



The Judiciary

American National Government
Topic 12



Overview

- What is the role of the courts in American democracy?
- How is the American judiciary organized?
- What is judicial review?

I – What is the role of courts in American democracy?

Courts & Democracy

- Remember how the rights you have as an American depend on what five Supreme Court justices decide? (Civil Liberties unit)
- This week, we'll talk about why that is, and how it might be different
 - The basic answer is because the US Supreme Court exercises a very strong version of the power of judicial review and lacks any effective check on its power

Courts & Democracy

- Courts are the branch of government that wield judicial power
 - But what is judicial power?
- The nature of judicial power varies widely in the world
 - Legislatures make the law, executives execute the law; what do courts do?
 - We'll see it's not simply 'interpret the law'

What Do Judges/Courts Do?

- Different systems of law generate different jobs for judges/courts
- Two main systems of law in the world
 - Common law
 - Civil law

What Do Judges/Courts Do?

- In civil law systems, judges apply detailed written law to specific cases
 - They look at the facts and apply the law to them
 - They do not question the law
- In common law systems, judges interpret laws that are broader & less detailed, & sometimes missing entirely, to decide specific cases
 - Interpretation means making leaps of judgment between general and abstract principles found in prior cases or legislation and specific circumstances
 - Example: Is a hot dog a sandwich?
 - Supposed to follow the decisions of previous judges, or **precedents**
 - **Stare decisis**

What Do Judges/Courts Do?

- When we think that judges should apply the law to specific cases, they have less power
 - Become extension of executive or legislative branch, as in France
- When judges interpret the law, they have more power
 - There is always ambiguity and unclarity in law & constitutions
 - Example: Remember Bill of Rights speaks in general and abstract principles
- When judges ‘fill in the blanks,’ they make law
 - Judge-made law is called “**case law**” and is a major source of law in common law systems like the US
- **What do you think**: Should judges apply the law or interpret it?

What Do Judges/Courts Do?

- What about checks and balances?
 - A core principle of limited government and rule of law is that there should be checks on powerful actors; courts could help check elected branches
 - This goes far beyond interpreting or applying law; this is a political function
- For courts to be able to check elected branches, they must have some power of **judicial review**
 - The power of courts to declare acts of the executive or legislative branches invalid, including duly passed laws
 - Judicial review makes courts inevitably political
- We'll see that there are different kinds of judicial review that give courts more or less power to check other branches
 - Some forms of judicial review, like the US's, give courts so much power they require a check, but there are no effective checks on the US Supreme Court

What Do Judges/Courts Do?

- So the job of judges & courts in democracy isn't to 'interpret the law'
 - The alternative of applying the law is different and not obviously worse
 - In common law systems like the US, **judges make law**, not just interpret it
 - Courts can serve the political function of checking elected branches
- These are different ways of having the rule of law
 - Remember the rule of law is part of limited government, also protection from powerful private actors
- The way courts are designed and their relations with other branches determines how much each of these jobs dominates what they do
 - It also determines courts' political power

II – How is the American judiciary organized?

Structure of US Judiciary

Federal courts

US Supreme Court

Circuit courts

District courts

- Most (99%) of all legal cases
- Most criminal cases involve violations of state law
- Civil cases heard in state where the violation took place

