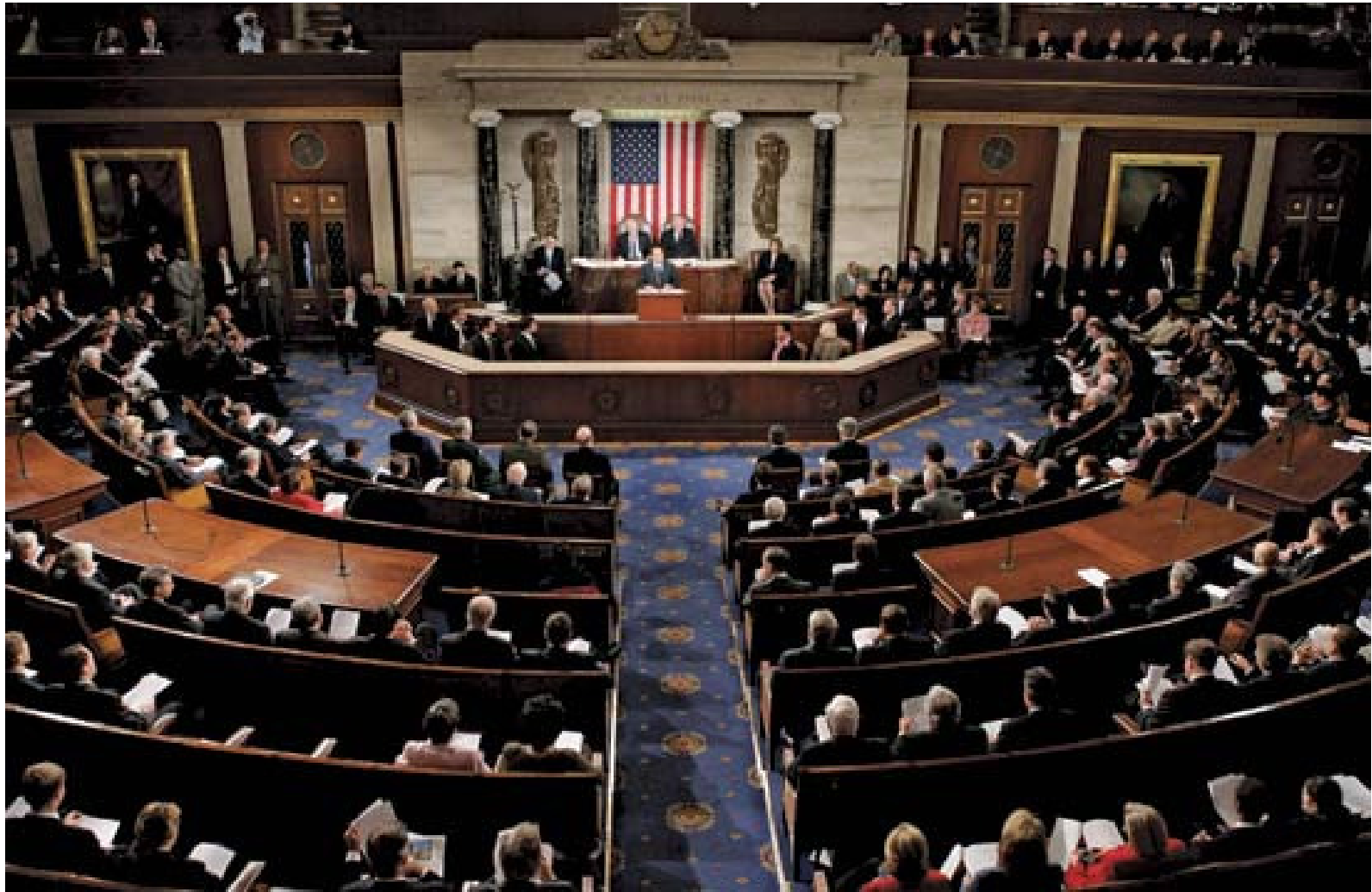
Member Behavior

- **Representational view:** members vote to please their constituents, in order to secure re-election
- **Organizational view:** where constituency interests are not vitally at stake, members primarily respond to cues from party and colleagues
- **Attitudinal view:** the member's ideology determines her/his vote
 - Ideology has become increasingly important recently as congress has become **polarized**.

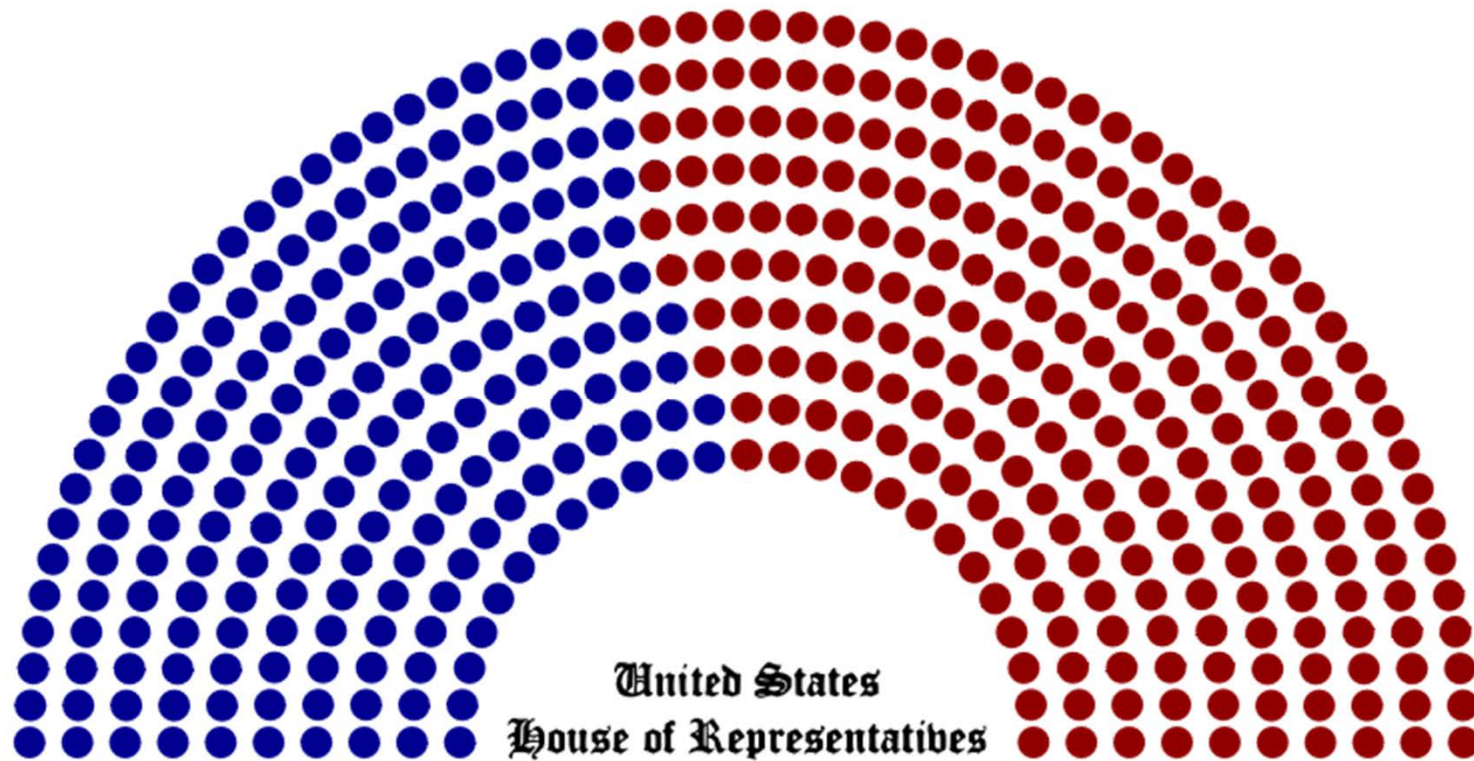
Congressional Caucuses

- **Caucus:** an association of members of Congress created to advocate a political ideology or a regional or economic interest
- **Intra-party caucuses:** members share a similar ideology
- **Personal interest caucuses:** members share an interest in an issue
- **Constituency caucuses:** established to represent groups, regions or both

The House of Representatives



112th Congress



435 Representatives:

Democratic Party: 193 members.

Republican Party: 242 members.

Structure of the House

- **Speaker of the House** is leader of majority party and presides over House
- **Majority leader** and **minority leader**: leaders on the floor
- **Party whips** keep leaders informed, round up votes, and ensure a **quorum**
 - 100 Reps for debate
 - 217 for vote
 - 2/3ds to choose President or Vice President

Speaker of the House

- Leader of majority party
- Decides who may speak during debates
- Has the power to discipline members
- Runs the **Steering Committee** which assigns representatives to committees and selects Committee Chairs
- Runs **Policy Committee** which controls introduction of bills and determines which committees they are sent to for consideration
- Runs the **Rules Committee** which sets the legislative agenda and the rules on voting and floor debate
- Assigns office space

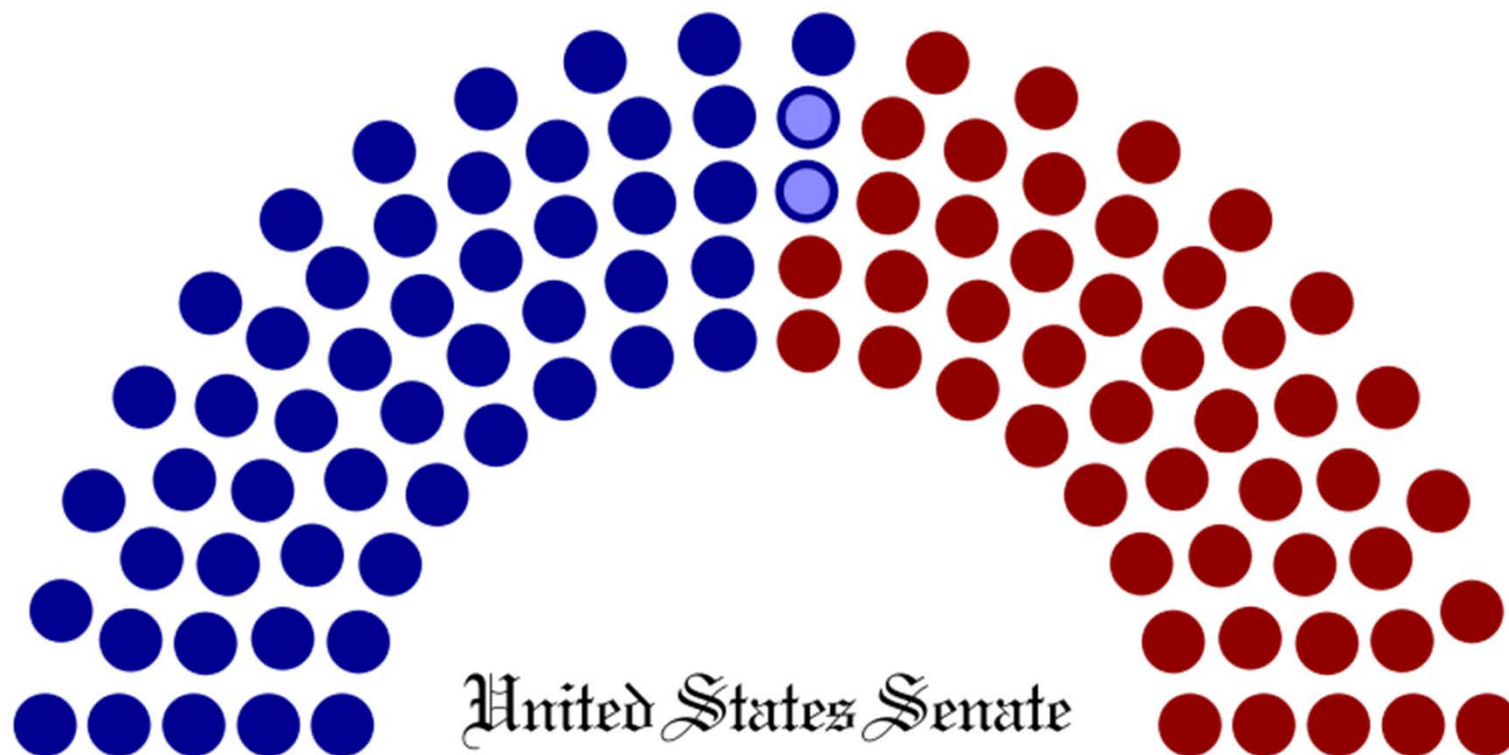
The Senate



Copyright © Houghton
Mifflin Company. All
rights reserved



112th Congress



Party standings in the Senate

57 Democratic Senators

2 Independent Senators, caucusing with Democrats

41 Republican Senators

Structure of the Senate

- **Vice President** presides over Senate and casts vote in event of tie
- **President pro tempore** presides in VP's absence; this is the member with most seniority in majority party (a largely honorific office)

