

The Supreme Court and You

By Carlton Jordan



Who is Right?







Here's Why You're Wrong

The background features a vertical gradient from light green at the top to dark blue at the bottom. It is decorated with faint, semi-transparent technical diagrams, including circular gauges with numerical scales (e.g., 100, 120, 140, 160, 180, 200) and arrows. Small, glowing blue and white particles are scattered across the entire surface, giving it a futuristic or scientific aesthetic.

SUPREME COURT NOMINATIONS



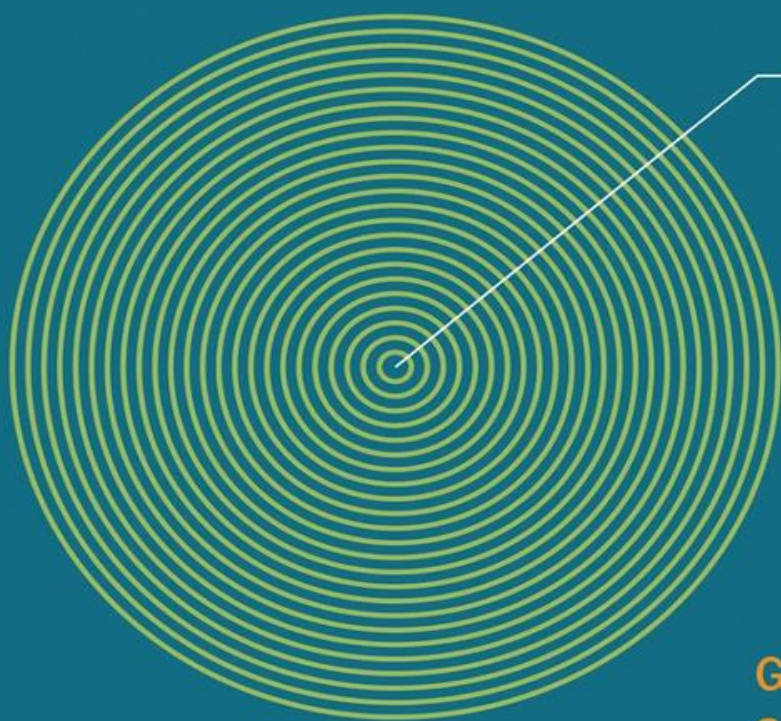
Alexander Hamilton *Federalist #81*



- *Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power in a body composed of men chosen for a limited period.*
- *There is greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge.*



Judicial Selection Methods by State, 2017



Gubernatorial appointment through nominating commission

- Alaska
- Arizona
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Hawaii
- Indiana
- Iowa
- Kansas
- Maryland
- Missouri
- Nebraska
- New Hampshire
- New Mexico
- New York
- Oklahoma
- Rhode Island
- South Dakota
- Tennessee
- Utah
- Vermont
- Wyoming

Legislative selection

- South Carolina
- Virginia



Gubernatorial appointment

- California
- Maine
- Massachusetts
- New Jersey



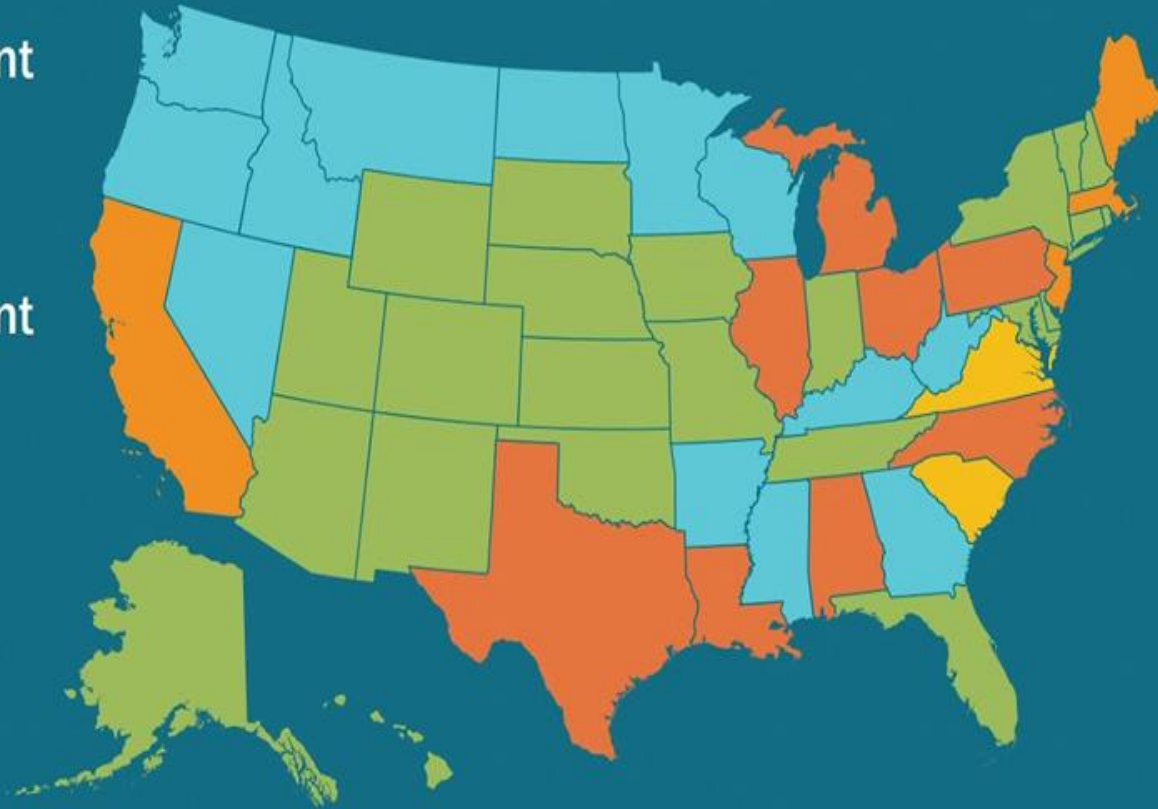
Nonpartisan election

- Arkansas
- Georgia
- Idaho
- Kentucky
- Minnesota
- Mississippi
- Montana
- Nevada
- North Dakota
- Oregon
- Washington
- Wisconsin
- West Virginia



Judicial Selection Methods: A Regional View

- Gubernatorial appointment through nominating commission
- Gubernatorial appointment
- Nonpartisan election
- Partisan election
- Legislative selection



Partisan election

- Alabama
- Illinois
- Louisiana
- Michigan
- North Carolina
- Ohio
- Pennsylvania
- Texas



SOURCES: American Judicature Society, *Judicial Selection in the States*, www.judicialselection.us/; and IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, "Selection and Retention of State Judges," *Texas Bar Journal* (February 2016): 92–97.

I'm No Dummy

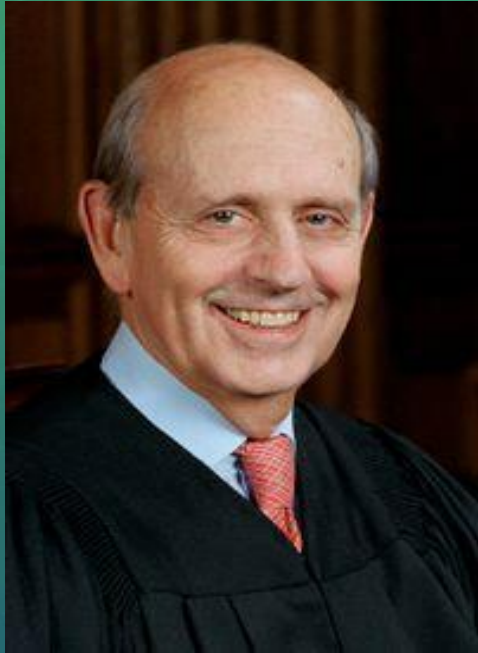
SUPREME COURT JUSTICES: APPOINTMENTS

- Justices are nominated by the sitting President and confirmed by the U.S. Senate.
- Since the latter part of the 20th century, justices have been commonly selected from the Justice Department, District and Appellate Federal courts, or the highest state courts.

SUPREME COURT JUSTICES: APPOINTMENTS

- In general, most presidents try to appoint judges whose partisan and ideological views are like their own.
- The nominee is first considered by the Senate Judiciary Committee; then the full Senate uses its “advice and consent” powers to confirm the nominee by a simple majority.

Popular Confirmations since 1981



#42 Clinton: 1994

Stephen Breyer

87-9

Retired 2022

Served 28 yrs.



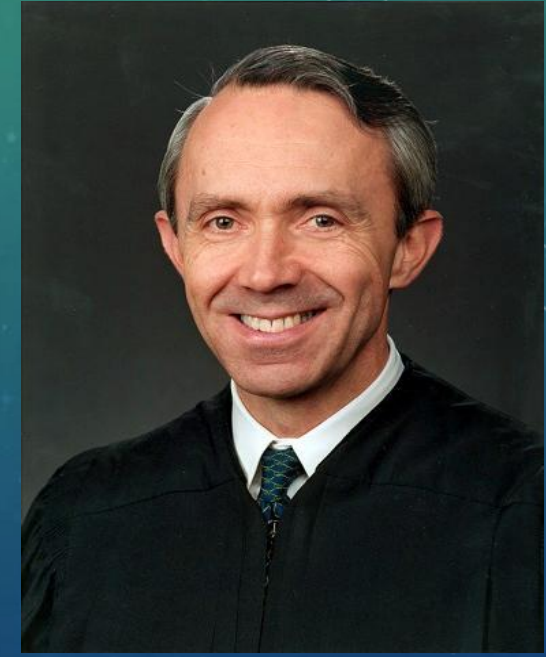
#42 Clinton: 1993

Ruth Bader Ginsberg

97-3

Deceased 2020

Served 27 yrs.