State courts

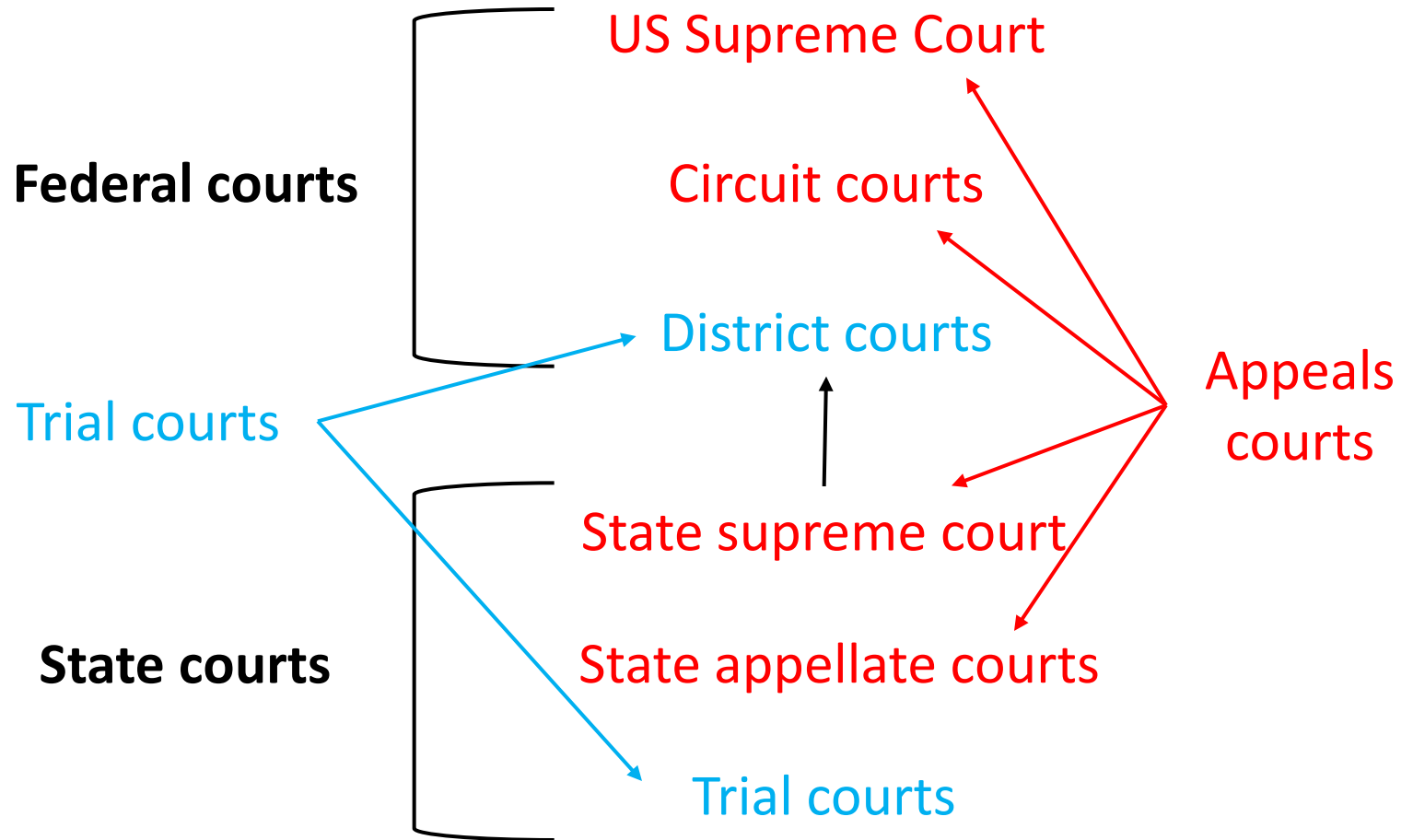
State supreme court

State appellate courts

Trial courts



Different Kinds of Courts



Different Kinds of Courts

Constitutional courts

- **Constitutional courts**

- Carry out the duties of the federal judiciary
- Exercise same powers as Supreme Court—meaning above all, the power of judicial review
- Are appointed by president, with Senate ok, for life term
 - Can only be removed by impeachment
- Salaries cannot be reduced

US Supreme Court

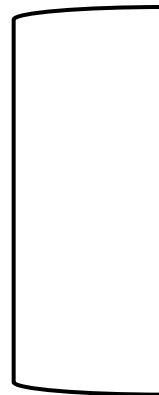
Circuit courts

District courts

State supreme court

State appellate courts

Trial courts



Different Kinds of Courts

- Several non-constitutional specialized federal courts
 - Created by Congress (sometimes referred to as Article I or legislative courts)
 - Appointed by president for fixed terms
 - Can be removed by President
 - Salaries may be reduced during term
 - Examples
 - U.S. Court of Military Appeals
 - Bankruptcy Court
 - U.S. Tax Court