Party Structure in the Senate

- **Majority leader** and **Minority leader**, elected by their respective party members
- **Party whips**: keep leaders informed, round up votes for **quorum**
 - 51 senators
- **Policy committee**: schedules Senate business
- Committee assignments are handled by each party usually based on seniority

How a Bill Becomes a Law

- Bill must be introduced by a member of Congress
- Bill is referred to a committee for consideration by either Speaker or presiding officer of the Senate
- Revenue bills must originate in the House
- Most bills die in committee

Committees

- Committees are the most important organizational feature of Congress
- Consider bills or legislative proposals
- Maintain oversight of executive agencies
- Conduct investigations
- Majority party has majority of seats on the committees and names the chair

Types of Committees

- **Standing committees:** basically permanent bodies with specified legislative responsibilities
- **Select committees:** groups appointed for a limited purpose and limited duration
- **Joint committees:** those on which both representatives and senators serve
- **Conference committee:** a special temporary joint committee appointed to resolve differences in Senate and House versions of the same piece of legislation before final passage

How a Bill Becomes a Law in the House

- Speaker assigns a bill to a committee
- After **hearings** and **mark-up sessions**, the committee **reports out** a bill to the House
- Most bills are not reported out and die in committee
- Bill must be placed on a calendar by the **House Rules Committee** to come to the floor for debate and a vote
- House Rules Committee sets rules for debate, **amendments**, and voting

How a Bill Becomes a Law in the Senate

- Bill are placed on calendar by the **Majority** and **Minority Leaders**
- Bills may be sent to committee for **hearings** and **mark-up sessions**
- Bills may be directly introduced to floor
 - House bills are automatically
- No restrictions on debate: the *filibuster*
 - restricted by Rule 22 (1917), which allows a vote of cloture
 - ***Supermajority*** needed for cloture, 60 votes

How a Bill Becomes a Law

- Bills are debated on the floor of the House or Senate
- If there are major differences in the bill as passed by the House and Senate, a **conference committee** is appointed
- The bill goes to the president
- President can sign or veto
- If President vetoes bill, congress can override his veto with a 2/3ds vote of BOTH houses.

CHAPTER 14

Article II



The Presidency

The President

- The intent of the Framers:
 - Delegates feared both anarchy and monarchy
 - needed a strong, independent executive without the excessive powers of a monarch.
 - Principal concern was to balance power of legislative and executive branches
 - Expected Congress to be the dominant institution
 - but indirect election by congress would give too much power to legislature
 - direct election would lead to mob rule

The Electoral College

- Even though the national popular vote is calculated by media organizations, the national popular vote is not the basis for electing a President or Vice President.
- Although ballots list the names of the presidential candidates, voters within the 50 states actually choose electors when they vote. These presidential electors in turn cast electoral votes for those two offices.
- Presidential electors are selected on a state-by-state basis, as determined by the laws of each state

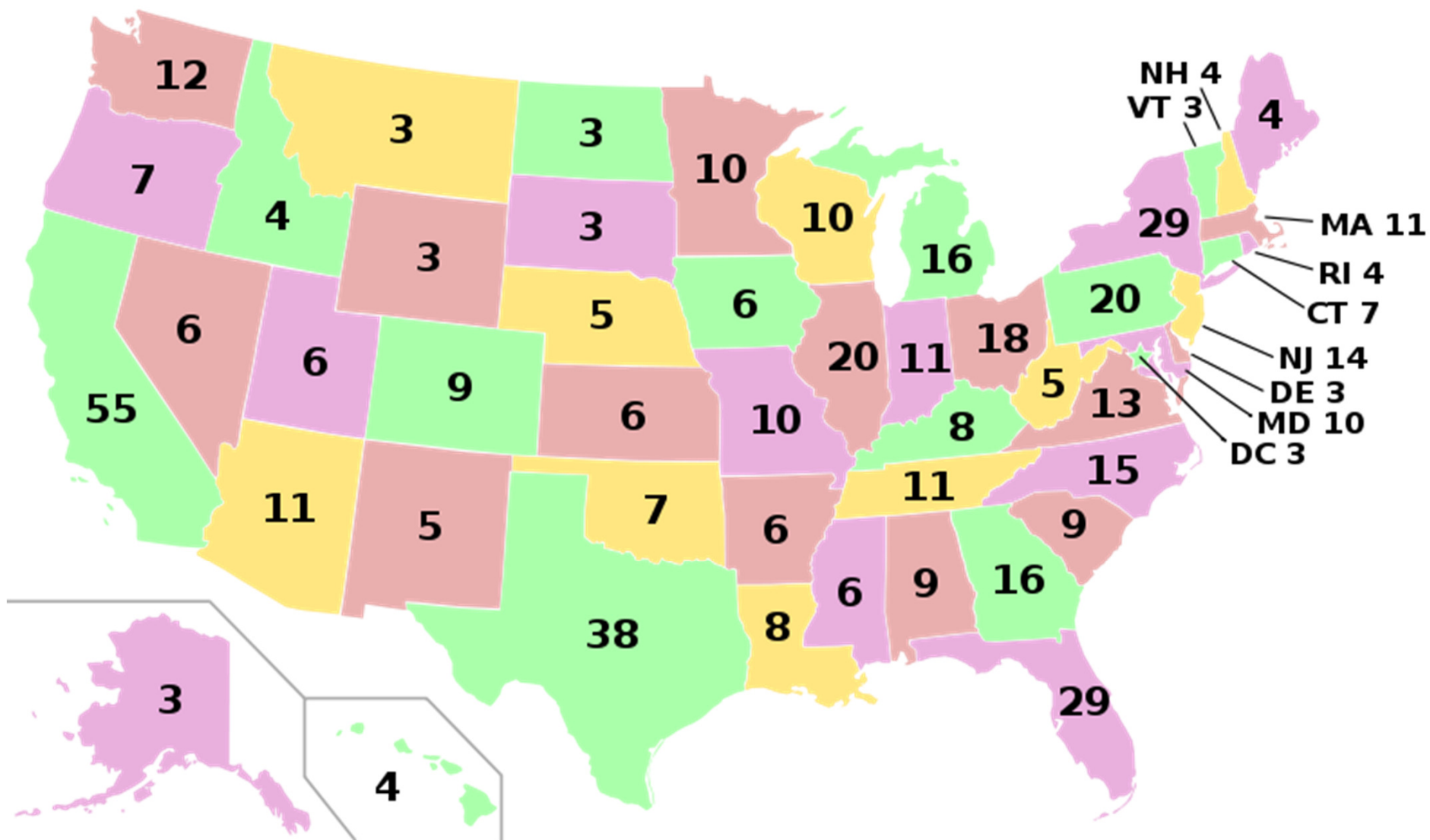
Section I:

Each state appoints a number of electors equivalent to?

Each state gets number of electors equal to representation in congress

The Electoral College

- The size of the Electoral College is equal to the total membership of both Houses of Congress (435 Representatives and 100 Senators) plus the three electors allocated to Washington, D.C., totaling 538 electors.
- Almost all states use a winner-take-all system
- A candidate must receive an absolute majority of electoral votes (currently 270) to win the Presidency.
- A faithless elector is one who casts an electoral vote for someone other than whom they have pledged to elect.
 - There are laws to punish faithless electors in 24 states.
- If no candidate receives a majority in the election for President, or Vice President, that election is determined by Congress.



Electoral College Reallocation, 2010

Under the original wording of the constitution, how would the president and vice president be chosen?

The Person having the majority of Electoral Votes is President, the person with the second most votes is vice-president.

The Electoral College ultimately worked differently than expected, because the Founders did not anticipate the role of political parties and the concept of running on a ticket . . .

What would happen in the case of a tie in the electoral college?

If no one has a Majority, then The House of Representatives chooses with each State having one Vote.

A quorum for this purpose is two thirds of the States.

A Majority of all the States is necessary to select the president.

If there is a tie for second, the Senate chooses the Vice President.

12th Amendment, 1804

Section 3. The Electors shall meet in their respective states, and vote by ballot for President and Vice-President; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President and of the number of votes for each

The person having the greatest Number of votes for President, shall be the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President.

CHAPTER 14

Article II



Qualifications to be President

Arnold Schwarzenegger was born in Austria, but is now the Governor of California. He is interested in running for president in 2012. Is this constitutionally possible? Why or why not? What criteria must be met before a person can be president?

No, he must be a natural born Citizen, or a Citizen of the United States at the time of the Adoption of the Constitution, or a constitutional amendment must be passed.

A natural born citizen (born in the US or US territories, or born to US Citizens), must be thirty five years old, and a resident of the US for 14 years.

22nd Amendment, 1951

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.



CHAPTER 14

Article II



Presidential Succession

Presidential Transition

- Only fifteen of forty-four presidents have served two full terms
- Eight vice presidents have taken office upon the president's death

Under the original wording of the Constitution, what would occur if the President could no longer fulfill his duty? What if the President and Vice-President were both incapacitated?

In Case of the Death, Resignation, Removal, or Inability to discharge the Powers and Duties of the President, these powers shall devolve on the Vice President

Congress decides what Officer shall act as President in the Case of Removal, Death, Resignation, or Inability of both the President and Vice President.

20th Amendment, 1933

Section 3. If the President elect shall have died, the Vice President elect shall become President.

If the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified;

and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President.

Presidential Succession Act of 1947

President Truman requested that Congress return the **Speaker** and **President Pro Tempore** to the list of Presidential successors as they were elected and so the President could not appoint his own successor:

- **Vice President**
- **Speaker of the House**
- **President Pro Tempore**
- **Secretary of State**
- **Secretary of the Treasury**
- **Secretary of War (Defense)**
- **Attorney General**

25th Amendment, 1967

- **Section 1.** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
- **Section 2.** Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
- **Section 3.** Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

CHAPTER 14

Article II



Powers of the President

The President

The Constitution gives only five specific powers:

- the **Veto power**
 - Congress can over-ride veto
- **Power of Appointment**
 - Senate must confirm appointments
- **Treaty-making power**
 - Senate must ratify treaties
- **Commander in chief** of the armed forces
 - Congress has power to declare war
- **Power to Pardon**
 - Except in cases of Impeachment

Section II:

Name the three powers specifically given to the President under the first paragraph of Section II.

Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States

Require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices

Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

List the ways that the president's power is checked in Section II.
Mention the power that he is given and how that power is checked.

To make Treaties

-provided two thirds of the Senators present concur

Appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States

-by and with the Advice and Consent of a majority of the Senate

Grant pardons

-except in cases of congressional impeachment

The last paragraph of section II gives the president the power to make recess appointments. What is meant by a recess appointment?

The President can fill vacancies while the Senate is away, but only until they return.

CHAPTER 14

Article II



Power of Veto

Article I, Section 7

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The Veto Power

- President does not hold **line-item veto** power, he can either
- Sign the legislation; the bill then becomes law.
- Veto the legislation; the bill does not become law, unless both Houses of Congress vote to override the veto by a two-thirds vote.
- Take no action. In this instance, the president neither signs nor vetoes the legislation. After 10 days, not counting Sundays:
 - If Congress is still convened, the bill becomes law.
 - If Congress has adjourned the bill does not become law. This latter outcome is known as the **pocket veto**.