#41 Bush: 1990

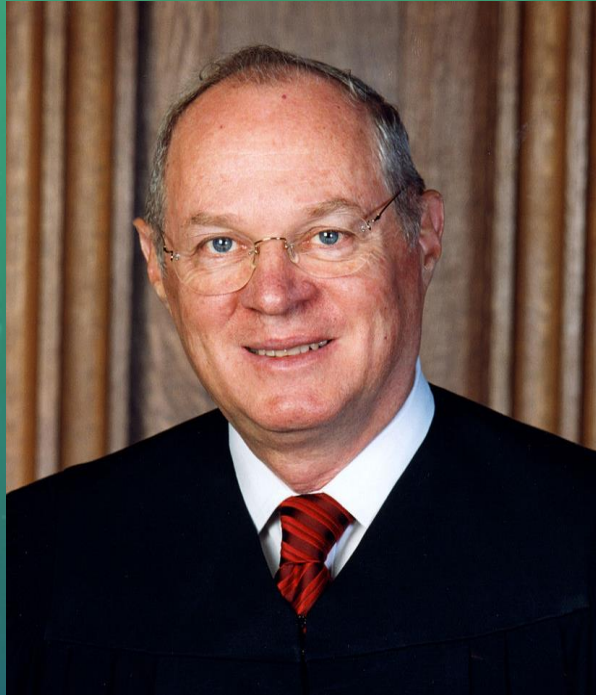
David Souter

90-9

Retired 2009

Served 19 yrs.

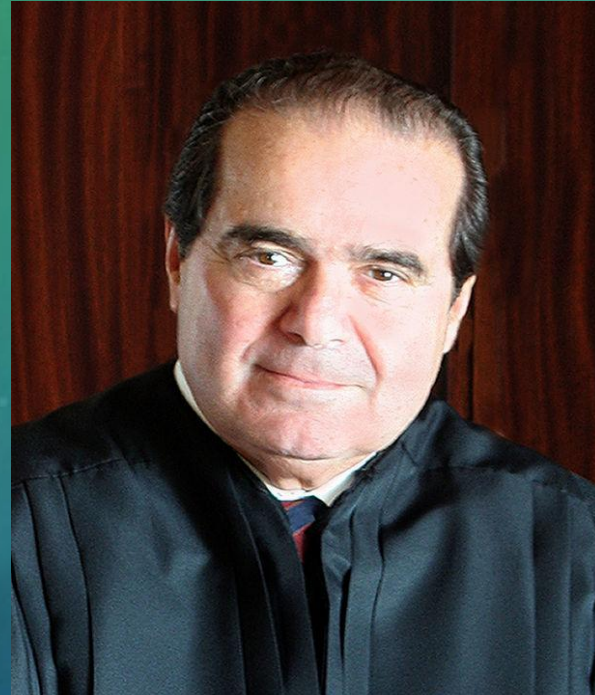
Popular Confirmations since 1981



#40 Reagan: 1988
Anthony Kennedy

97-0

Retired 2018
Served 30 yrs.



#40 Reagan: 1986
Antonin Scalia

98-0

Deceased 2016
Served 30 yrs.



#40 Reagan: 1981
Sandra Day O'Connor

99-0

Retired 2006
Served 25 yrs.



SUPREME COURT 2023-24

Front Row: Sonia Sotomayor '09, Clarence Thomas '91, Chief Justice John Roberts, Jr. '05, Samuel Alito '06, Elena Kagan '10

Back Row: Amy Coney Barrett '20, Neil Gorsuch '17, Brett Kavanaugh '18, Ketanji Brown-Jackson '22

Supreme Court Justices 2024 By Seniority of Appointment					
Name	Year of Birth	Law School Attended	Prior Experience	Appointed By	Year Appointed
Clarence Thomas	1948	Yale	Federal judge	Bush #41	1991
John Roberts, Jr. <i>(Chief Justice)</i>	1955	Harvard	Federal judge	Bush #43	2005
Samuel Alito	1950	Yale	Federal judge	Bush #43	2006
Sonia Sotomayor	1954	Yale	Federal judge	Obama	2009
Elena Kagan	1960	Harvard	Solicitor General	Obama	2010
Neil Gorsuch	1967	Harvard	Federal judge	Trump	2017
Brett Kavanaugh	1965	Yale	Federal judge	Trump	2018
Amy Coney Barrett	1972	Notre Dame	Federal judge	Trump	2020
Ketanji Brown-Jackson	1970	Harvard	Federal judge	Biden	2022

Demographics of the 9 Justices in 2024

Yale = 4; Harvard = 4; Notre Dame = 1

Catholic = 7; Jewish = 1; Protestant = 1

Federal Appeals = 8; Clerked for SCOTUS = 6

Baby Boomer = 4; GenX = 5

Geographic Region:

- **NE (5) = Alito, Kagan, Kavanaugh, Roberts, Sotomayor**
- **South (3) = Brown-Jackson, Coney-Barrett, Thomas**
- **Mountain (1) = Gorsuch**

White = 6

- **Irish Catholic (4) = Roberts, Kavanaugh, Coney-Barrett, *Gorsuch (*raised Catholic, attends Episcopal*)**
- **Italian Catholic (1) = Alito**
- **Russian Jewish (1) = Kagan**

Hispanic (Puerto Rican) Catholic (1) = Sotomayor

Black Catholic (1) = Thomas

Black Protestant (1) = Brown-Jackson

Problematic Recent Confirmations



Ketanji Brown-Jackson 53-47
#46 Biden: 2022



Brett Kavanaugh 50-48
#45 Trump: 2018



Clarence Thomas 52-48
#41 Bush: 1991



Amy Coney-Barrett 52-48
#45 Trump: 2020

Merrick Garland (never considered)
nominated by #44 Obama: 2016



Neil Gorsuch 54-45
#45 Trump: 2017

Rejected Nominee Robert Bork



#40 President Reagan's 1987 nominee was rejected for confirmation due to his role as Solicitor General in carrying out impeached President Nixon's unpopular order to fire special prosecutor Archibald Cox in the Watergate scandal of 1973.

Opponents of Bork's nomination found arguments against him justified: he believed the Civil Rights Act of 1964 was unconstitutional, supported poll taxes and literacy tests for voting, mandated school prayer, and sterilization as requirement for jobs. He opposed free speech rights for non-political speech as well as privacy rights for gay conduct.

Bork's defeat in the Senate 58-42 was one of the worst of any Supreme Court nominee.

bork (verb): "To vilify a person systematically, especially in mass media, usually to prevent his or her appointment to public office; to obstruct or thwart a person in this way."

Failed Nomination 2005: Harriet Miers

This nomination by President Bush #43 was criticized by liberals and conservatives alike: her lack of having served as a judge at any level, her perceived lack of intellectual rigor, and her lack of a clear record on issues.

When Miers met with the Senate Judiciary Committee, she was ill-prepared and uninformed on the law, had difficulty explaining basic law concepts, and had no experience in constitutional law and very little actual litigation experience.

In the face of an almost certain imminent rejection, Miers asked Bush to rescind the nomination, to which he wisely complied.



MY PREDICTIONS OF NEAR FUTURE NOMINATIONS

- ✓ Likely to be driven by identity politics and diversification.
- ✓ Partisan polarization in the Senate is at its highest in decades.
- ✓ Although he is “only” 76 years old, Justice Thomas is likely to retire within the next 2-4 years, having served 33 years and might be holding out for a conservative President to replace him.
- ✓ Justices will be chosen from a “pool” of qualified jurists, rather than from the top of a vertical list of “the most” experienced or qualified.
- ✓ Women will likely be in the majority on the Court very soon, probably within 5 years.

SUPREME COURT JUSTICES: REMOVAL

- According to Article III of the Constitution, federal judges and justices are to serve their terms in “good behavior,” which means they may serve until retirement or death—whichever comes first.
- **Impeachment** is the constitutional remedy for judges that engage in “bribery, treason, or high crimes and misdemeanors.”

SUPREME COURT JUSTICES: REMOVAL

- A simple majority in the House of Representatives votes for charges against the judge, then the full Senate will hear the case. A conviction requires a 2/3 majority vote in the Senate trial; the result is removal from office and the person may never hold that office again.
- As of June 2024, there have been 66 federal judges or Supreme Court Justices *investigated* for impeachment.

SUPREME COURT JUSTICES: REMOVAL

- Fifteen federal judges have been **formally impeached**. Of those fifteen:
 - 8 were convicted by the Senate
 - 4 were acquitted by the Senate
 - 3 resigned before an outcome at trial

Of the 8 convicted, **all were charged with bribery.**



SUPREME COURT JUSTICES: REMOVAL



- Only one **Supreme Court Justice** has ever been impeached: Samuel Chase was acquitted in 1805, mainly because the charges were politically personal in nature. Four articles focused on “procedural errors” made during Chase’s appellate cases, and an eighth article was directed to his *“intemperate and inflammatory, peculiarly indecent and unbecoming, highly unwarrantable, highly indecent”* remarks.

SUPREME COURT JUSTICES: REMOVAL

- The acquittal of Chase – by lopsided margins on many of the counts – is believed to have ensured that an independent federal judiciary would survive partisan challenge.
- As Chief Justice Rehnquist noted in his book, *Grand Inquests*, some people expressed opinions at the time of Chase's trial that the Senate had absolute latitude in convicting a jurist it found unfit, but **the acquittal set an unofficial precedent that judges would not be impeached based on their performance on the bench.**

- All judges impeached since Chase have been accused of outright criminality.
- In 1969, Supreme Court Justice Abe Fortas resigned under threat of impeachment.
- In 2010, Thomas Porteus was the last federal judge convicted and removed from office.