Structure of Federal Judiciary

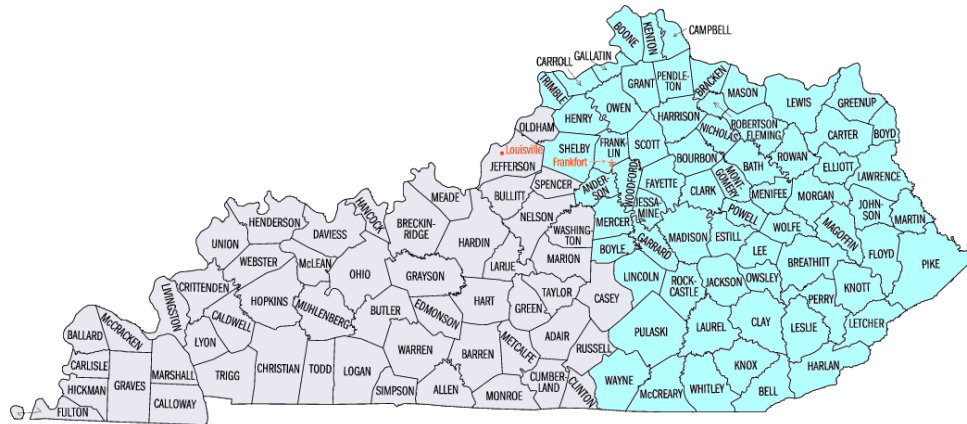
- Federal judiciary established in Article III of the Constitution
 - “the judicial Power of the United States shall be vested in one supreme Court and in such inferior courts as Congress may from time to time ordain and establish”
 - Constitution silent on size & composition of SC
 - Says nothing at all about the nature of judicial power

Structure of Federal Judiciary

- What cases get heard in federal courts? (Federal jurisdiction)
 - Federal law
 - Treaties
 - Disputes between states
 - Cases in which the U.S. government is a party
 - Civil cases involving the citizens of more than one state
 - Appeals from state-level courts
 - U.S. Constitutional law
- Federal courts' jurisdiction can be altered by Congress