CHAPTER 14

Article II



Presidential Appointments

The Cabinet

- Not explicitly mentioned in Constitution
- Presidents have many appointments to make:
 - Cabinet
 - Federal Judiciary
 - Ambassadors
 - Military Officers
- Positions that can be filled in a given presidential term: 6,478

White House Office

- **Rule of propinquity:** power is wielded by people who are in the room when a decision is made
- Political Power is held by those closest to the President

White House Office

- **Pyramid structure:** assistants report through hierarchy to Chief of Staff, who then reports to President
 - Eisenhower, Nixon, Reagan, Bush
- **Circular structure:** cabinet secretaries and assistants report directly to the President
 - Carter, Kennedy, Clinton
- ***Ad hoc* structure:** task forces, committees, and informal groups deal directly with president
 - Clinton (early in his administration)

CHAPTER 14

Article II



Presidential Character

Section III:

List the responsibilities that the president receives from Section III.

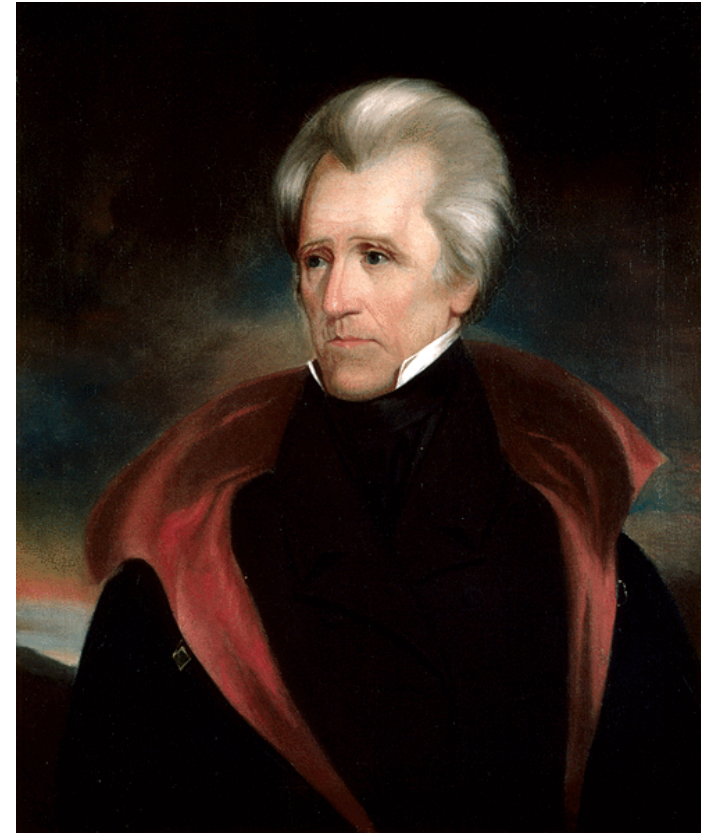
- **Give a State of the Union to Congress recommending to Congress Measures he judges necessary**
- **Convene either or both Houses in times of emergency**
- **Dismiss Congress in Case of Disagreement between the Houses about the time of adjournment**
- **Receive Ambassadors and other public Ministers**
- **Faithfully execute and enforce the Laws of the United States**
- **Commission all the Officers of the United States military**

Powers of the President

- Potential for power found in ambiguous clauses of the Constitution—e.g., power as commander in chief, duty to “take care that laws be faithfully executed” (executive power)
- Greatest source of power lies in politics and public opinion

ANDREW JACKSON

- APPOINTMENT POWER
 - PARTY PATRONAGE
 - SPOILS SYSTEM
- VETO POWER
 - POLICY VETOS
- COMMANDER-IN-CHIEF
 - NULLIFICATION CRISIS
 - INDIAN REMOVAL
- POWER TO PERSUADE
 - POPULAR TRIBUNE
 - PRESIDENTIAL PROGRAM



The President's Program

- Resources in developing a program include interest groups, aides and campaign advisers, federal departments and agencies, and various specialists
- Constraints include public and congressional reactions, limited time and attention, and unexpected crises

The Power to Persuade

- Presidents try to transform popularity into congressional support for their programs
- Presidential coattails have had a declining effect for years
- Popularity is affected by factors beyond anyone's control – consider Bush's approval ratings following the September 11th attacks

Constraints on the President

- Both the president and the Congress are more constrained today due to:
 - Complexity of issues
 - Scrutiny of the media
 - Greater number and power of interest groups

CHAPTER 14

Article II



Impeachment

Section IV:

For what offenses can a president be removed from office?

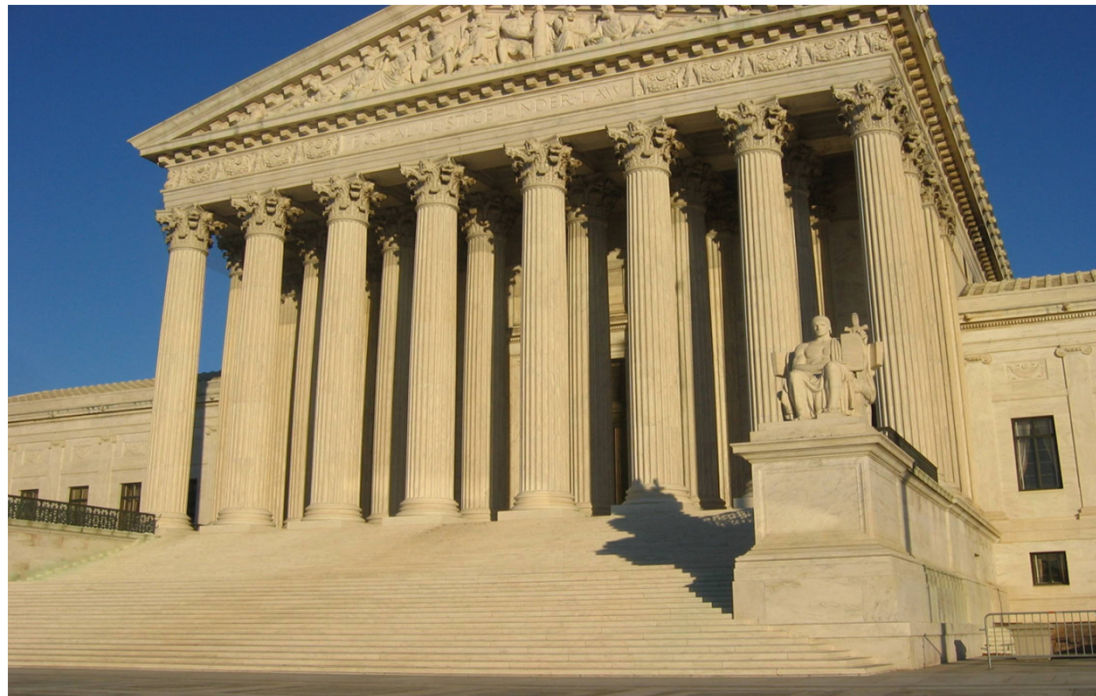
The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors

Impeachment

- Indictment by the House, conviction by the Senate
- Presidential examples: Andrew Johnson, Richard Nixon (pre-empted by resignation), Bill Clinton
- Neither Johnson nor Clinton was convicted by the Senate

Chapter Sixteen

The Judiciary



Code Law and Common Law

- A written legal Code covers the entire system of law
- Judges must discover the **facts** in order to apply the appropriate **law**.
- Legislature is final Court of Appeal
- The law gives general guidelines.
- Judges referee debate between the parties based on the applicability of **Precedent** cases.
- A Supreme Court is the final court of Appeal.

Civil Law and Criminal Law

- A private party files the lawsuit as the **plaintiff**.
- Burden of proof is on the Plaintiff
- ‘For the Plaintiff’ or ‘For the Defendant’ by a ***preponderance of the evidence***
- Remedy is **Compensation** in equity or money
- The state, representing the people, **prosecutes** the case.
- Presumption of Innocence; burden of proof is on the state
- ‘Guilty or Not Guilty’ **beyond a reasonable doubt**
- Remedy is **Punishment:** Fines, Imprisonment, or Execution

Article III, Section 1

Which branch of government is given the power to establish lower federal courts?

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

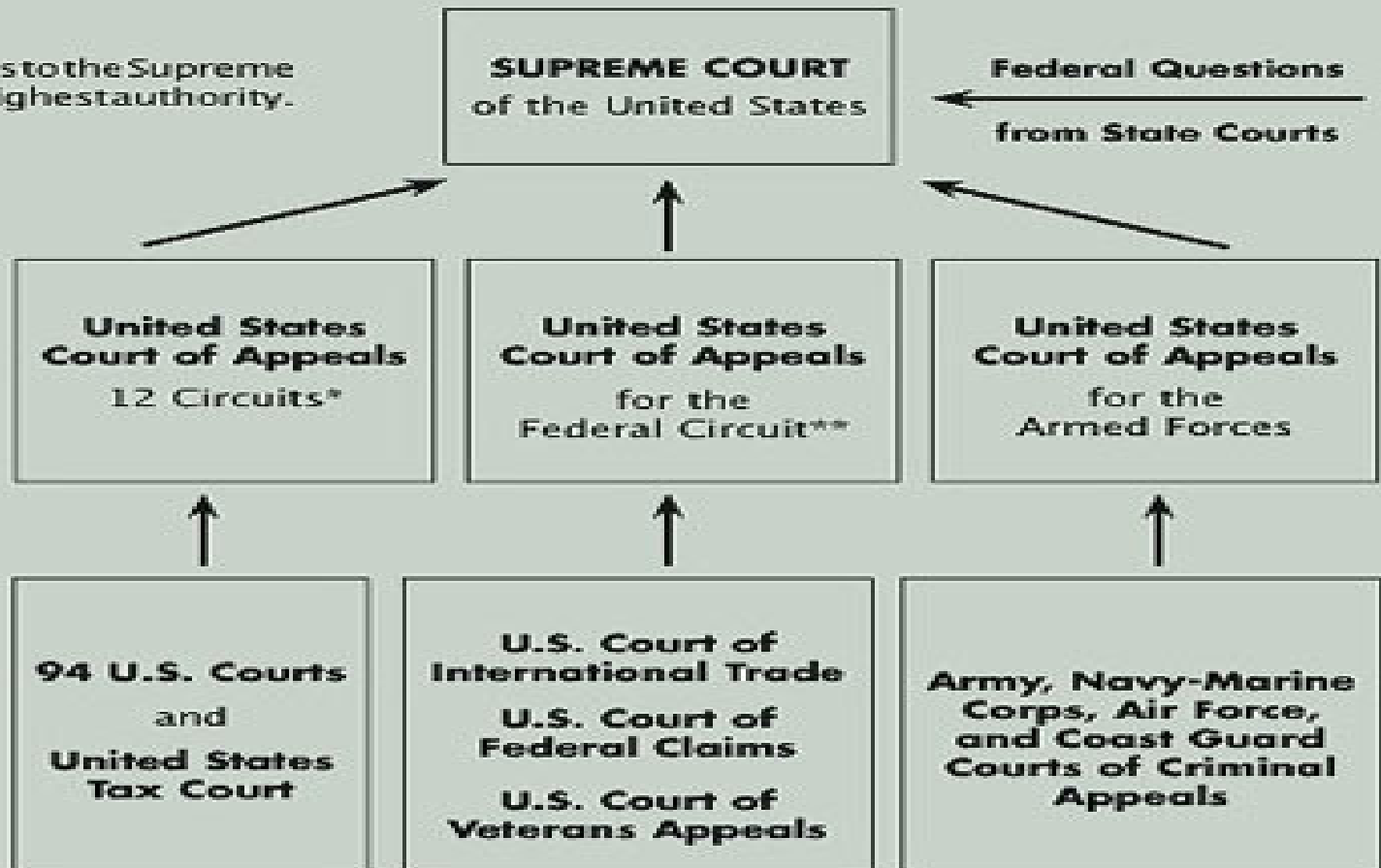
Why do you think this is the case?