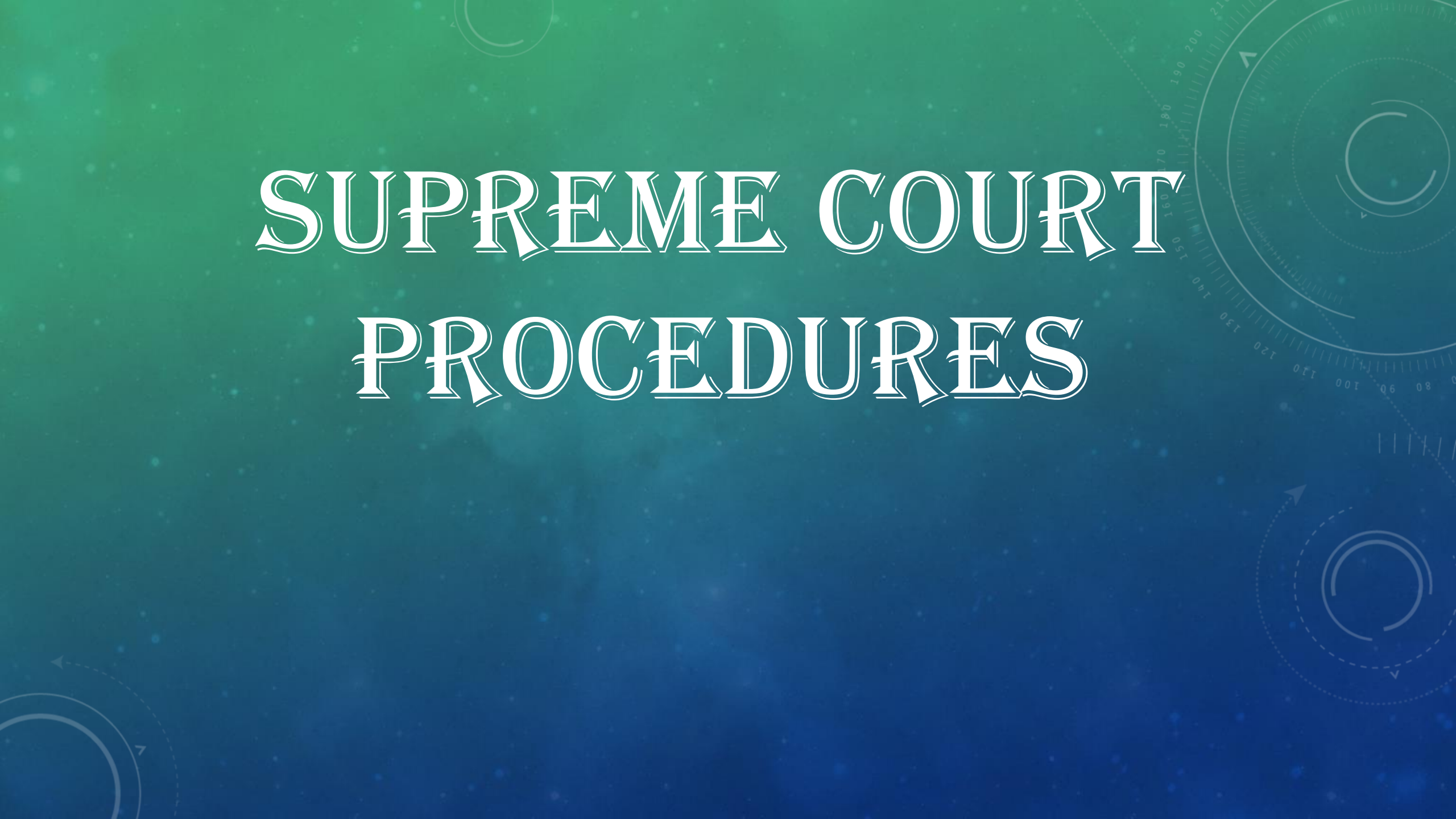


Alexander Hamilton *Federalist* #81

- *The members of the legislature will rarely be chosen with... those qualifications which fit men for the stations of judges...on account of the natural propensity of such bodies to party divisions...the pestilential breath of faction may poison the fountains of justice.*



SUPREME COURT PROCEDURES

The background features a vertical gradient from green at the top to blue at the bottom. It is decorated with faint, light-colored technical diagrams, including circular gauges with numerical scales and arrows, and a field of small, scattered white dots resembling a starry sky.

ACCESSING THE SUPREME COURT: RULES CRITERIA

The Supreme Court has developed specific rules that govern which cases within its jurisdiction it will and will not hear:

- Justiciable: The case must involve **an actual dispute**, not a hypothetical one.
- Standing: Parties to a case **must have a substantial stake in the outcome** of the case.
- Mootness: This criterion is **used to dismiss cases that no longer require a resolution**. If the issue has been resolved, then there is nothing to address.
- Ripeness: A case must be **appropriately ready for litigation**; if the law was never applied, then no one can claim harm yet.



3 ELEMENTS STANDING TO SUE

INJURY IN FACT

suffered harm

CAUSATION

caused harm

REDRESSABILITY

compensation



ACCESS TO THE SUPREME COURT: WRITS OF CERTIORARI

Most cases reach the Court through a writ of certiorari: a decision of at least four of the nine Supreme Court justices to review a lower-court decision.

“Cert-worthy” cases include those that involve:

- Conflicting decisions by two or more state courts of last resort
- Conflicting decisions by two or more circuit courts
- Conflicting decisions by circuit courts and state courts of last resort
- Decisions by the circuit court on matters of federal law that should be settled by the Supreme Court
- Circuit court decisions that are at odds with a Supreme Court precedent

ACCESS TO THE SUPREME COURT: LOBBYING

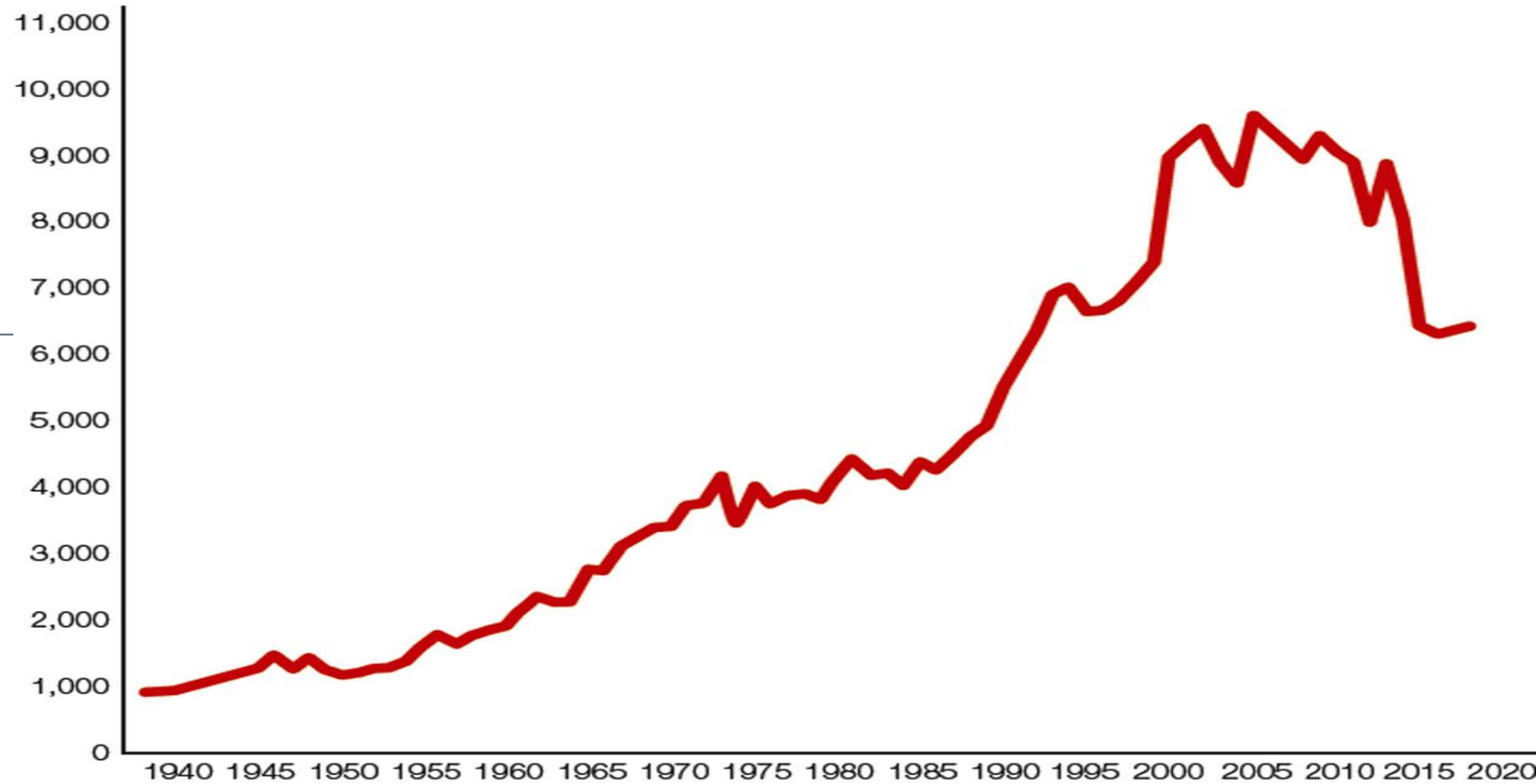
- Interest groups seek to persuade justices to listen to their problems by filing briefs called *amicus curiae*, "friend of the court."
- Lawyers representing these groups try to choose the proper client and case so that the issues in question can be both dramatically and appropriately portrayed.
- When possible, they bring cases in a district with a sympathetic judge.
- One effective strategy for getting cases accepted for review is to develop a "pattern of cases."
- They bring one type of suit to more than one circuit in the hope of inconsistent treatment.