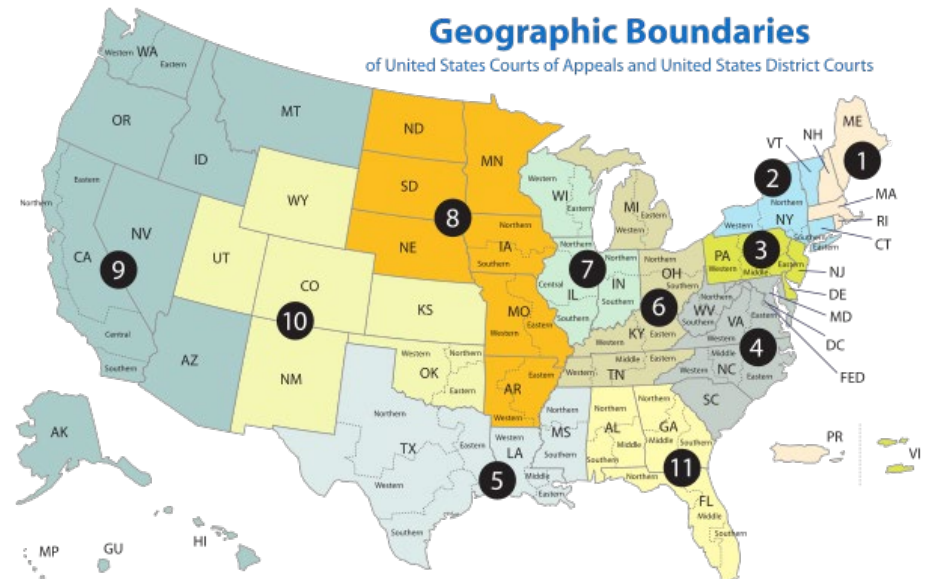
Structure of Federal Judiciary

- Organization of Federal judiciary
 - Lowest level
 - 94 district courts (1-4 per state); 2 in KY
 - Approximately 680 judges (one judge per case)
 - Must take all cases that are brought to them (i.e., no agenda control)
 - Similar to state trial courts, but have stricter procedural requirements
 - Considered constitutional (Article III) courts



Structure of Federal Judiciary

- Intermediate level
 - 13 courts of appeals (i.e., circuit courts)
 - 179 judges
 - Considered a constitutional court
 - Sit as three judge panels; rare instances sit *en banc*
 - 10% of all lower court cases appealed
 - Must hear all cases appealed to them (i.e., no agenda control)
 - Rulings serve as precedents for district courts within circuit
 - Except for cases selected by SC for review, all decisions by appeals courts are final
 - One SC justice assigned to each circuit to hear emergency appeals



Structure of Federal Judiciary

- Supreme Court

- 9 judges, called “justices” (one is “Chief Justice of the United States”)
- Considered a constitutional court
- Court of final appeal
- Can choose what cases to hear (limited agenda control)
 - Accept <1% of appeals (fewer than 100 cases annually)
 - To be heard, a case must be granted a **writ of certiorari**
 - This is known as “granting cert” and takes vote of 4 of 9 justices
- Court often chooses to hear cases that
 - Resolve lower court disagreements
 - Involve important constitutional issues
 - Are requested by the government’s chief lawyer, the solicitor general
- Rulings of SC set binding precedent for *all* lower courts

The Supreme Court Today

- 3 liberal justices
 - Sotomayor, Kagan, Jackson
- 6 conservative justices
 - Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Barrett
- Few new appointments on the horizon
 - Clarence Thomas is 73, but this court will be with us a long time