THE U.S. COURT SYSTEM

The final appeal goes to the Supreme Court, the last and highest authority.

Disputes can be appealed and decided by these courts.

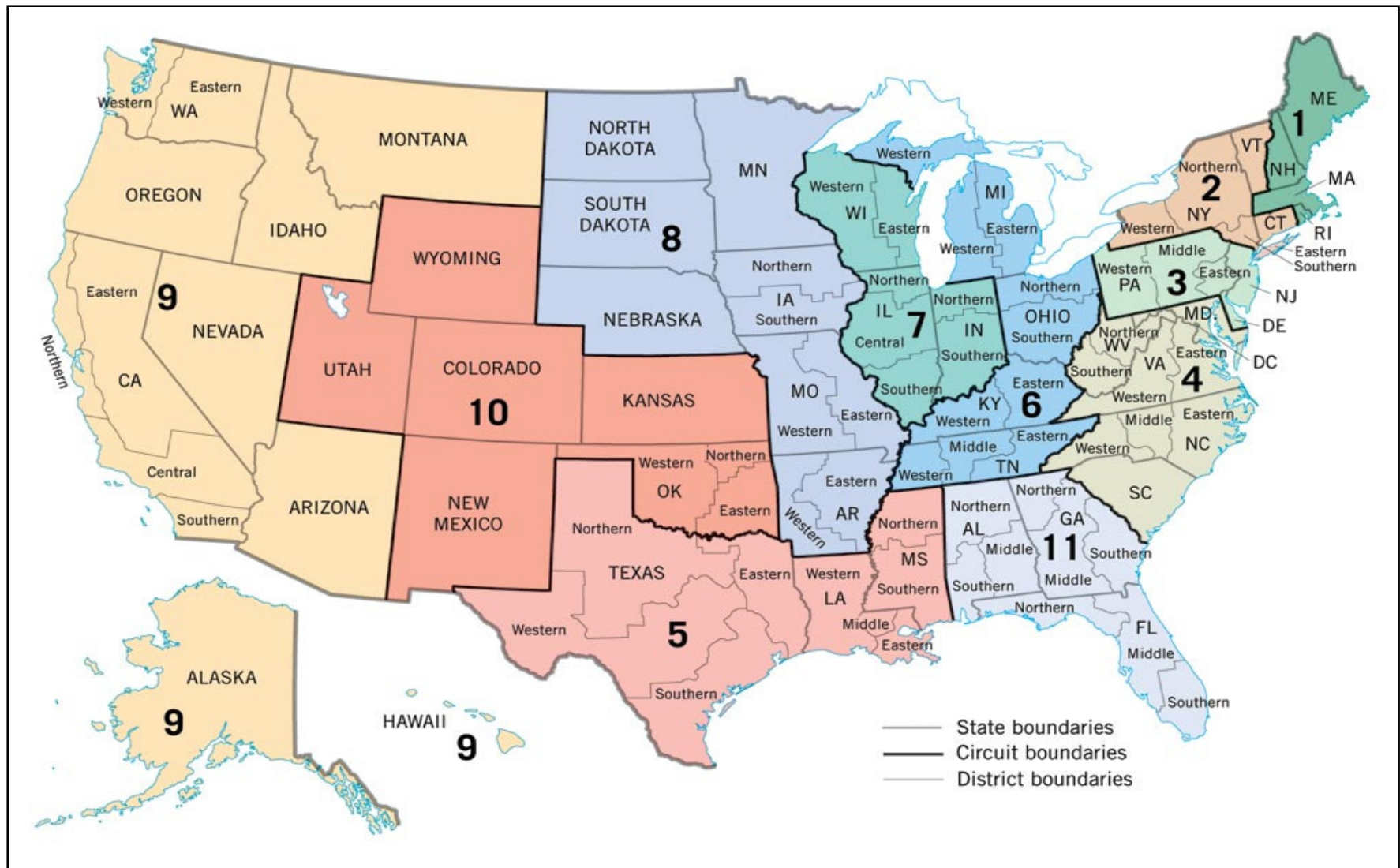
Cases start in these courts.



* The 12 regional Courts of Appeals also receive cases from a number of federal agencies.

** The Court of Appeals for the Federal Circuit also receives cases from the International Trade Commission, the Merit Systems Protection Board, the Patent and Trademark Office, and the Board of Contract Appeals.

District and Circuit (Appellate) Courts



Selection



Back row: Sotomayor, Breyer, Alito, Kagan
Front row: Thomas, Scalia, Chief Justice Roberts, Kennedy, Ginsburg.

Article II, Section 2

(The President) shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.

Selecting Judges

- Presidents seek judicial appointees who share their political ideologies
 - Potential Nominees for federal courts are first recommended by the National Bar Association
 - ‘**Litmus test**’ interviews
 - Creation of ‘**short list**’ of potential nominees



Constitutional Interpretation

- **Strict Construction**: judges feel bound by the actual wording of the Constitution
 - most **strict constructionists** tend to be conservative Republicans
- **Activist**: feel judges should look to the underlying principles and intentions of the founders
 - most **activists** tend to be liberal Democrats

Current Supreme Court

Ginsberg (Clinton, 1993): very liberal

Sotomayor (Obama, 2009): consistently liberal

Breyer (Clinton, 1994): consistently liberal

Kagan (Obama, 2010): centrist but more likely to vote liberal

Kennedy (Reagan, 1988): the *swing* vote, but generally conservative

Alito (Bush, 1990): consistently conservative

Roberts (W. Bush, 2005): consistently conservative

Scalia (Reagan, 1986): extremely conservative

Thomas (Bush, 1991): extremely conservative

The current court is considered conservative

Selecting Judges

- Tradition of *Senatorial Courtesy*
 - The short list is reviewed by senators
 - Senators from the same state may ‘*blue slip*’ the nominee

Why do you think the President does this?

Is this process Constitutional?

Robert Bork, 1987



"BORKED!"

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy... No justice would be better than this injustice.

-Senator Ted Kennedy, 1987

Article III, Section 1

What is the term of a Supreme Court justice?

The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office

Why do you think this is their term?

Alexander Hamilton, Federalist #78

“The judiciary . . . is in continual jeopardy of being overpowered, awed, or influenced by [the other] branches; and nothing can contribute so much to its firmness and independence as permanency in office; since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty as regulating their decisions by fundamental laws rather than the simple will of the majority.”

Jurisdiction



Article III, Section 2

List three examples of cases that would fall under the judicial power of the Federal Courts:

*The judicial power shall extend to all cases, in law and equity, arising under this **Constitution**, the **laws of the United States**, and **treaties** made, or which shall be made, under their authority;*

*--to all cases affecting **ambassadors**, other public ministers and consuls;--to all cases of **admiralty and maritime** jurisdiction;--*

*--to controversies to which the **United States shall be a party**;*

*--to controversies between **two or more states**;--between **a state and citizens of another state**;*

*--between **citizens of different states**;*

--between citizens of the same state claiming lands under grants of different states,

*and between **a state, or the citizens thereof, and foreign states, citizens or subjects.***

Article III, Section 2

List three examples of cases that would fall under the judicial power of the Federal Courts:

- ***Federal Questions***

- *The Constitution or Federal laws*
- *Treaties*
- *Ambassadors, other public ministers and consuls*
- *Admiralty and maritime jurisdiction*
- *The United States government*

- ***Diversity Cases***

- *Two or more states*
- *A state and citizens of another state*
- *Citizens of different states*
- *citizens of the same state over property in a different state*
- *a state or citizen and foreign states or citizens*

Federal Cases

- **Federal question cases**: involving the U.S. Constitution, federal law, the sea, or treaties
- **Diversity cases**: involving different states, or citizens of different states

Article III, Section 2

What is “**Original Jurisdiction**”?

The ability and authority to hear and decide cases for the **first time** based on hearing testimony and viewing evidence

In contrast to hearing a case “on appeal” after a verdict has been rendered.

Article III, Section 2

Under what circumstances does the Supreme Court have “original jurisdiction**”?**

In all cases affecting **ambassadors**, other public ministers and consuls, and those in which a **state** shall be party, the Supreme Court shall have **original jurisdiction**.

In all the other cases before mentioned, the Supreme Court shall have **appellate jurisdiction**, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Article III, Section 2

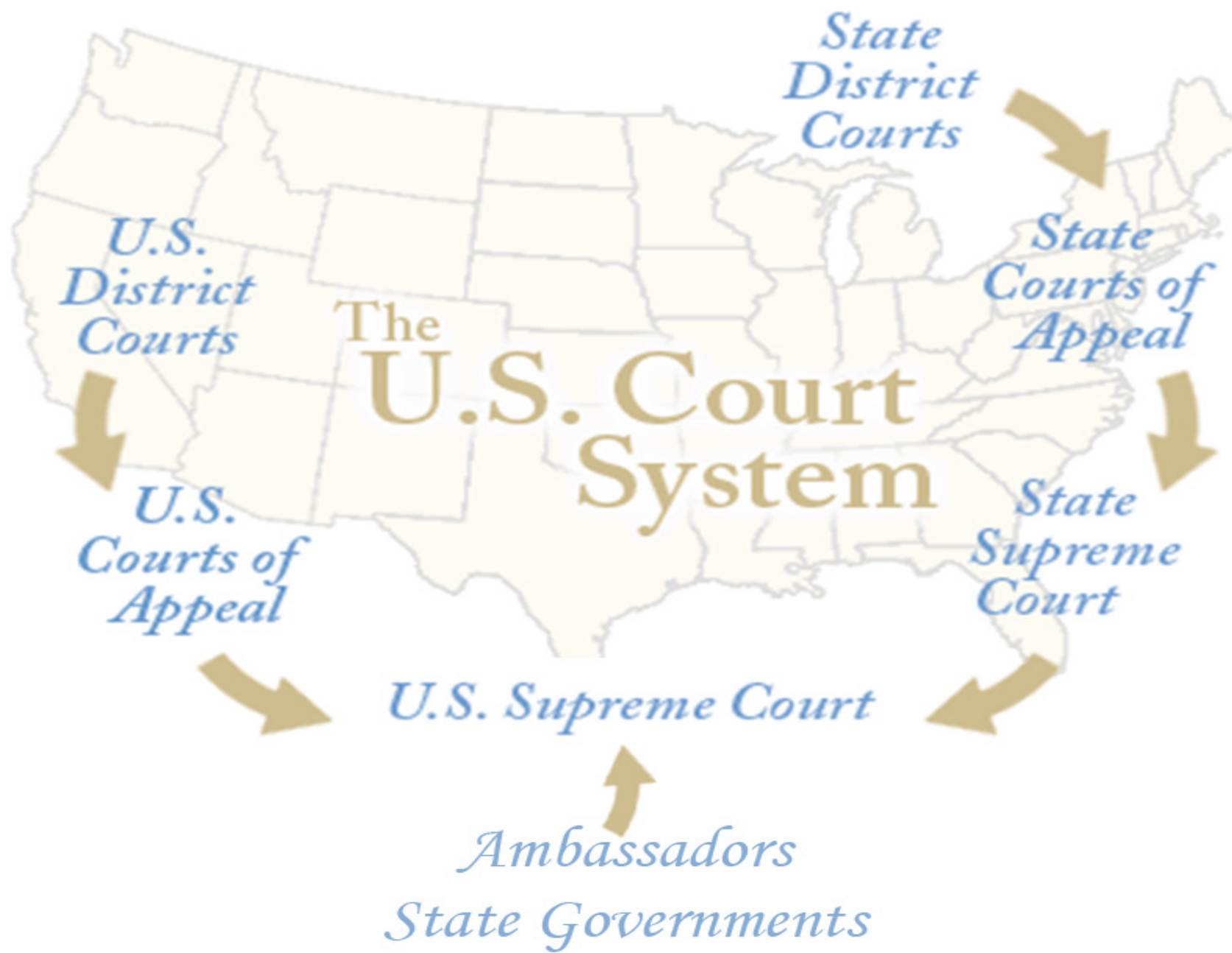
Under what circumstances does the Supreme Court have “original jurisdiction**”?**

In all cases dealing with

- ambassadors, other public ministers and consuls
- a state government

In all the other cases

- the Supreme Court shall have appellate jurisdiction



ARTICLE VI, US CONSTITUTION

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The SUPREMACY CLAUSE

Procedure



Procedure



- The Supreme Court Term begins the **first Monday in October**
- The Court divides its time into sessions of approximately four weeks.
 - “**Sittings**,” two-week periods during which the Justices hear arguments
 - “**Recesses**,” two weeks where they hold conferences and write opinions.
 - They may hear as many as 24 cases each sitting.