FIGURE 13.3

**Cases Filed in the U.S. Supreme Court,
1938–2018 Terms***

**CASES FILED IN THE
U.S. SUPREME COURT**

NUMBER OF CASES FILED PER YEAR



*Number of cases filed in term starting in year indicated.

SOURCES: Years 1938–69, 1970–83, 1984–99: reprinted with permission from *The United States Law Week* (Washington, DC: Bureau of National Affairs) (copyright © Bureau of National Affairs Inc.); 2000–05: U.S. Bureau of the Census, *Statistical Abstract of the United States*; 2006–07: Office of the Clerk, Supreme Court of the United States; and Supreme Court of the United States, *Cases on Docket*, www.uscourts.gov; Supreme Court, 2018 Year-End Report on the Federal Judiciary, www.supremecourt.gov/cou (accessed 10/7/20).

CONTROLLING THE FLOW OF CASES: SOLICITOR GENERAL

The solicitor general—the United States’ lawyer in all cases before the Supreme Court to which the federal government is party—has great influence over federal courts.

- Serves as the 4th ranking official in the Justice Dept.
- Screens cases before any agency of the federal government can appeal them to the Supreme Court
- Can enter a case even if the federal government is not a direct litigant by writing an amicus curiae



Elizabeth Prelogar
2021-present

CONTROLLING THE FLOW OF CASES: LAW CLERKS

- Federal judges employ law clerks who research legal issues and assist with the preparation of opinions.
- Each Supreme Court justice is assigned four clerks.
- Law clerks help justices with advice in writing opinions and in deciding whether the Court should hear a case.
- Most members of the Supreme Court have “clerked” for previous members of the Court.

LAW CLERK



What my parents think I do



What my boss thinks I do



What clients think I do



What my friends think I do



What I actually Do..... EVERYTHING!

Draft Opinion Leak of 2022

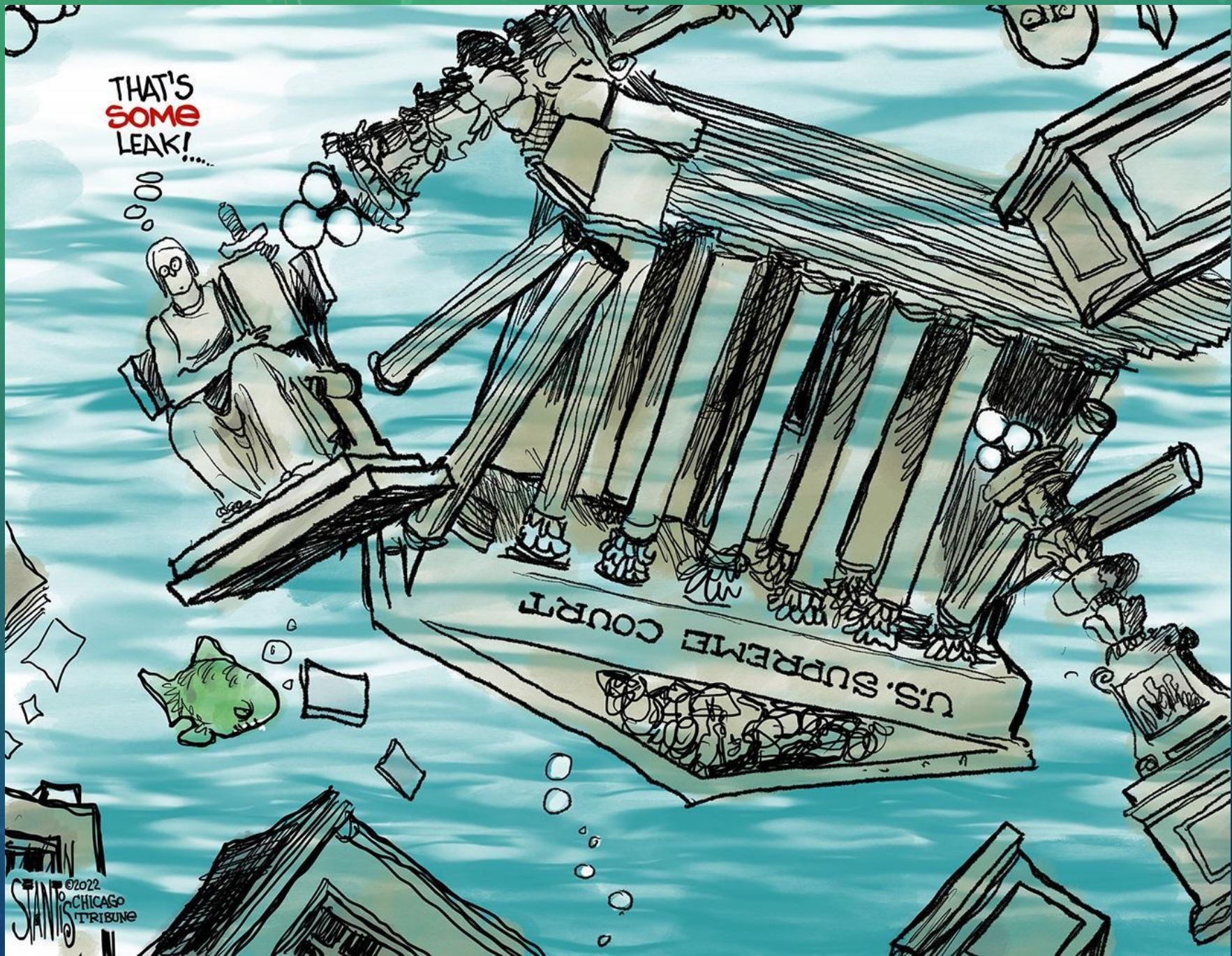
On May 2, 2022, *Politico* released a leaked 98-page draft opinion authored by Associate Justice Alito in a highly watched abortion case, *Dobbs v. Jackson Women's Health Organization*, which had 5 votes to overturn *Roe v. Wade*.

The draft was from February, but *Politico*—and later, *The Washington Post*—reported that the 5-vote majority was still intact.

Draft Opinion Leak of 2022

The authenticity of the draft was confirmed by Chief Justice John Roberts, who also directed the Marshal of the Court to investigate the source of the leak, which is highly suspected to be by one of the Supreme Court's law clerks, but not by one of the justices themselves.

Although an opinion purposely leaking from the Court is quite rare and highly unethical, it is unlikely that the leak violated any federal criminal laws, unless the draft was obtained by hacking, theft, or other unlawful means.



THAT'S
SOME
LEAK!...

U.S. SUPREME COURT

STAN
SANTIS
©2022
CHICAGO
TRIBUNE

THE SUPREME COURT'S PROCEDURES: PREPARATION

- The Supreme Court's decision to accept a case is the start of a lengthy and complex process.
- **Briefs:** written documents (by attorneys to the parties involved) explain, using case precedents, why a court should find in favor of their client
- Attorneys also often ask sympathetic interest groups for support (via *amicus curiae* briefs).

NO... I THINK SHE
WANTED TO SEE
LEGAL BRIEFS.



SUPREME COURT

ANNA NICOLE SMITH

THE SUPREME COURT'S PROCEDURES: ORAL ARGUMENT

- The next stage of a case is **oral argument**: attorneys for both sides appear before the Court to present their positions and answer the justices' questions.
- Cases are never televised, but the audio and transcript can be easily accessed by the public within days of the ruling
- Each attorney has a half hour to present a case, which includes interruptions for questions by the justices.
- Oral arguments can be important to the outcome of the case.

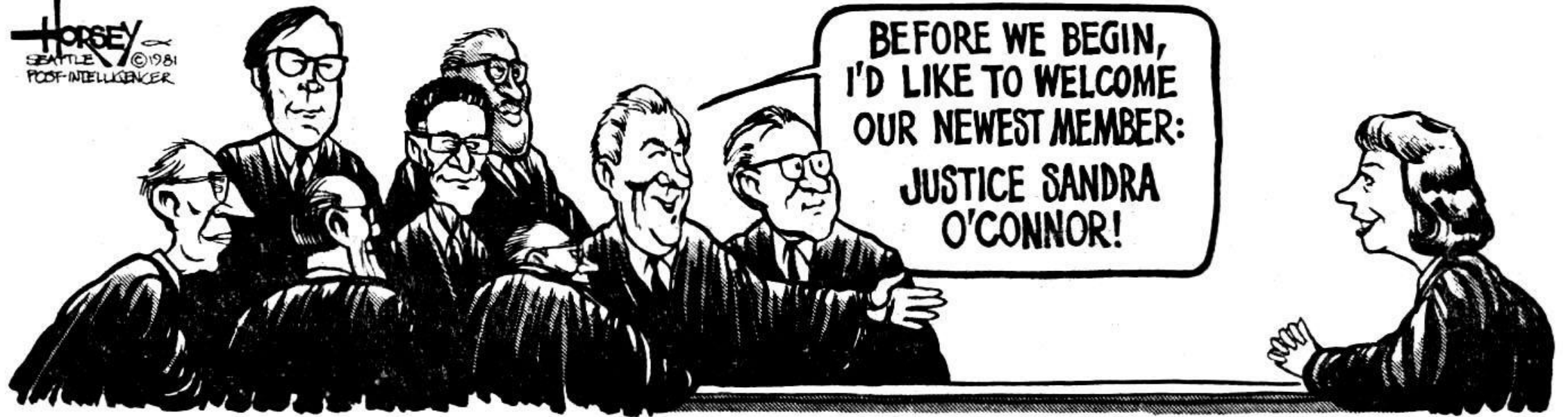
OYEZ! OYEZ! OYEZ!