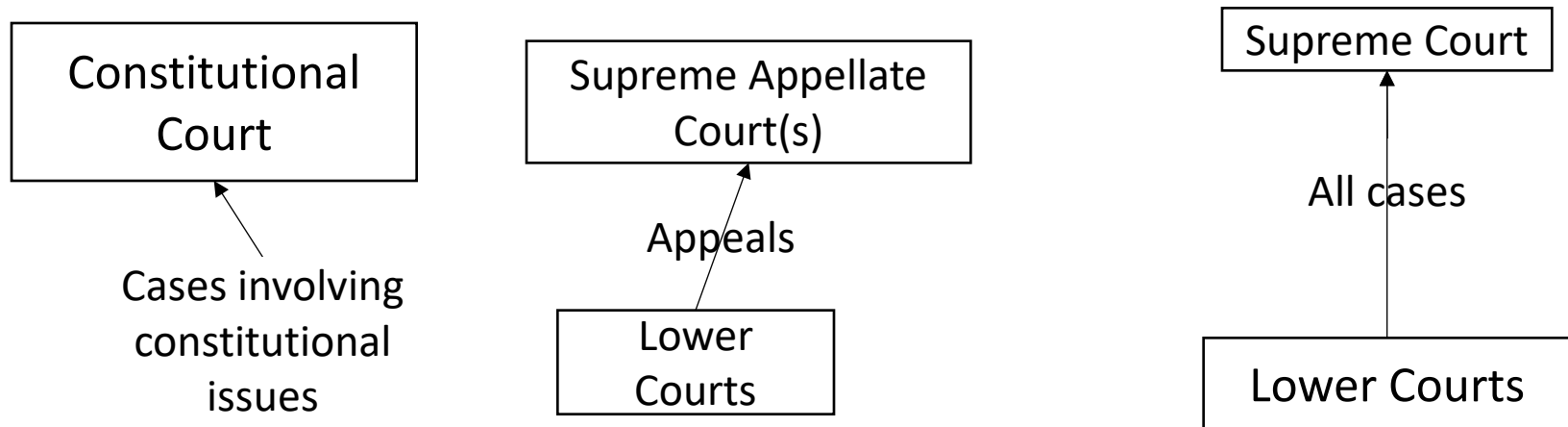


The Supreme Court Today

- Supreme Court has been transformed (ideologically)
 - Republican presidents since Reagan have appointed ideologically conservative judges
 - Trump appointee Kavanaugh replaced swing justice Kennedy; conservative Barrett replaced liberal Ruth Bader Ginsburg
 - Kavanaugh is more consistently conservative than Kennedy was and Barrett is much, much more conservative than the liberal stalwart Ginsburg
- Has led to a much more conservative court
 - 6-3 majority allows for radically conservative decisions because five conservative justices can afford to lose one of their members' vote in order to make a very conservative decision
 - Increasing disdain for precedent, willing to overturn longstanding case law to achieve conservative ideological goals
 - Roe, affirmative action, Miranda, voting rights

Federal Judiciary in Comparative Context

- Other countries structure their judiciaries differently
- Many countries separate the Constitutional Court which exercises judicial review from the ordinary appellate court system, which doesn't
 - The Constitutional Court then becomes unique
 - Often selected differently from other judges
 - May have different terms in office



Federal Judiciary in Comparative Context

- Term of judges

- Only two other countries allow judges on the highest court to serve life terms (Denmark, Argentina)
 - Zero US states allow it
- Most countries have mandatory retirement ages for judges (65, 70, 75 at most)
- Judges on Constitutional Courts, in particular, serve defined terms
 - Terms tend to be around 10 years
 - On the US Supreme Court, Justice Clarence Thomas has served 30 years, is only 74; Stephen Breyer served 27 years.
 - Appointing younger judges is a strong recent trend: Gorsuch was 49; Kavanaugh was 53; Barrett was 48; Jackson is 51.
 - Life terms create a strong partisan incentive to appoint young judges, but this can lead to underqualified candidates being selected

Federal Judiciary in Comparative Context

- Selecting judges

- Service vs Recognition systems of selecting judges
 - Key question: how involved are elected politicians in selecting judges?
- **Service systems** work like the civil service; one must train to be a judge, pass examinations, and promotion on basis of performance assessed by fellow judges
 - A “professional” selection system
- **Recognition systems** select on basis of excellence or promise in other careers, usually lawyers, who do not formally train to be judges
 - Tend to be more political because elected actors select or confirm candidates
 - A “political” selection system
 - Selection for US federal judiciary is a quintessential recognition system, highly politicized