Procedure



- The Justices actively hear arguments from October until the end of April or early May using this rotating schedule
- During May and June, the Justices announce decisions
- From July through September, they read **petitions for writs of certiorari** and discuss cases for the next term.

Writs of Certiorari

- Most cases arrive through a **writ of certiorari**
- Requires agreement of ***four justices*** to hear the case
 - Involves significant federal or constitutional question
 - Involves conflicting decisions by circuit courts
 - Involves Constitutional interpretation by one of the highest state courts
- 7000 petitions, only around 100 granted

Standing to Sue

- There must be a real *controversy* between adversaries
- *Harm* must be demonstrated
 - *Actual*
 - *Personal*
- *Political Questions*
- *Sovereign immunity*
- Expenses
 - *In forma pauperis*
 - Fee shifting
 - Class actions

Procedure

- Brief
 - Stare Decisis
 - **Precedent!!!**
 - Remedy
- Amicus Curiae
 - ‘Friend of the Court’
- Oral Argument
 - Plaintiff
 - Defendant
 - Inquiry by Justices
 - Closing Arguments
 - Rebuttal



Adversarial Systems

- In the **ADVERSARIAL SYSTEM**, two or more opposing parties gather evidence
- The parties then present the evidence, and their arguments, to a **judge** or **jury**.
- The judge or jury knows nothing of the litigation until the parties present their cases to the decision maker.
- The judge acts as a referee on points of law.
- The judge or jury determine both the verdict and the remedy.

The **Inquisitorial** System

- In the **INQUISITORIAL** system, the presiding judge is not a passive recipient of information.
- The judge actively steers the search for evidence and questions the witnesses
- Attorneys play a more defensive role, suggesting arguments and precedents and answering the judge's questions.
- The judge determines the verdict and the remedy.

Inquisitorial and Adversarial Legal Systems

- While **lower courts** tend to be **Adversarial**, the Supreme Court is more **Inquisitorial**.
- After opening arguments, Justices question and cross-examine the attorneys



Court Opinions

- ***Per curiam***: brief and unsigned
- **Opinion of the court**: majority opinion
- **Concurring opinion**: agrees with the ruling of the majority opinion, but modifies the supportive reasoning
- **Dissenting opinion**: minority opinion

Development of the Federal Courts

- Most Founders probably expected judicial review but did not expect the federal courts to play such a large role in policy-making
- But the federal judiciary evolved toward judicial activism, shaped by political, economic, and ideological forces

Judicial Review

- **Judicial review**: the right of the federal courts to rule on the constitutionality of laws and executive actions
- It is the chief judicial weapon in the checks and balances system

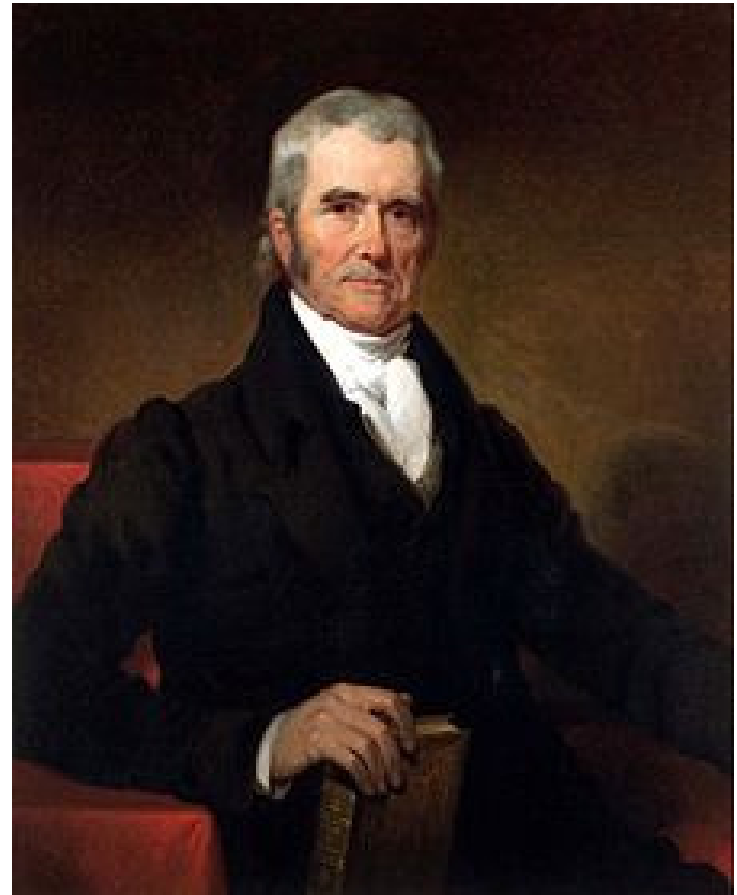
Judicial Review

Marbury v. Madison

“It is emphatically the province and duty of the judiciary to say what the law is, and a law repugnant to the Constitution is void.”

-John Marshall

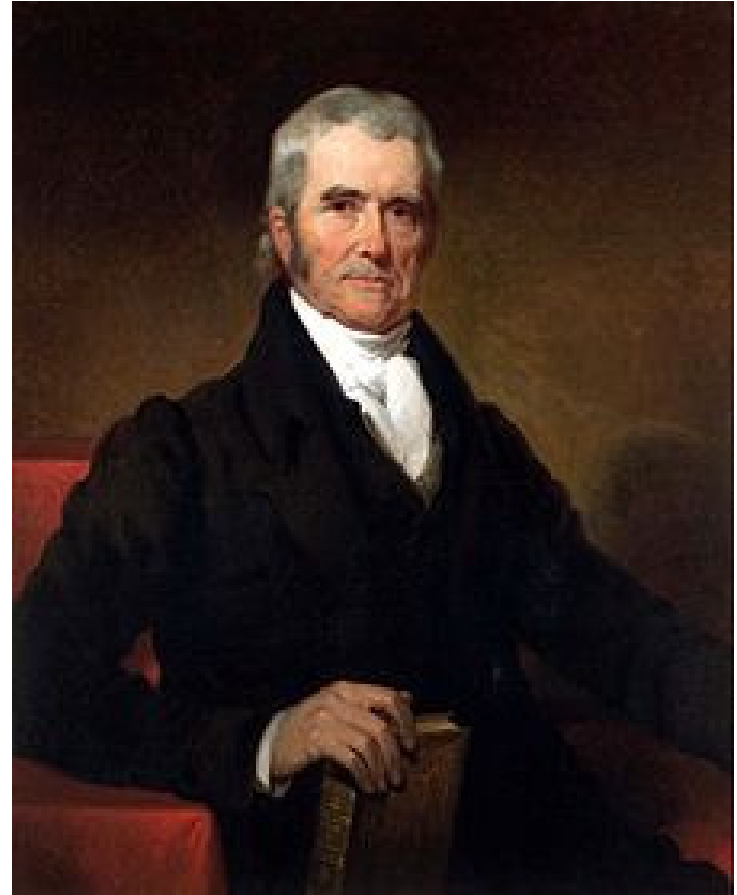
Chief Justice of the Supreme Court,
1801-1835



Judicial Review

Marbury v. Madison (1803)

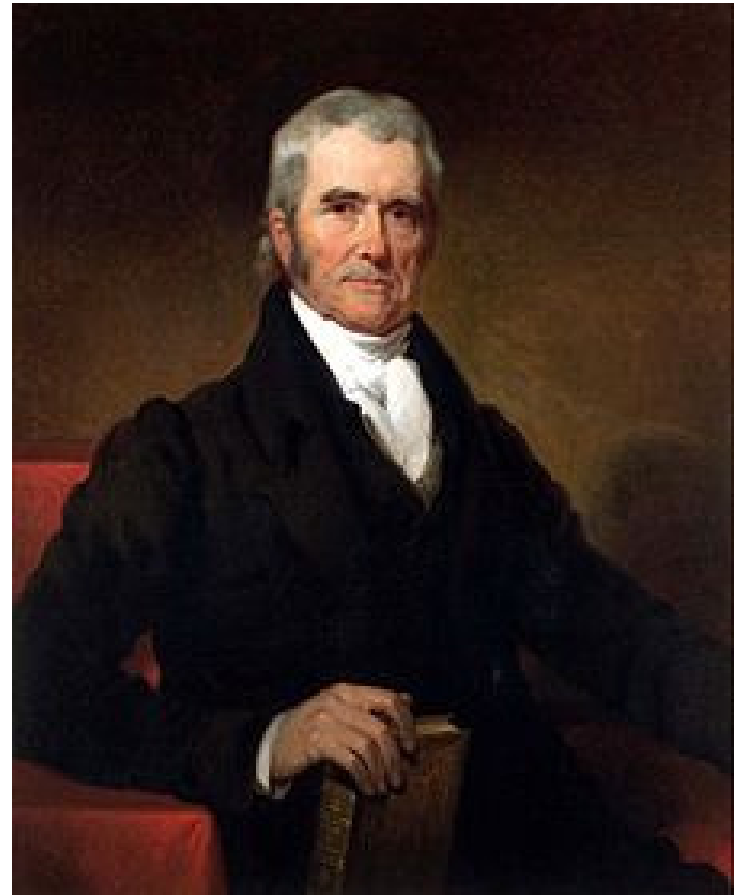
- The Supreme Court has the power to declare an act of congress unconstitutional.



Judicial Review

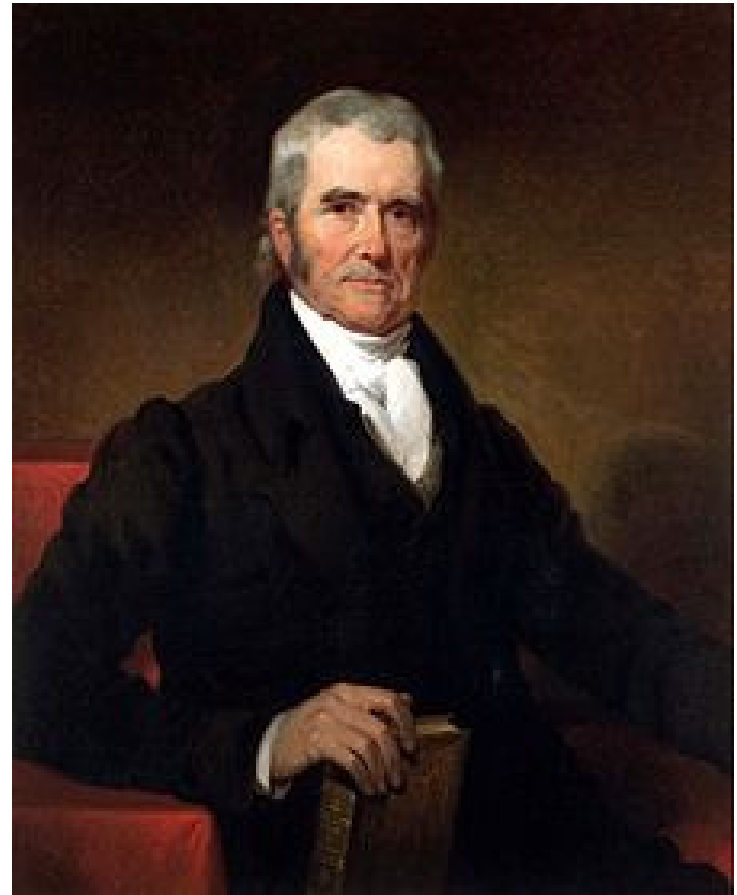
McCulloch v. Maryland (1819)

- Federal law is supreme over state law
- Congress has implied powers under the Elastic Clause



Judicial Review

Would Marshall have been considered an activist or a strict constructionist?