THE SUPREME COURT'S PROCEDURES: CONFERENCE

- The **conference** follows **the oral argument**.
- **The justices meet in private and hold an initial vote.**
- The chief justice speaks (votes) first, and other justices follow in order of *seniority*.
- **A preliminary decision is reached based on a majority vote.**
- If the Court is divided, several votes may be taken before a final decision is reached.
- **The justices may try to influence or change one another's opinions.**

HORSEY
SEATTLE ©1981
POOF-INTELLIGENCER



Political Cartoon, 1981

THE SUPREME COURT'S PROCEDURES: OPINION OF THE COURT

- After a final decision is reached, one justice in the majority is assigned to write the **majority opinion**: the written explanation of the Supreme Court's decision.
- A chief justice who is in the majority will assign the justice to write it.
- If the chief justice is not in the majority, then the most senior justice in the majority will assign the opinion.
- Once the majority opinion has a final draft, it is circulated to the other justices.
- If justices agree with the decision but not with the reasoning, they usually write **concurring opinions**. (Their votes are still in the tally for majority.)

Majority & Minority Opinions

Majority Opinions

- At least 5 justices
- Legally binding
- Sets court precedent

Concurring Opinions

- Agrees with majority opinion but for different reasons

Minority / Dissenting Opinions

- 1-4 justices
- Explains basis for disagreement with Majority opinion
- Sometimes leads to cases being re-considered later:
 - Plessy v. Ferguson was overturned by Brown v. Board

THE SUPREME COURT'S PROCEDURES: DISSENT

Justices who disagree with the majority
can write a **dissenting opinion**, which may be:

- Used to express irritation with the outcome
- Done to signal to the defeated parties that their position had legitimate support from members of the Court
- Done to persuade a swing justice to join their side on the next round of cases on a similar topic
- Serves as a “place-holder” appeal to keep bringing cases through the Court; they influence future arguments



**“As you all know, I don’t like dissent ...
and yet I heard a low growl.”**



SUPREME COURT
PHILOSOPHY &
LEGITIMACY

JUDICIAL MEANING

- The Supreme Court decides what laws mean and the importance of **precedent**.
- *Stare Decisis* = “Let the decision stand”
- Institutional interests of the three branches matter.
- The justices are aware of the Court’s place in history; they care about protecting the Court’s reputation.

JUDICIAL PHILOSOPHY: **ACTIVISM**

Judicial Activism:

The Court should go beyond the words of the Constitution or a statute to consider the broader societal implications of its decisions.



JUDICIAL PHILOSOPHY: RESTRAINT

Judicial Restraint:

Adherents refuse to go beyond the clear original intent of the words and context in the Constitution when interpreting the document's meaning.



WADSWORTH THE FLAINDEALER
©2012 3/29

WE'RE CONCERNED
OBAMACARE
IS GOVERNMENT
OVERREACH.

CORPORATIONS
ARE
PEOPLE

BUSH
V
GORE

SUPREME
COURT



TRADITIONAL LIMITATIONS ON THE FEDERAL COURTS

- Courts must wait until a case is brought to them; they are “passive” players in the system.
- Courts were traditionally limited in the kind of remedies they could provide those who won cases.

Andrew Jackson



The authority of the Supreme Court must not be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

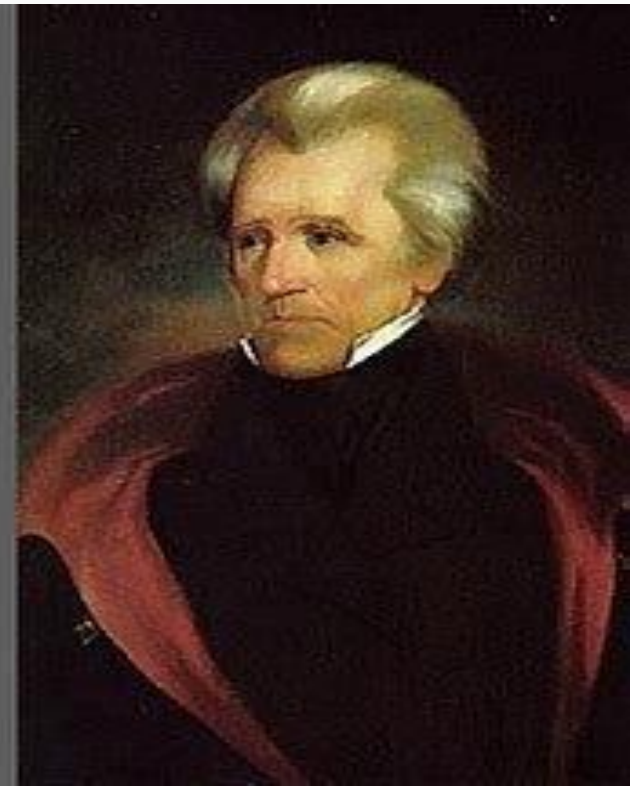
**THE DECISION OF THE SUPREME COURT
HAS FELL STILL BORN, AND THEY FIND
THAT IT CANNOT COERCE GEORGIA TO
YIELD TO ITS MANDATE.**

- ANDREW JACKSON -



“John Marshall
has made his
decision; now
let him enforce
it.”

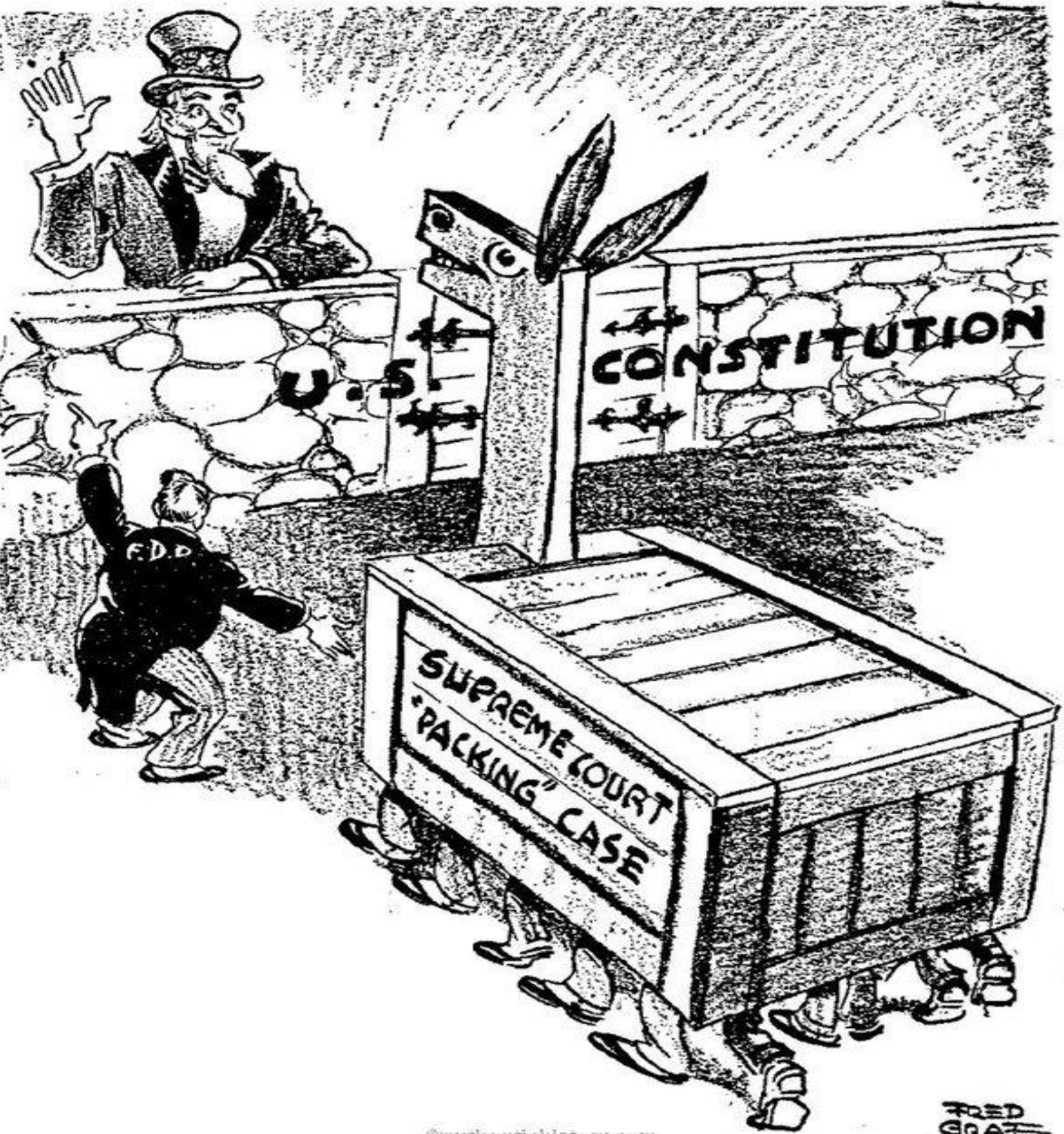
--Andrew Jackson



TRADITIONAL LIMITATIONS ON THE FEDERAL COURTS

- Courts lacked enforcement powers and had to rely on the executive branch or state agencies for enforcement.
- Judges somewhat reflect the agendas and goals of the appointing president and the confirming Senate.
- Congress can change the size and appellate jurisdiction of the Supreme Court and other federal courts.