Federal Judiciary in Comparative Context

- Selecting judges

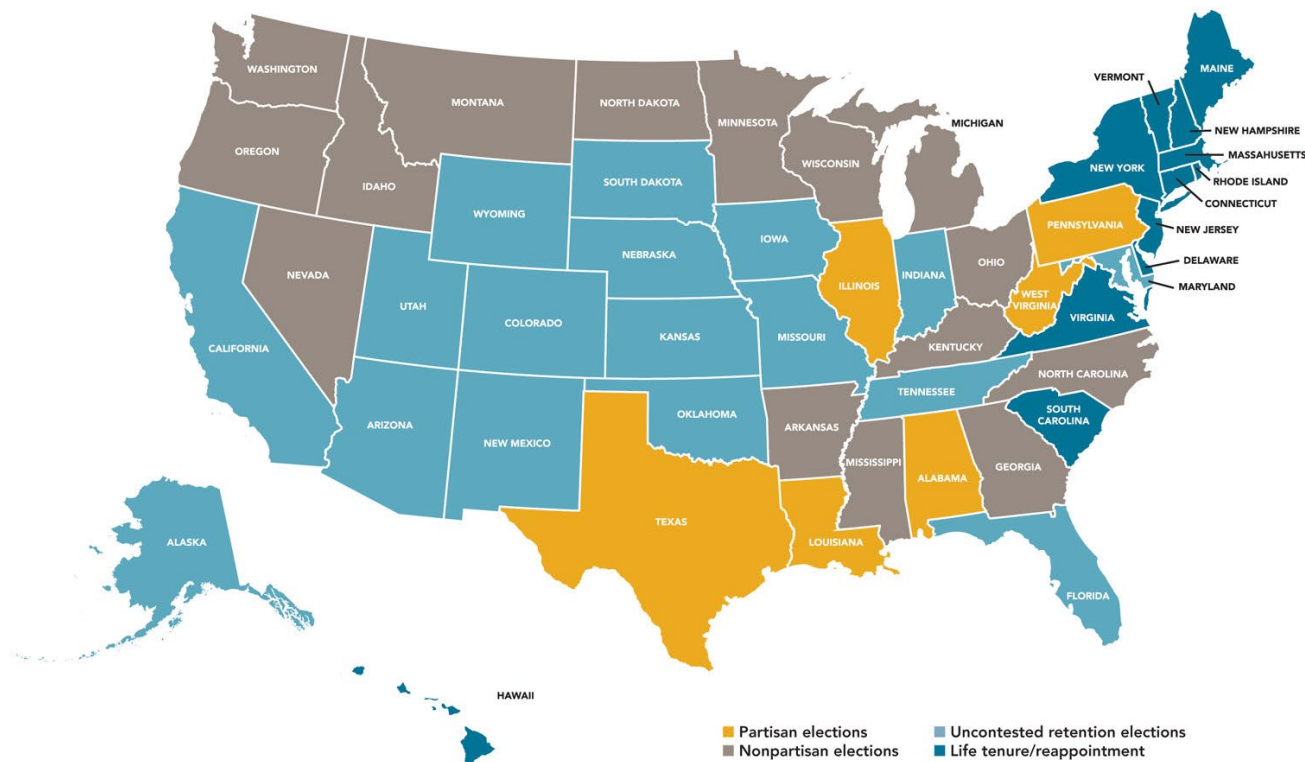
- How involved are elected officials in selecting candidates?
 - US federal system is about the most political in the world, with only elected politicians involved in selecting federal judges
 - In some systems, panels of judges select judges or put forth qualified candidates that elected leaders choose from
 - This makes it less political, more professional; a hybrid of service and recognition systems; used by many US states

Federal Judiciary in Comparative Context

- Ways to select judges

- Judicial elections are rare in the world

- The US is unique in that most states hold elections for judges
 - But there are no federal judicial elections



Battle over the Future of the Supreme Court

- Battles over Supreme Court appointments are intense because
 - Lifetime appointments, combined with tendency to appoint younger justices & longer life spans
 - Supreme Court sets important policies, has unchecked power
 - Changing the composition of the court has been an important goal of social conservatives for decades
 - Examples: Merrick Garland; Brett Kavanaugh
- Many of these features we can see now are choices that might be made differently
 - If judges were chosen professionally rather than politically, battles wouldn't occur or be so intense
 - Happens at state level
 - If terms were limited and set, or the Court's size uncapped and presidents given one appointment each term, presidents & Congresses would know when to expect nominations; more fairly distribute them among election winners

III – What is judicial review?

What is Judicial Review?

- **Judicial review** is the power of the courts to declare actions or laws of the legislative and executive branches invalid or unconstitutional
 - Possessed by all constitutional courts
 - Can declare both federal and state laws unconstitutional
- Constitution does not clearly grant this power to federal courts/Supreme Court
 - The Constitutional Convention rejected Madison's idea of a "Council of Revision" that would have a power like this
 - Hamilton in *Federalist 78* asserts something like judicial review is implied by the Constitution's Supremacy Clause
 - Anti-federalists fear judicial tyranny

Where did Judicial Review come from?