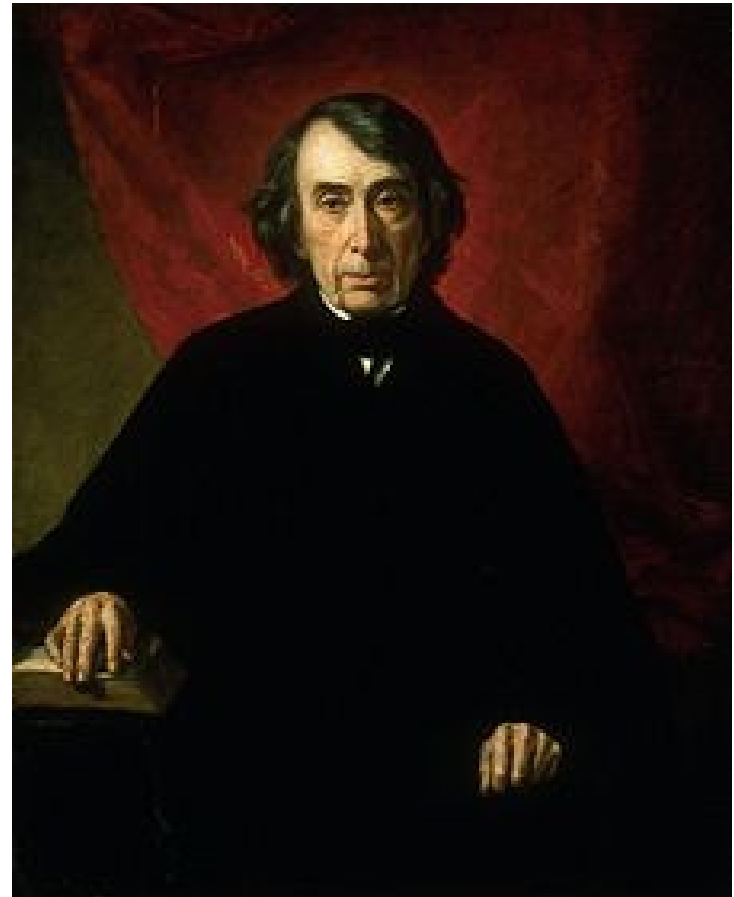
Judicial Review

Dred Scott v Sanford, 1857

“Slaves, as chattels or property worth 3/5ths of a person as defined by the Constitution, cannot be taken away from their owners without due process and compensation as put forward by the 6th Amendment.”

-Roger Taney

Chief Justice of the Supreme Court,
1836-1864

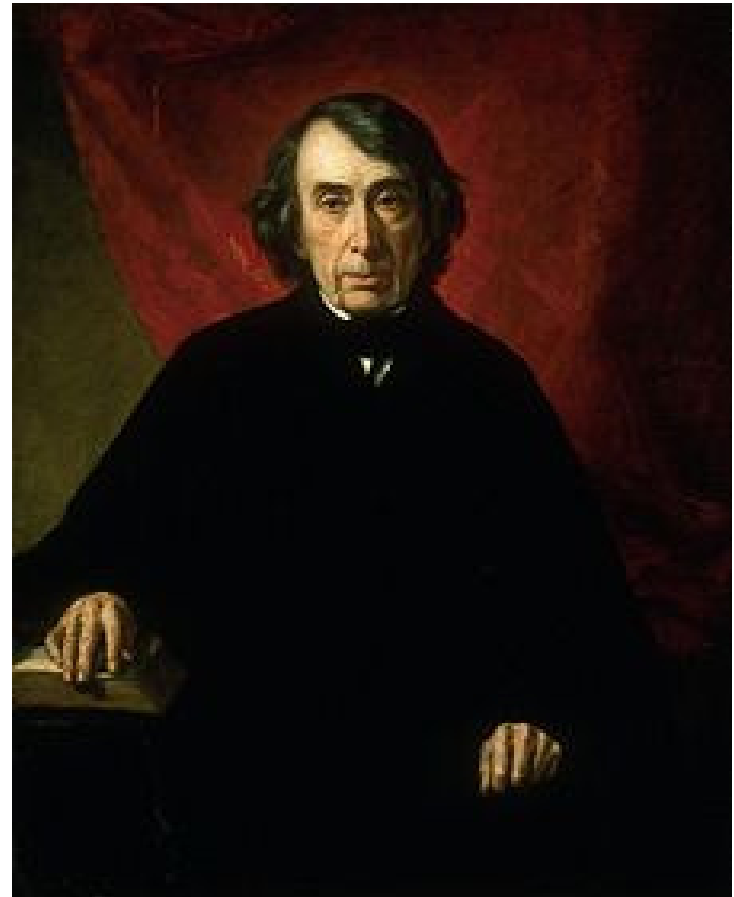


Judicial Review

Dred Scott v Sanford, 1857

The enumerated powers of the Constitution
do not include the regulation of slavery
All Federal laws prohibiting slavery are
unconstitutional
Slaves are not citizens, they are property.
Therefore
cannot file lawsuits
cannot be taken from their masters without
due process and adequate compensation
Blacks are not citizens of the US and
cannot ever be citizens

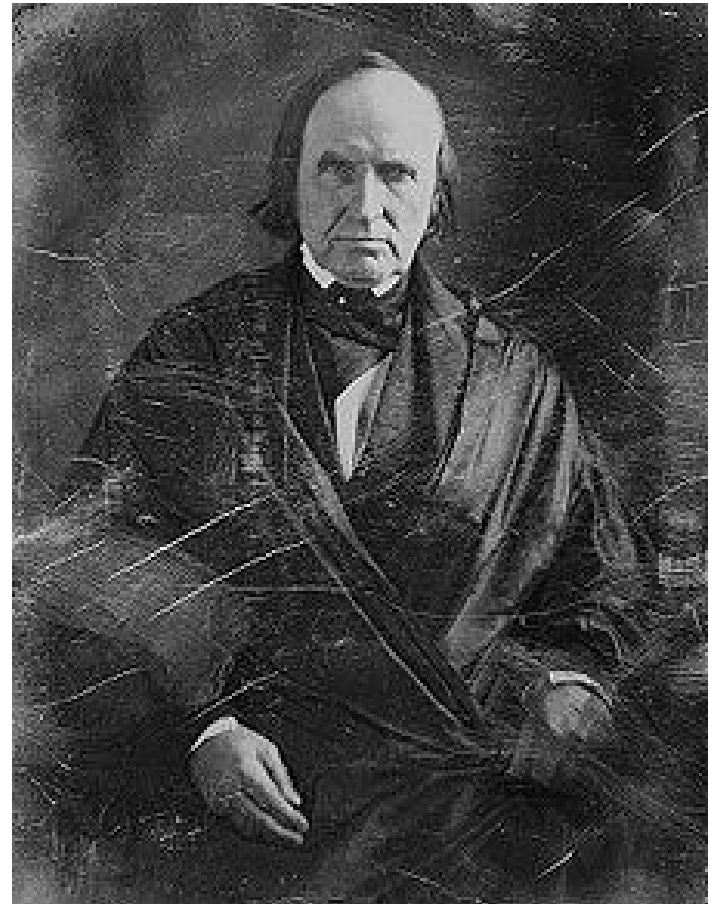
Roger Taney
Chief Justice of the Supreme Court,
1836-1864



Dred Scott

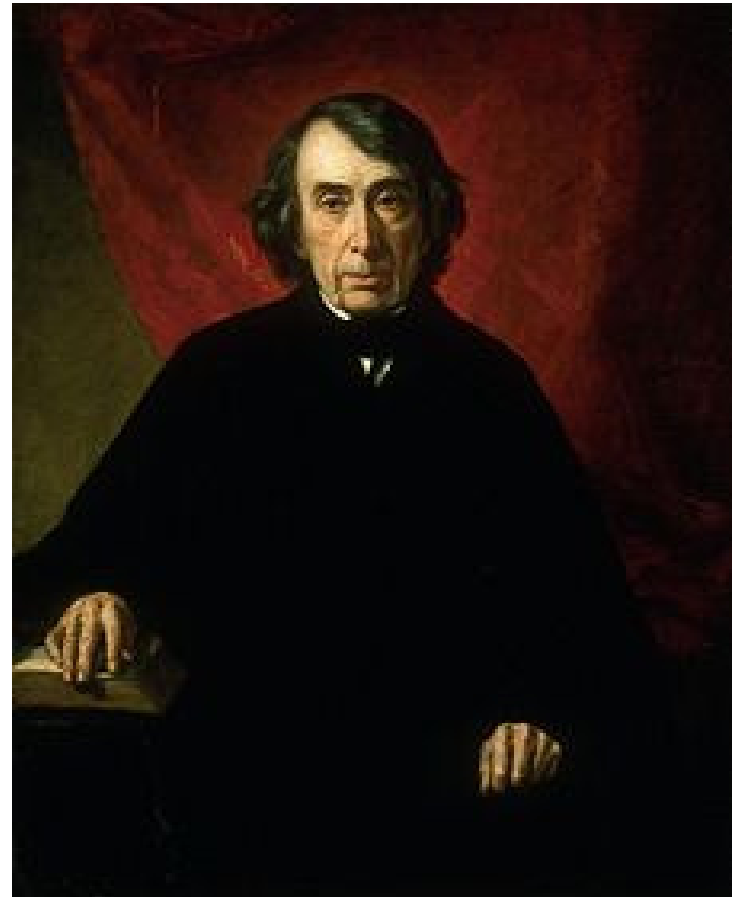
Justice McLean's Dissent

- Article I, section 9 does imply federal power to regulate slavery
- There is no Constitutional basis for the claim that blacks cannot be citizens.
- At the time of the ratification of the Constitution, black men could vote in ten of the thirteen states.
- This fact made them citizens not only of their states but of the United States.

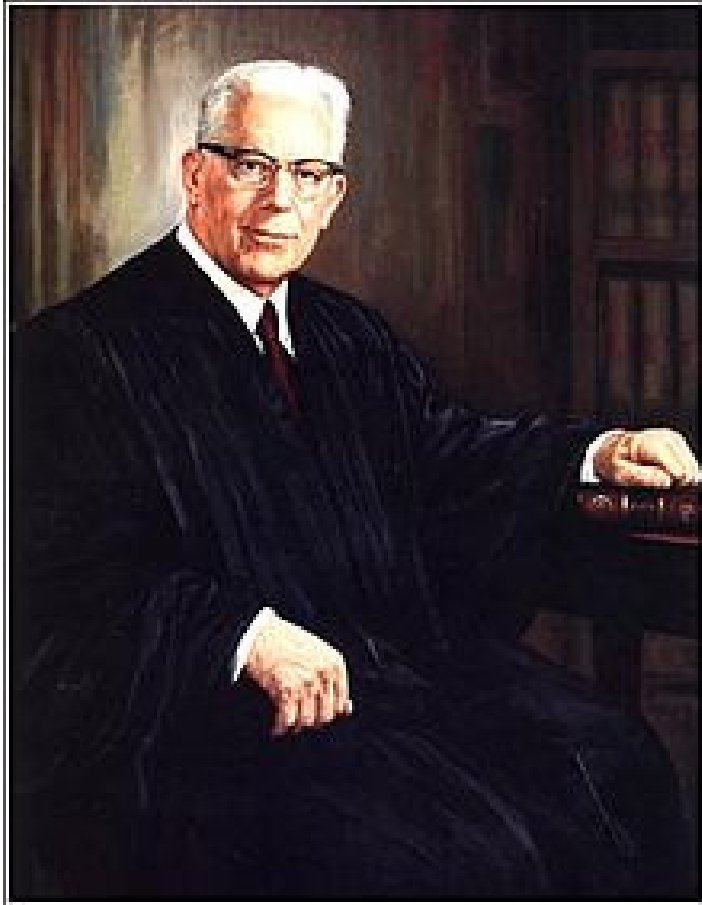


Judicial Review

Would Taney have been considered an activist or a strict constructionist?