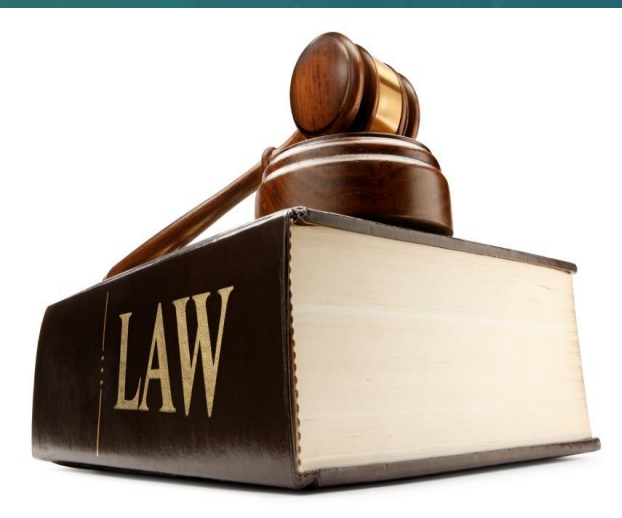
That Trojan Horse Trick Won't Work Now



Alexander Hamilton *Federalist* #78



The interpretation of the laws is the proper and peculiar province of the courts; it therefore belongs to them to ascertain its meaning, as well as the meaning of any act proceeding from the legislative body.



If there should happen to be an irreconcilable variance between the two...the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

U.S. SUPREME COURT: JUDICIAL REVIEW

- The Supreme Court's most significant power is **judicial review**.
- This is the power to review and, if necessary, declare laws or executive actions invalid or **unconstitutional**.
- The U.S. Constitution does not mention judicial review, but it is implied in Article III.

U.S. SUPREME COURT: JUDICIAL REVIEW

- It was established in *Marbury v. Madison* (1803):
“It is emphatically the province and duty of the Judicial Department to say what the law is.”
- In more than two centuries, the Court has declared fewer than 170 acts of Congress or Executive Orders to be unconstitutional.

Marbury v. Madison (1803)

Storyboard

Judicial Act of 1789

1 Chief

5 Associates

This panel shows a scroll with the text 'Judicial Act of 1789' and a quill pen. Below the scroll, there is one figure labeled '1 Chief' and five smaller figures labeled '5 Associates'.

Adams

Marbury - Chief of Justice

He elected Marbury for Chief of Associates last minute before his Presidency was over.

Then he sent out the paper work...

Marbury

The papers still weren't coming in the mail:-(

This panel depicts John Adams sitting at a desk with a box labeled 'Marbury - Chief of Justice'. A speech bubble says, 'He elected Marbury for Chief of Associates last minute before his Presidency was over.' An arrow points to a woman (Marbury) kneeling in frustration, with a mailbox labeled 'Marbury' nearby. A speech bubble says, 'The papers still weren't coming in the mail:-('. Another speech bubble says, 'Then he sent out the paper work...'.

Jefferson

Madison

Okay!!

Trash these papers immediately

This panel shows Thomas Jefferson and James Madison on a checkered floor. Jefferson says, 'Trash these papers immediately' and Madison replies, 'Okay!!'. Below them, a scroll of papers is shown being crumpled into a ball.

THE END

Marbury never got the papers or his job.

This panel shows Marbury sitting in a chair, looking frustrated. A scroll above her says 'THE END'. A speech bubble below her says, 'Marbury never got the papers or his job.'

WHAT??!

Marbury

Judiciary Act is unconstitutional and should not be a thing. The Constitution says nothing about Judicial Review.

Madison: I WONNN!

This panel shows Marbury in a courtroom setting. A speech bubble says, 'WHAT??!'. Another speech bubble says, 'Judiciary Act is unconstitutional and should not be a thing. The Constitution says nothing about Judicial Review.' Madison is shown in the background with a speech bubble saying, 'Madison: I WONNN!'.

Marbury

Supreme Court

USE YOUR POWER FROM JUDICIARY ACT!!

The supreme court stated that they could declare any law passed as unconstitutional.

This panel shows Marbury looking angry. A speech bubble says, 'USE YOUR POWER FROM JUDICIARY ACT!!'. To the right, an illustration of the Supreme Court building is shown with a speech bubble that says, 'The supreme court stated that they could declare any law passed as unconstitutional.'

Alexander Hamilton *Federalist* #78



➤ *The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.*



➤ *It may be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the executive arm...for the efficacy of its judgments.*



Alexander Hamilton Federalist #78

- *Every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void.*
- *No legislative act...contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.*



UNENUMERATED
RIGHTS & LIBERTIES

TABLE 4.1

Rights in the Original Constitution (Not in the Bill of Rights)

CLAUSE	RIGHT ESTABLISHED
Article I, Section 9	Guarantee of habeas corpus
Article I, Section 9	Prohibition of bills of attainder
Article I, Section 9	Prohibition of ex post facto laws
Article I, Section 9	Prohibition against acceptance of titles of nobility, etc., from any foreign state
Article III	Guarantee of trial by jury in state where crime was committed
Article III	Treason defined and limited to the life of the person convicted, not to the person's heirs

THE BILL OF RIGHTS

The First Ten Amendments to the U.S. Constitution



**FREEDOM OF SPEECH,
RELIGION, PRESS,
ASSEMBLY, AND
PETITION**



**RIGHT TO
BEAR ARMS**



**QUARTERING
OF SOLDIERS**



**ARRESTS
AND SEARCHES**



**RIGHTS OF PERSONS
ACCUSED OF CRIMES**



**RIGHTS OF PERSONS
ON TRIAL FOR CRIMES**



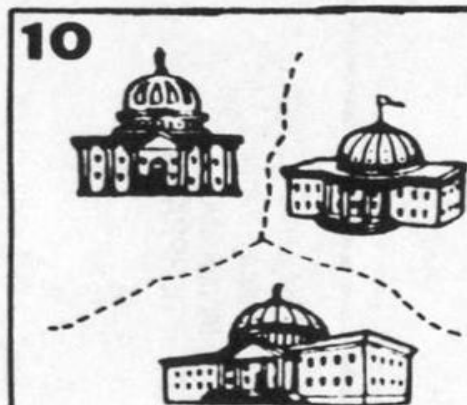
**JURY TRIALS
IN CIVIL CASES**



**LIMITATIONS
ON BAIL AND
PUNISHMENTS**



**RIGHTS KEPT
BY THE PEOPLE**



**POWERS KEPT BY
THE STATES OR
THE PEOPLE**

James Wilson, *State House Speech*, Nov. 6, 1787

*“Everything which is **not reserved** [to states] is given [to federal], but everything which is **not given**, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights is a defect in the proposed Constitution.”*

“Bills of rights ...are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers not granted; and...would afford a...pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”

Alexander Hamilton *Federalist #84*

9th Amendment

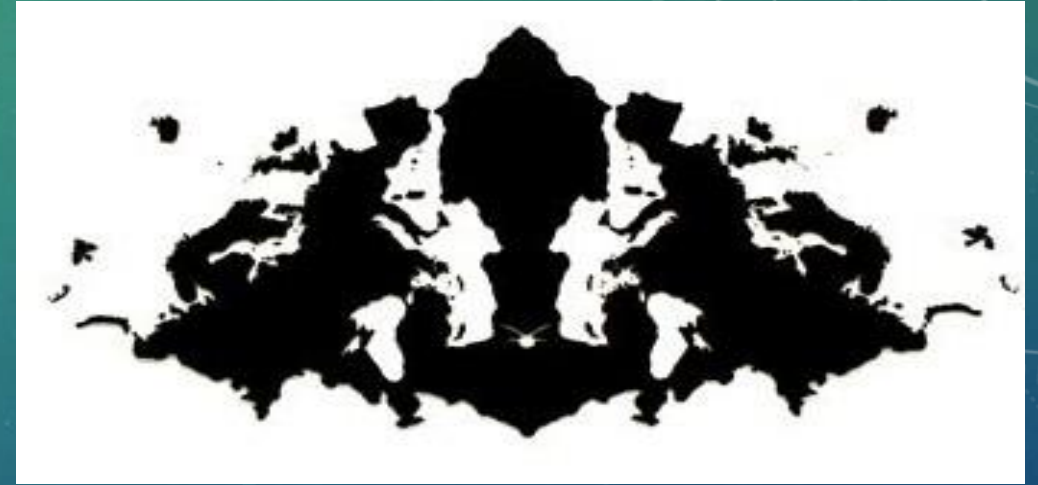
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

James Madison's Construction

The 1st through 8th Amendments address how the federal government is allowed to exercise its enumerated powers concerning expressed rights, while the 9th Amendment addresses a "*great residuum of rights that have not been thrown into the hands of the government,*" as Madison put it.

9th Amendment

- What is the meaning?
- What is the legal effect?
- How often to courts rely upon it?



- Robert Bork analogized the 9th Amendment to an “inkblot,” which hid the constitutional text that was under it. Just as judges should not guess what was under an inkblot, he argued, so too they should not guess at the 9th Amendment’s meaning.

GENERAL UNDERSTANDING
OF THE 9TH AMENDMENT
BY THE SUPREME COURT

The 9th Amendment has generally been regarded by the courts to negate any expansion of governmental power on account of the enumeration of rights in the Constitution, but the Amendment has not been regarded as further limiting governmental power.