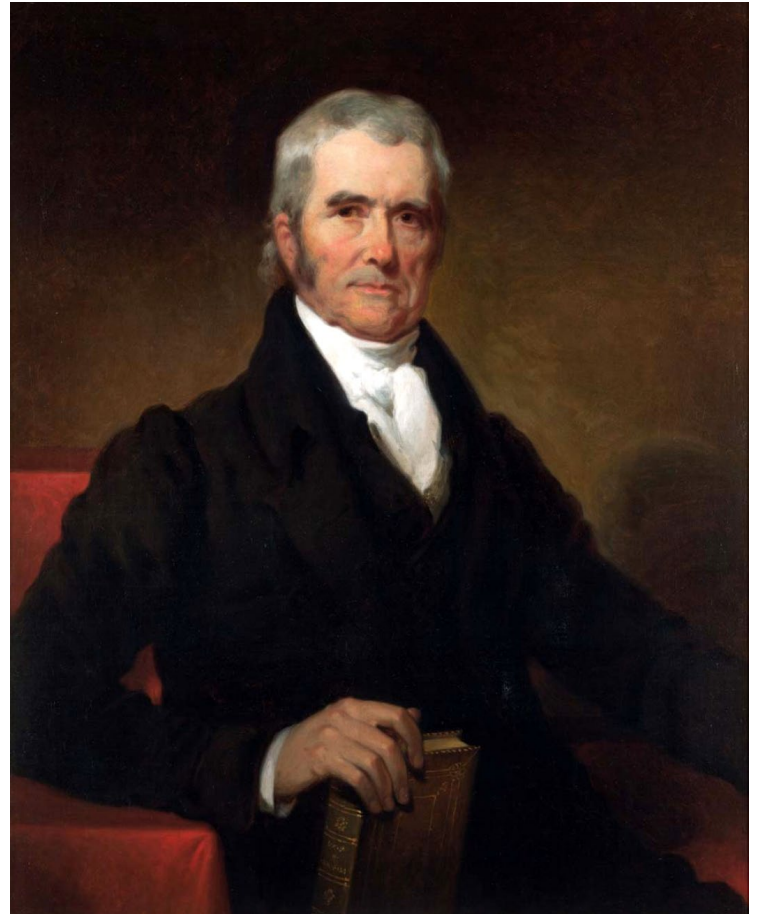
- If not from the Constitution, where did this authority come from?
- The Supreme Court made it up!
 - Basically, Chief Justice Marshall claimed this authority for court in *Marbury v. Madison* (1803)
 - Probably most important decision in American constitutional law

Marbury v. Madison

- What was the background of the case?
 - Election of 1800: Federalists lose control of Presidency and Congress
 - Lame duck Federalist Congress packs the courts
 - adopt Circuit Judge Act
 - Created 16 new circuit judgeships
 - Also passed Organic Act of District of Columbia
 - Authorized President to appoint 42 justices of the peace
 - Adams announced nominations on the March 2nd
 - March 3rd approved by Senate (day before Jefferson inauguration)

Marbury v. Madison

- John Marshall (as Adams's Secretary of State) failed to deliver commission to Marbury before inauguration
- Marbury filed suit in SC seeking writ of mandamus (requiring new Sec of State to give him the commission)
 - Via the Judiciary Act of 1789
- Placed Federalist SC in a bind
 - If court issued writ, Madison may have refused to obey order (undermining court's authority)
 - If court sided with Jefferson/Madison, it would appear to be weak
 - Chief Justice Marshall appeared to have a clear conflict of interest



Chief Justice John Marshall

Marbury v. Madison

- Marshall's ruling = brilliant political move to secure Court new power
 - Decision addressed three questions:
 - Did Marbury have a right to the commission?
 - Should Jefferson/Madison have delivered it?
 - Does the Court have jurisdiction to decide the case?
 - Court ruled that Marbury had a right to the commission
 - Court says judiciary can provide a remedy when the executive has a legal duty to act or refrain from acting, and Jefferson admin acted wrongly in not delivering it
 - But! The Court says it lacks jurisdiction to hear *this* case because the Judiciary Act of 1789 unconstitutionally expanded its original jurisdiction
 - Struck down part of the Judiciary Act as incompatible with the Constitution
 - So the court refused to issue the writ on the grounds that it lacked jurisdiction