Activist Court



The Warren Court

- Brown v Board of Education
- Miranda v Arizona
- Gideon v Wainwright
- Griswald v Connecticut

Earl Warren

Chief Justice of the Supreme Court,
1953-1969

Arguments for Judicial Activism

- Courts should correct injustices when other branches or state governments refuse to do so
- Courts are the last resort for those without the power or influence to gain new laws

Arguments Against Judicial Activism

- Judges lack expertise in designing and managing complex institutions
- Initiatives require balancing policy priorities and allocating public revenues
- Courts are not accountable because judges are not elected

Checks on Judicial Power

- Judges have no enforcement mechanisms
- Appointment and Confirmation
- Impeachment
- Revising legislation or Amending the Constitution
- Altering jurisdiction or Changing the number of judges

- What constitutes treason in this section 3?
- What is required to convict a person of treason?
- Why do you think Treason is the only specific crime that is mentioned in the Constitution?

Section 3.

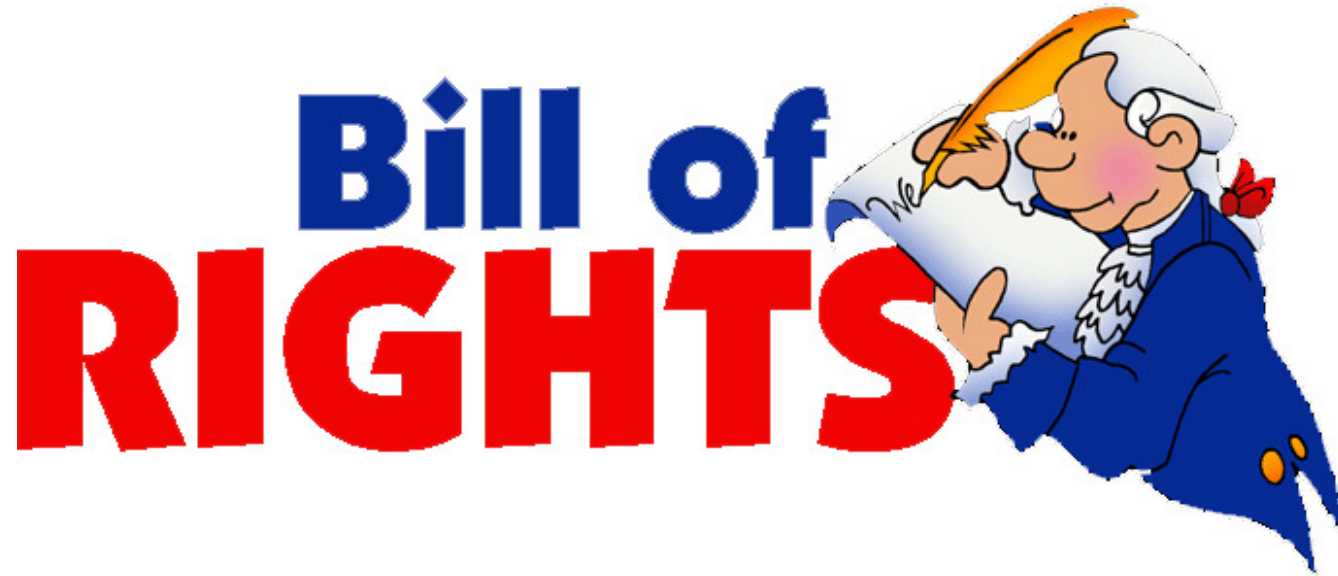
- Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
- The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Chapter Five

Section 1

Civil Liberties:

Incorporation



Civil Liberties versus Civil Rights

- Civil Liberties
 - Negative Rights
 - Bill of Rights
 - Amendments 1 - 9
- Civil Rights
 - Positive Rights
 - Due Process, Equal Protection, and Privileges and Immunities Clause
 - 14th and 15th Amendments
 - Article IV, Section 2

The Bill of Rights

- The first ten amendments to the US Constitution
 - Actually the first nine are rights, the 10th is 'reserved powers'
- Adopted in order to satisfy Anti-Federalists demands for limits on the Federal Government
- Draws influence from the Magna Carta (1215), the English Bill of Rights (1689), and the Virginia Declaration of Rights by George Mason (1776)

Amendment I

- Guarantee against **establishment of religion**
- Guarantee of **free exercise of religion**
- Guarantee of **freedom of speech**
- Guarantee of **freedom of the press**
- Guarantee of **freedom of assembly**
- Right to petition** for redress of grievances
- Guarantee of **freedom of association**

Amendment II

Right to keep and bear arms

Amendment III

Freedom from quartering of soldiers

Amendment IV

**No Unreasonable search and seizure
Requirement for a Warrant**

Amendment V

- Right to **indictment** by a **grand jury**
- Protection against **double jeopardy**
- Privilege against **self-incrimination**
- Protection against **taking of private property without due process and just compensation**

Amendment VI

- Right to a **public and speedy trial**
- Right to **trial by impartial jury**
- Right to **notice of accusations**
- Right to **confront adverse witnesses**
- Right to **compel witness testimony**
- Right to **assistance of counsel**

Amendment VII

Right to jury trial in civil cases

Amendment VIII

**Protections against excessive bail and
excessive fines**

**Protection against cruel and unusual
punishments**

Amendment IX

The enumeration in the Constitution of certain rights does not deny **the existence of other rights.**

Amendment X

The **powers not delegated to the United States** by the Constitution, nor prohibited by it to the states, **are reserved to the states** or to the people.

Original Interpretation

- Restrictions on Federal Government, not State Governments
- Based on 10th Amendment



The 14th Amendment (1868)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor **deny to any person** within its jurisdiction the **equal protection** of the laws.

Ratification July 9, 1868

The Fifteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.

Ratification completed on February 17, 1870

Selective Incorporation

- Burlington Railway v Chicago, 1897
 - “selective incorporation” versus “automatic incorporation”
 - Selective Incorporation wins
 - Bill of Rights will be applied to the states on a case by case basis



Constitutional Tests for Restricting Substantive Rights

- ***PREFERRED POSITION***
 - *The Right of Free Expression is not unlimited, but occupies the top spot over all the other rights in the Bill of Rights*
- ***PRIOR RESTRAINT***
 - *Censorship will not be tolerated, only subsequent punishment for improper expression*
- ***LEAST RESTRICTIONS***
 - *Restrictions must address the harm rather than prevent the exercise of free speech: zoning ordinances for adult theaters and bookstores have been upheld as it regulates use of property rather than expression*

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Interpreting and applying the First Amendment

First amendment is composed of freedom of
RELIGION

*“Congress shall make no law respecting an
establishment of religion, or prohibiting the free
exercise thereof;*

SPEECH

*or abridging the freedom of speech, or of the
press; or the right of the people peaceably to
assemble, and to petition the government for a
redress of grievances.”*

Legal Restrictions on Freedom of Speech

Supreme Court generally upholds these acts
(particularly in times of war)

FIVE EXCEPTIONS TO FIRST AMENDMENT FREEDOM OF SPEECH:

- CLEAR AND PRESENT DANGER**
- LIBEL/SLANDER**
- OBSCENITY**
- SYMBOLIC SPEECH**
- FALSE ADVERTISING**

The Clear and Present Danger

Gitlow v New York

- Government restrictions on Free Speech are allowed only where there is a “*Clear and Present Danger*”:
 - Intent to
 - Incite
 - Immediate
 - Incidents of **violence** to people or property

LIBEL

***Libel: written statement defaming
another by false statement***

Slander: defamatory oral statement

- ***NY Times v Sullivan, 1964***

- ***Public figures must also show the words were written with “actual malice”—with reckless disregard for the truth or with knowledge that the words were false***
- ***Because of the extremely high burden of proof on the plaintiff, and the difficulty in proving essentially what is inside a person's head, such cases — when they involve public figures — rarely prevail.***

Libel and Slander

NY Times v Sullivan

- Suits for libel and slander may only succeed where there is:
 - False statements
 - Harm to reputation or livelihood
 - Malice

OBSCENITY

- *No enduring and comprehensive definition*
 - *“I know it when I see it.” – Justice Potter Stewart*
- *Balancing competing claims remains a problem: freedom vs. decency*
- ***Miller v California, 1973***
 - *“judged by the average person, applying contemporary community standards” depicts “patently offensive conduct specifically defined by applicable state law in a way lacking any serious literary, artistic, political, or scientific value”*
 - *Localities decide whether to tolerate pornography but must comply with strict constitutional tests if they decide to regulate it*
- ***Reno v ACLU, 1997***
 - *Internet regulation ruled unconstitutional by the Supreme Court.*

The Miller Standard

Miller

- Speech is obscene and is not protected if:
 - It is **offensive**
 - Judged by the **average person**
 - Applying **community standards**
 - Specifically **defined by law**
 - **Lacking any literary, artistic, political, or scientific value**

SYMBOLIC SPEECH

- *Cannot claim protection for an otherwise illegal act on the grounds that it conveys a political message (example: burning a draft card)*
- *However, statutes cannot make certain types of symbolic speech illegal: e.g., flag burning is protected speech*
- ***Texas v Johnson, 1989***

Symbolic Speech Standard

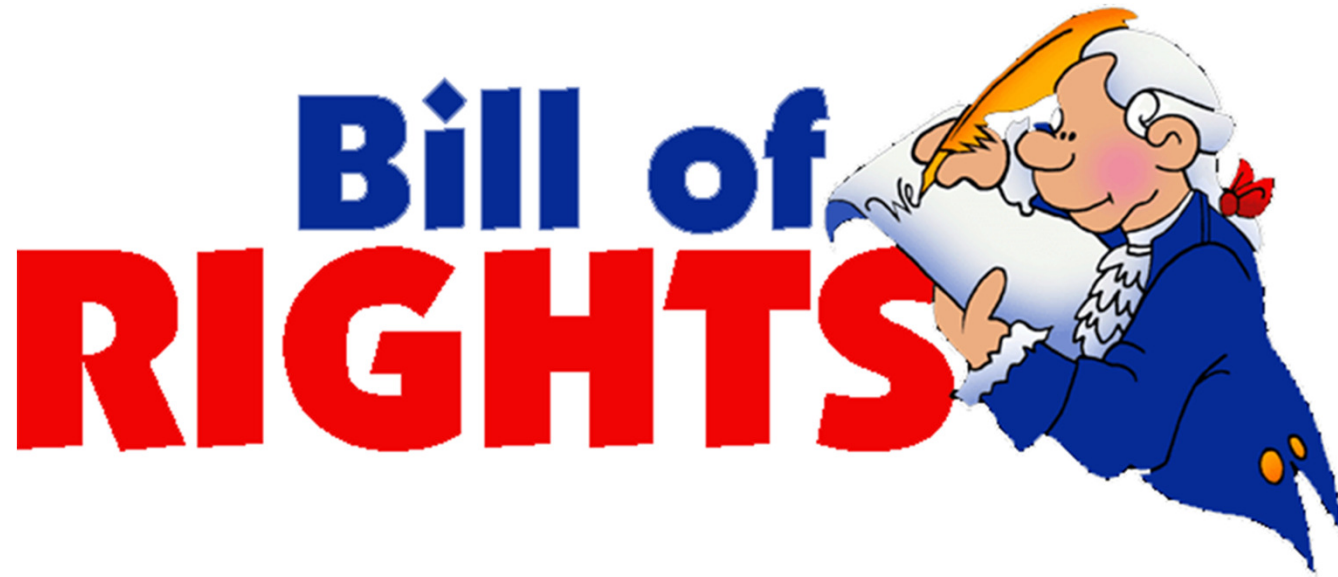
Texas v Johnson

- Symbolic Speech cannot be restricted where:
 - ***There is a **clear** link between the **act** and the **message*****

Chapter Five

Section 3

Civil Liberties:
Church and State



Establishment of a Secular State in the United States

A **secular state** is a state or country that is officially neutral in matters of religion, with no official or unofficial state religion and neither supporting nor opposing any particular religious beliefs or practices. A secular state treats all its citizens equally regardless of religion, and does not give preferential treatment for a citizen from a particular religion.