GENERAL UNDERSTANDING
OF THE 9TH AMENDMENT
BY THE SUPREME COURT

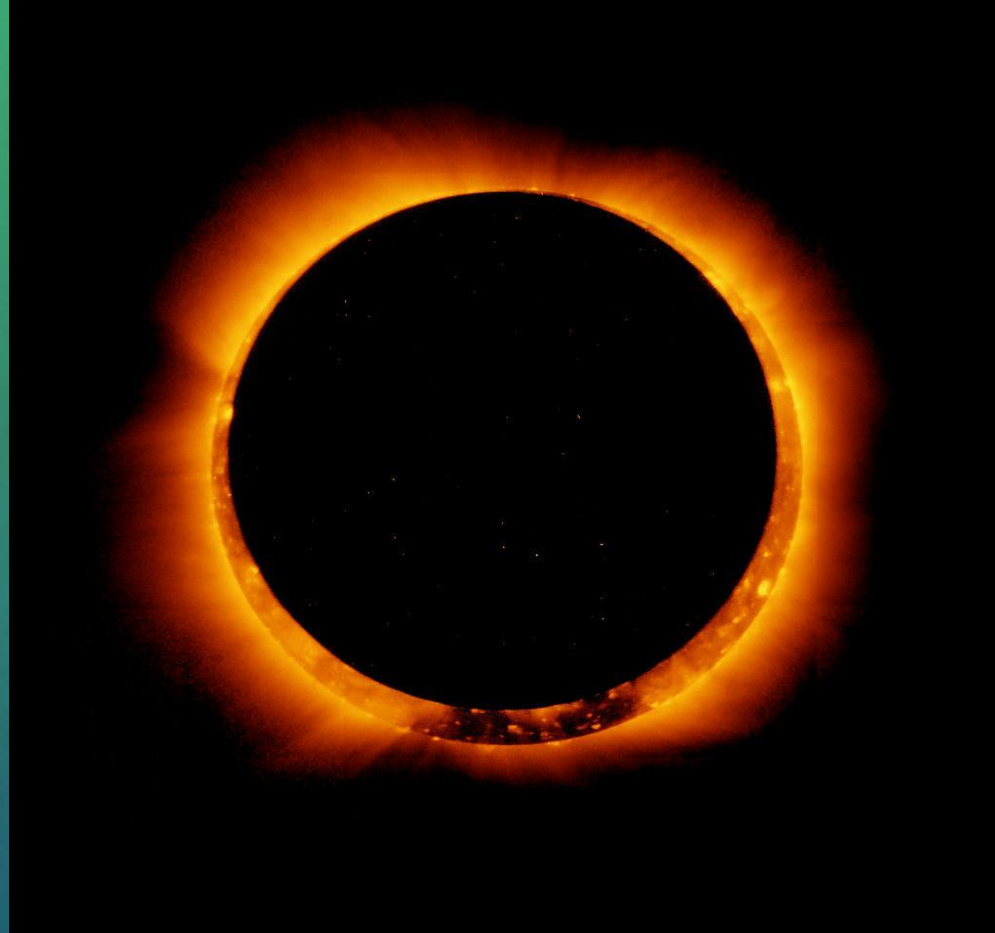
The Court explained this in
U.S. Public Workers v. Mitchell (1947):

"If granted power is found, necessarily the objection of invasion of those rights (reserved by the 9th and 10th Amendments) must fail."

RIGHTS AFFIRMED

USING THE 9TH AMENDMENT AS SUPPORT:

- Right to travel (1823)
- Right to contract (1905; abrogated 1937)*
- Right to association (1958)
- Right to not have illegally gained evidence used in court against defendants: exclusionary rule (1961)**
- Right to privacy: reproductive contraception (1965)
- Right to be made aware of due process rights at arrest (1966)**
- Right to privacy: abortion (1973; overturned 2022)*
- Right to privacy: sexual intimacy (2003)**
- Right to marry same-sex partners and make family decisions (2015)



**What do you see,
the shadow or the light?**

The Penumbra in Law

- In United States constitutional law, the *penumbra* includes a group of rights derived, by implication, from other rights explicitly protected in the Constitution.
- The first use of the word was in an 1873 law review article written by Oliver Wendell Holmes, in which he argued:

“It is better for new law to grow in the penumbra between darkness and light, than to remain in uncertainty.”

The Penumbra in Law

- Justice Oliver Wendell Holmes used the term to describe rights derived by implication:

*"the law allows a **penumbra** to be embraced that goes beyond the outline of its object in order that the object may be secured."*



The Penumbra in Law

- Justice Benjamin Cardozo used the term to **describe an area of uncertainty in the law:**

“there is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere.”



The Penumbra in Law

- Justice Felix Frankfurter used the term in reference to a group of rights that are not explicitly stated in the Constitution but can be inferred from other enumerated rights. When arguing that a group of legislators lacked standing:

*“No doubt the bounds of such legal interest have a **penumbra** which gives some freedom in judging fulfillment of our jurisdictional requirements.”*



The Penumbra in Law

Judge Learned Hand also used the term 11 times between 1915 and 1950, usually to place emphasis on words or concepts that were ambiguous:

“The [familiar] words of a statute have not the fixed content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.”



William O. Douglas

Interpretation of Penumbras

- Justice Douglas declared that “*specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.*”
- In *Griswold v. Connecticut* (1965), Justice Douglas argued that the Court could infer a right to privacy by looking at “*zones of privacy*” protected by the 1st, 3rd, 4th, and 5th Amendments.

William O. Douglas

Interpretation of Penumbras

*“Various guarantees create zones of privacy. The **right of association** contained in the penumbra of the 1st Amendment is one, as we have seen.*

*The 3rd Amendment in its prohibition against the **quartering of soldiers** ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy.”*



“The 4th Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’

The 5th Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

The 9th Amendment: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’”



William O. Douglas

Interpretation of Penumbras

- Justice Douglas argued that the Constitution included “*penumbral rights of privacy and repose,*” and that without ‘peripheral rights,’ the ‘specific rights’ enumerated in the constitution would be “*less secure.*”
- According to Burr Henly, Justice Douglas' majority opinion in *Griswold* did not use the term *penumbra* to identify the articulable boundaries of language and the law, as Justice Holmes had done, but rather to connect the text of the Constitution to unenumerated rights.

Criticisms of Penumbral Reasoning

- In his dissenting opinion in *Griswold*, Justice Hugo Black stated his concerns with finding a right to privacy in the *penumbra* of the Constitution and that he disagreed with the majority's attempts to "stretch" the Bill of Rights.



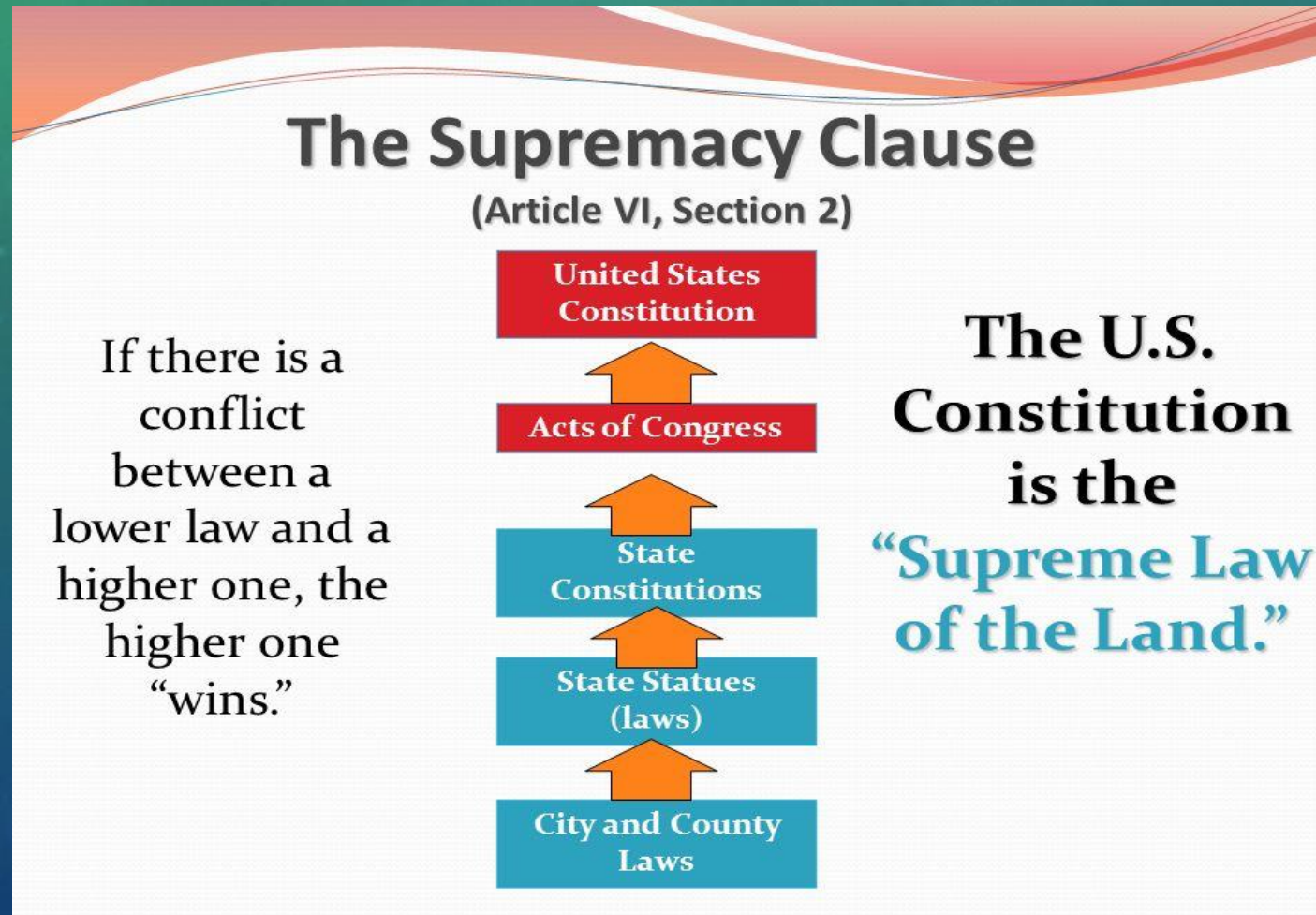
Criticisms of Penumbral Reasoning

- Louis J. Sirico Jr. has described the term as **“intellectually confusing”**, and William J. Watkins, Jr. wrote that the penumbra of the Constitution is **“a seemingly strange place to discover constitutional guarantees.”**
- Robert J. Pushaw Jr. also described **penumbral reasoning** as a **“transparently fictional” process**, and Jennifer Fahnstock has cautioned that **“implicit constitutional rights”** are vulnerable to being lost **“due to their lack of permanency.”**