Marbury v. Madison

- Marbury decision is politically brilliant because
 - Allowed Marshall to harshly criticize the President
 - Gave Jefferson what he wanted so he had no reason to challenge the case
 - Left unchallenged the Court's assertion of this massive new authority

Marbury v. Madison

- The influential reasoning of Marbury establishing judicial review:
 - Constitutional limits are meaningless without judicial enforcement
 - Inherent in judicial role to decide constitutionality of laws
 - Judges take an oath of office and would violate this oath if they enforced unconstitutional laws
 - Supremacy Clause
- This logic helped introduce the practice of judicial review into the world, and it has spread widely, especially since the end of WWII
 - A major institutional innovation exported by the US
 - But the US's form of judicial review is not the only form it has taken

Varieties of Judicial Review

- Strong vs Weak Judicial Review
 - **Strong judicial review**: a court can nullify a law in the entire country (US)
 - **Weak judicial review**: courts decide cases but can be overridden by the legislature
- Concrete vs Abstract Judicial Review
 - **Concrete judicial review** requires a specific case to consider a legal or constitutional question (US)
 - **Abstract judicial review** doesn't; questions can be considered abstractly, on principle alone, even before a law is passed
- Other alternatives
 - Courts can offer **advisory opinions** on the constitutionality of laws before they're passed, in consultation with the legislature
 - Rejected by US Supreme Court (in an advisory opinion!) in 1793
 - Courts can decide a particular case without nullifying or otherwise affecting the validity of the relevant law (by applying not interpreting law)

Judicial Review in the US Today

- The US's strong form of judicial review empowers the judiciary
 - Power of judiciary is enhanced by several features of contemporary American politics
- Major sources of judicial power in the US
 - 1. Belief in the myth or ideology of “legalism”
 - Ideology that courts do not make the law, but only interpret it impartially
 - Example: judges are like umpires calling ‘balls and strikes’ (Chief J. Roberts)
 - Literally makes no sense in a common law system where judge-made case law is a core source of law
 - Acts as ideological cover for courts pursuing highly politicized agenda
 - 2. Very difficult amendment rule
 - US Constitution is nearly the most difficult to amend in the world, so there is effectively no ability to check the Court by amending the Constitution above their heads

Judicial Review in the US Today

- Major sources of judicial power in the US
 - 3. Political gridlock in Congress
 - When Congress cannot engage in routine legislation due to procedural gridlock, above all due to the routinization of the filibuster, power accrues to bodies that can act, like the Court
 - Court makes decisions based on majority rule; what if Congress did the same?
 - 4. Lack of will to check the Court through use of Congressional power
 - Congress has express power to do court expansion, jurisdiction stripping, control docket, strip funding, etc.
 - Example: FDR's threat to expand the Court pressured it to stop blocking popular New Deal policies
 - Congress could pressure Court via threats (if credible), but little willingness even to try among congresspeople (so far)

Checking the Judiciary

- Viable pathways to check judicial power
 - Publicly criticize courts
 - Courts are political, SC judges are politicians, and both respond to pressure
 - Abolish the filibuster
 - Turning the Senate back into a majoritarian body would facilitate congressional policymaking
 - Can be done (ironically) with a majority vote in the Senate
 - Credibly threaten Court expansion, strip jurisdiction or funding, etc.
 - Worked for FDR
 - Actually expand the Court
 - Can be done with ordinary legislation. A larger court would set a powerful precedent that the judiciary is not supreme in the political system
 - Introduce term limits for justices on the Supreme Court
 - Could potentially be done with ordinary legislation that randomly cycles judges from Circuit Courts on to and off the Court periodically
- **We can always think constructively and imaginatively as citizens about how to improve our democratic institutions**