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article 6, US Constitution

*“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; **but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.**”*

The Establishment Clause

“There should be a ‘**wall of separation**’
between church and state.”

-Thomas Jefferson
letter to the Danbury Baptist Association, 1802

The Reynolds Rule

Reynolds v US

- Government restrictions on religious activities:
 - must have a **compelling** reason
 - must be **neutral**
 - must be **narrow**
 - must allow for **reasonable alternatives**

The Lemon Test

Lemon v Kurtzman

- Government involvement in religious activities *must* meet the following tests:
 - It must have a **secular** purpose
 - It must be **neutral** toward religion
 - There must be no excessive government **entanglement** with religion

The Second Amendment

“A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”



McDonald v. Chicago, 2010

FINDING

- In a majority decision, Justice Scalia concluded "that the Due Process Clause of the Fourteenth Amendment **incorporates** the Second Amendment to protect a *private* right of armed self defense."

The Third Amendment

“No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

Right to Privacy

Griswald

- Though the Constitution does not explicitly protect a right to privacy, the guarantees in the First, Third, Fourth, and Ninth Amendments, create an implied right to privacy
- **Roe v Wade**

Right to Privacy

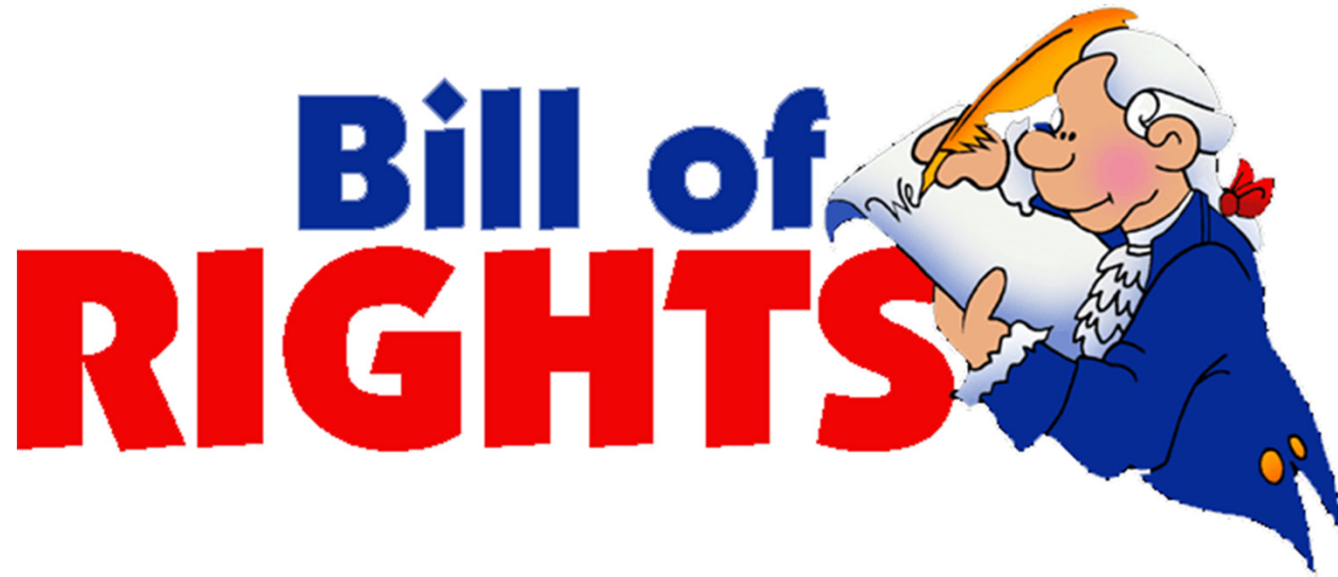
Roe v Wade

- Freedom of Choice, whether it is based in the
 - Third Amendment's right to privacy
 - the Ninth and Tenth Amendments' reservation of rights to the people
 - or the Fourteenth Amendment's restrictions upon state action
- is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Chapter Five

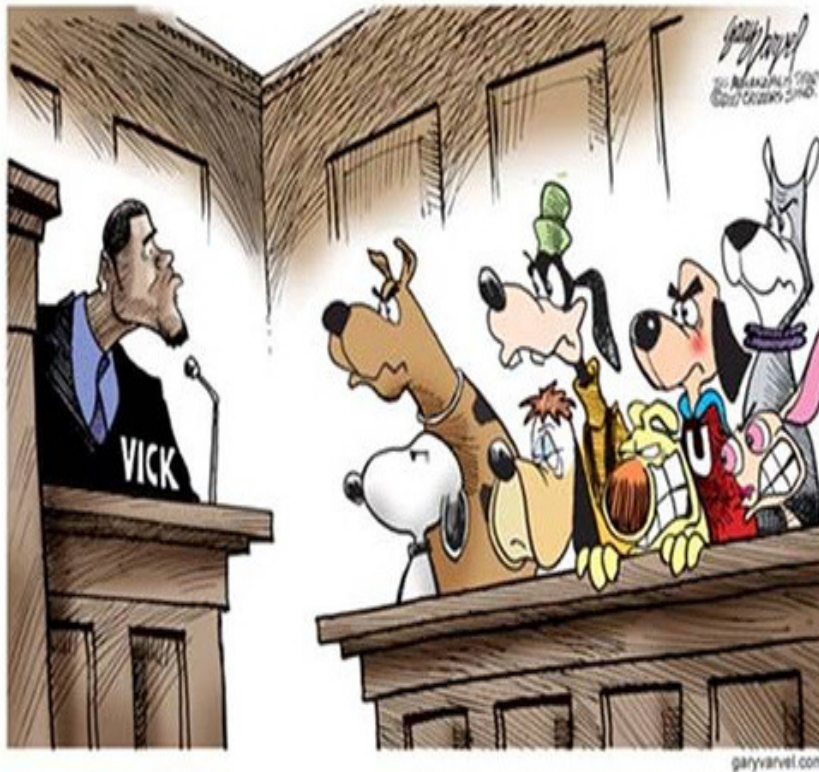
Section 4

Civil Rights:
Procedural Rights



Procedural Due Process

Fairness of the Administration of the Law



- Requirement for a Warrant
- No double jeopardy
- No self-incrimination
- A public and speedy trial
- A trial by impartial jury
- Notice of accusations
- Right to confront witnesses
- Right to compel testimony
- Right to assistance of counsel

Procedural Due Process

Fairness of the Administration of the Law



Minimum standards:

- *Told*
- *Opportunity to be Heard*

The Fourth Amendment

“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.”

Search and Seizure

- **Inclusionary**
 - Most legal systems currently use an inclusionary search and seizure rule: all evidence is presented at trial, and police are punished later for evidence which was obtained improperly
- **Exclusionary**
 - Exclude improperly gathered evidence from the trial even if it is relevant to determining guilt or innocence of the accused.

Weeks v. US, 1914

- Established the “**Exclusionary Rule**”
- Evidence gathered in violation of the Constitution cannot be used in a trial
- Based on
 - the Fourth Amendment (freedom from unreasonable searches and seizures)
 - the Fifth Amendment (protection against self incrimination)



Mapp v. Ohio, 1961

- All evidence obtained by searches and seizures in violation of the Constitution is inadmissible in any court under the Fourth Amendment.
- Established the “bigger than a breadbox” rule that anything found must have been reasonable to find under the warrant
 - example: can’t search a drawer while looking for a body



US v. Leon, 1984

- Established the “Good Faith” exception
- Evidence seized on the basis of a mistakes made in “good faith” by police officers can be introduced at trial.



The Fifth Amendment

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Miranda v. Arizona, 1966

- Prosecutors cannot use statements of defendants unless they demonstrated the use of procedural safeguards "effective to secure the privilege against self-incrimination."
 - Confessions are presumed to be involuntary **unless the suspect is fully informed of his or her rights.**
 - The Court specifically outlined the necessary aspects of police warnings to suspects, **including warnings of the right to remain silent and the right to have counsel present during interrogations.**

MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING IF YOU WISH.
5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

WAIVER

DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?
HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?

The Sixth Amendment

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

Gideon v Wainwright, 1964

- Defendants have a **right to be represented by a court-appointed attorney**.
- Establishes *In Forma Pauperis* (state paid attorney)

I can't defend myself. I need appointed counsel.



And yet you've gotten your case all the way to the Supreme Court. How ironic.



The Seventh Amendment

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

The Eighth Amendment

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Selective Incorporation

- **Eighth Amendment**

- Excessive bail
- Excessive fines
- Cruel and unusual punishment

The death penalty was suspended from 1972 (*Furman v. Georgia*) until 1976 (*Gregg v. Georgia*)

Chapter Six

Section 1

Civil Rights



What are civil rights?

- Positive Rights
- Protect certain groups--***Suspect Classifications***--against discrimination
- Claims are raised when a group is denied access to facilities, opportunities, or services available to other groups
- The issue is whether differences in treatment are reasonable and whether there is a compelling state interest under ***Strict Scrutiny***

African-Americans

- Reconstruction 1865-1876
 - **13th, 14th, and 15th Amendments**
 - federal law provided civil rights protection in the South for "*freedmen*"—the African Americans who had formerly been slaves
- Jim Crow 1876-1965
 - ***De Facto Segregation***
 - ***De Jure Segregation***
 - **Plessy v Ferguson, 1896**

Plessy v Ferguson, 1896

- The Court upheld state-imposed racial segregation.
- The justices based their decision on the separate-but-equal doctrine, that separate facilities for blacks and whites satisfied the Fourteenth Amendment so long as they were equal.
- The justices noted that while the 14th amendment intended to establish absolute political equality for the races before the law, it could not have been intended to abolish distinctions based upon color, or to enforce social equality." In short, segregation does not in itself constitute unlawful discrimination.



“Separate but Equal”

A phrase denoting a system of segregation that justifies giving different groups of people separate facilities or services with the declaration that the quality of each group's public facilities remain equal.

Brown v. Board of Education, 1954



Brown v. Board of Education, 1954

- **Facts of the Case**
 - Black children were denied admission to public schools attended by white children under laws requiring or permitting segregation according to the races.
 - The white and black schools approached equality in terms of buildings, curricula, qualifications, and teacher salaries.
- **Question**
 - Does the segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment?
- **Conclusion**
 - Yes. Racial segregation in public education has a detrimental effect on minority children because it is interpreted as a sign of inferiority.
 - ***Separate but equal*** is **inherently unequal** in the context of public education.
 - **Plessy** is overturned.

Equal Opportunity
vs
Equal Outcome

Equal Outcome

Affirmative action: preferential hiring and admission practices to remedy past and present discrimination

- Followed **Brown** ruling on **integration**
- Goal of diversity, multiculturalism, inclusion
- Set **targets** for **equal outcome** in business, government, and education

Regents v Bakke, 1978

Facts of the Case

- Allan Bakke, a white man, was rejected twice by the University of California Medical School.
- The school reserved 16 places in each entering class for "qualified" minorities as part of the university's affirmative action program.
- Bakke's qualifications exceeded those of any of the minority students admitted in the years his applications were rejected.
- Bakke contended that he was excluded from admission solely on the basis of race.

Question

Did the University of California violate the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, by practicing reverse discrimination?

Conclusion

- No and yes.
- The rigid use of racial quotas as employed at the school violated the equal protection clause of the Fourteenth Amendment, but the use of race is permissible as one of several admission criteria
- Four of the justices dissented, and contended that **any** racial quota system violated the constitution

Equal Opportunity

- **Reverse Discrimination:** preferential hiring and admission based on race are unconstitutional
 - Followed “color blind” interpretation of 13th, 14th, and 15th amendments
 - Quotas are unconstitutional, but goal of multicultural representation is . . .