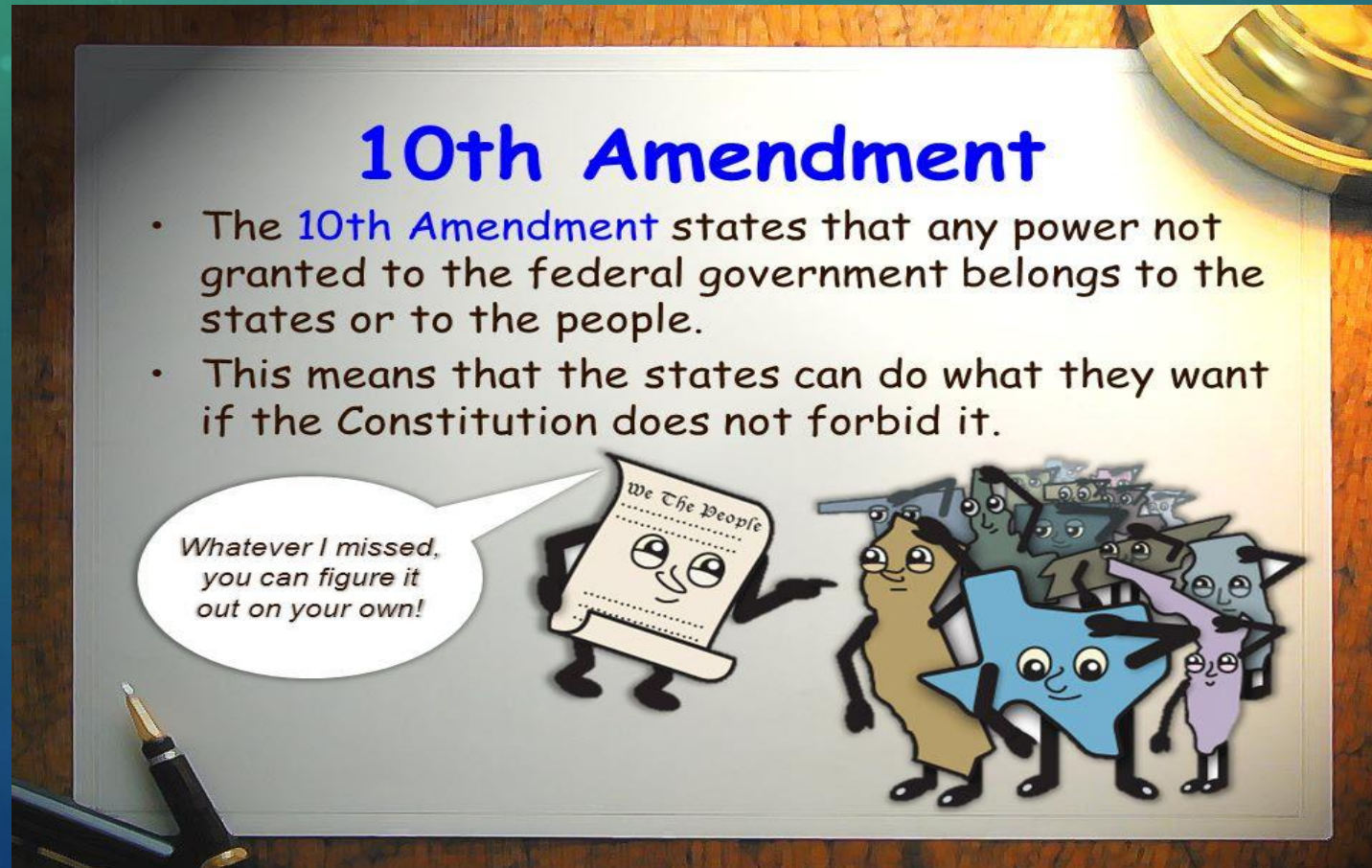
Four Rival Interpretations of the Phrase: *“rights, . . . others retained by the people.”*”



1) Russell Caplan claimed that it referred to “other rights” that were granted by state laws, which could be then be preempted by federal laws under the Supremacy Clause.



2) Thomas McAfee contended that the Amendment referred to those “**residual**” rights that are not surrendered by the enumeration of powers. From this, it followed that, if Congress is exercising its enumerated powers, it cannot be violating a retained residual right.



3) Akhil Amar argued that the Amendment's core meaning **referred to the collective rights of the people**; anyone supposing it protected “counter-majoritarian” selective rights was anachronistic.

To assume the Amendment was meant to protect non-majoritarian rights is equivalent to



4) Randy Barnett maintained that the Amendment referred to the **natural liberty rights of the people as individuals**, which are also referred to in the Declaration of Independence, state bills of rights, etc.



*This approach is the only one that would have much application to legal cases or controversies.

“The Presumption of Liberty” Construction

- Kurt Lash and Randy Barnett would give the provision judicial effect by narrowly construing the scope of the enumerated powers of Congress, especially its implied powers under the Necessary and Proper Clause.
- Barnett also maintains that the 9th Amendment mandates the “equal protection” of enumerated and unenumerated rights: ‘other’ rights should be judicially protected to the same extent that enumerated rights are protected.

(continued)

- To implement this requirement, Barnett proposes a rule of construction—the “presumption of liberty”—to protect all the retained rights of the people by placing the onus on legislatures to justify their restrictions on liberty as both necessary and proper, without judges needing to specifically identify the retained ‘other’ rights.

“No Legal Effect” Argument

Among others, the late Justice Antonin Scalia has argued that:

*“The Declaration of Independence...is not a legal prescription conferring powers upon the courts; **the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.**”*



In this way, Justice Scalia would deny the amendment any judicially-enforced legal effect.

UNEQUIVOCAL PROTECTION OF DUE PROCESS: UNENUMERATED RIGHTS



Washington v. Glucksberg (1997)

- The protection of our nation's **objective fundamental, historically rooted, rights and liberties;**
- The **cautious definition of what constitutes a due process liberty interest.**

Other Views on the 9th Amendment

- Professor Laurence Tribe shares the view that **this amendment does not confer substantive rights:**

*“It is a common error...to talk of ‘9th Amendment rights.’ **The 9th Amendment is not a source of rights; it is simply a rule about how to read the Constitution.**”*

Other Views on the 9th Amendment

- In 2000, Harvard historian Bernard Bailyn gave a speech at the White House about the 9th Amendment:

*“It refers to a universe of rights, possessed by the people – **latent rights, still to be evoked and enacted into law...a reservoir of other, unenumerated rights that the people retain, which in time may be enacted into law.**”*

- Journalist Brian Doherty has argued that the 9th Amendment:

*“...specifically roots the Constitution in a natural rights tradition that says **we are born with more rights than any constitution could ever list or specify.**”*

“The Ninth Amendment: For Us, The Living”

By Louis Michael Seidman

- He argues that, while it defeats the inference that the enumeration of some rights denies the existence of others, the Amendment **does not itself establish the existence** of these other rights.
- He points out that the House Committee that considered the Amendment from 1789-91 removed **even indirect endorsement of natural rights.**
- The inaugural Congress chose no less than 5 times **not to adopt any provisions that would expressly protect unenumerated rights.**
- **At best, the 9th Amendment protects natural rights only by implication.**

*“Prior generations are like
foreign nations to us.”*

–Thomas Jefferson

Founding Fathers Debate Rights of People (2:05)

MY OBSERVATIONS: 9TH AMENDMENT JURISPRUDENCE

- The Constitution is the highest authority of American rights, and Supreme Court decisions are binding precedents supplying meaning to the Constitution.
- Justices are tempted to make difficult binding decisions based on vague and incomplete information in the Amendment.

MY OBSERVATIONS:
9TH AMENDMENT JURISPRUDENCE

- Just as opponents of unenumerated rights cannot rely on the enumeration of some rights to defeat the claim that there are other rights, **proponents of unenumerated rights cannot rely on the text of the 9th Amendment to prove that ‘other’ rights exist or to distinctly establish what they are.**
- **The 9th Amendment, as written, leaves the argument unsettled as to how unenumerated ‘other’ rights are to be affirmed.**

MY OBSERVATIONS:
9TH AMENDMENT JURISPRUDENCE

- This argument will be revisited again and again through the application of *stare decisis* and the overturning of precedent with each era of political change in the “discovery” of unenumerated rights.
- The responsibility of court decisions interpreting our Constitution is built into the notion of **popular sovereignty**; in our nation, this is expressed in a written Constitution, the very instrument of conveying meaning and identity of our **fundamental principles** with which we wish to be governed.

MY OPINIONS: CONSTITUTIONAL RIGHTS & LIBERTIES

- ✓ Civil Liberties belong to the individual, not groups.
- ✓ Civil Liberties must be agreed upon by the society at large.
- ✓ Civil Liberties must be delegated and expressed in the text of the Constitution.
- ✓ Natural Rights must not be abridged by government.

MY OPINIONS: CONSTITUTIONAL RIGHTS

- ✓ Civil Rights created by government must not harm the individual, nor society.
- ✓ Civil Rights must be always applied to all individuals equally.
- ✓ No unenumerated right shall be inferred outside of the expressed ones in the Constitution.
- ✓ Amendments must be made prior to the Supreme Court affirming any new rights not specifically enumerated.

MY RECOMMENDATION FOR
RE-WORDING THE 9TH AMENDMENT:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people **to be amended.**”

THE END