

Judiciaries

Lesson 6

Judicial review

- Power of courts to overturn laws passed by legislature on the grounds that they are in conflict with constitution
- Opposite is legislative supremacy: legislature determines whether laws are constitutional or unconstitutional

The case for judicial review

- Popular majorities tend to oppress minorities
- Passions of moment often overwhelm judgment
- Rights are too important to leave to legislators
- Legislators are not experts on constitutional law
- Judges have special expertise (compare central bank)

Countermajoritarian dilemma

- Do court decisions of unconstitutionality have any legitimacy?
- Legislature is legitimized by democratic elections
 - Chosen by voters and can be voted out of office
- Where does judiciary gain authority to overturn will of people?
 - Indirectly if chosen by elected officials
 - But can't be sanctioned



Conditions for judicial review to work

- Is the meaning of the constitution clear?
 - If clear, then probably don't need review
 - If unclear or ambiguous, then what does it add
- Are justices better informed than legislature?
 - Yes about constitution
 - No on consequences of laws in individual policy areas
- Do justices have incentive to get things right?
 - What are their incentives? What are they trying to do?
- Has judicial review had any influence?
 - Courts cannot enforce their decisions
- Has judicial review on balance helped or hurt?

Two styles of judicial review

European

- Specialized court just for constitutional questions
- Cases can be brought by many parties
- Judges serve limited terms

American

- Any court can rule on constitutionality
- Only particular cases brought by injured party
- Lifetime tenure for judges

Some design issues

- Standing: who can bring a claim?
 - US: any citizen, but must be concrete injury
 - Germany: political bodies and individuals
 - France: legislative minorities and special bodies
- What kind of claims can be brought?
 - Concrete review versus abstract review
- Timing: when can claims be brought?
 - Before promulgation of law: court more like 3rd chamber, can suggest changes
 - After promulgation of law: often requirement of injury or potential injury
- Effect: what is impact of decision of unconstitutionality
 - Is decision binding, advisory, subject to override?

Judicial independence

- Independence not the only value
 - Also accountability and representativeness
- Who should it be independent from?
 - Other branches of government
 - Public pressure, political ideology
 - Superiors in judicial hierarchy

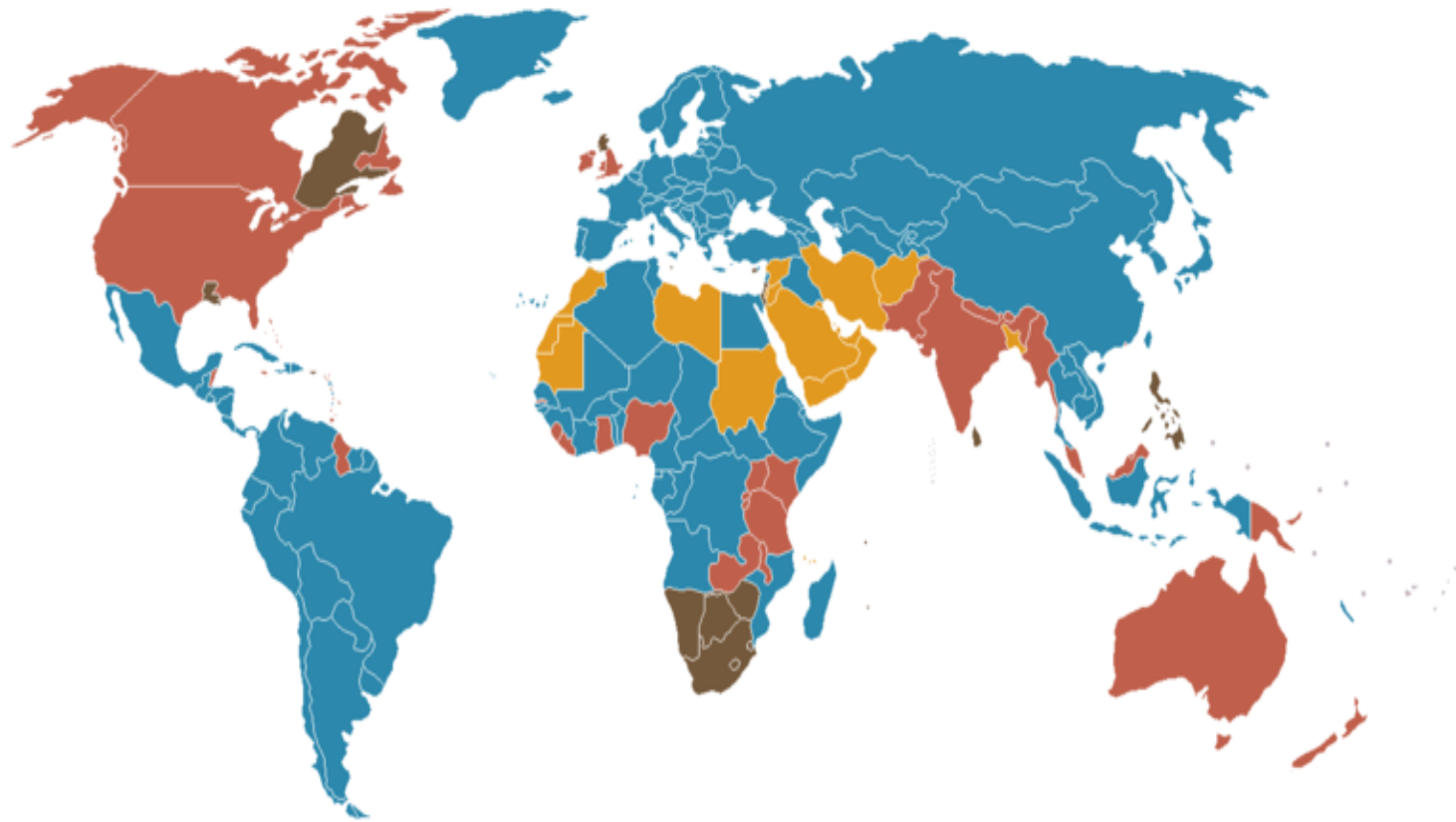
Guaranteeing independence

- Systems of appointment
 - Political institutions
 - Representative: several institutions choose part of court – no one dominates, but judges may be agents
 - Cooperative: two institutions need to cooperate – moderate justices, but risk of deadlock
 - Single institution but may be supermajority requirement
 - Judicial branch: judges may conform to superiors
 - Judicial council: may include non-judges, may make multiple nominations
 - Elections: often simply retention election, common in US
- Term length
 - Life terms, fixed terms with or without reappointment
- Removing and disciplining judges
- Finances of courts

Civil law versus common law

- Common law: law made by judges through decisions in cases
 - Uncodified, based on precedents (stare decisis)
 - Adversarial trials with jury
 - Legal education = learning cases
 - Judges have large role in making law
- Civil law: law determined by civil codes
 - Law is codified and comprehensive
 - Inquisitory trials with judges
 - Legal education = learning civil code
 - Judges simply apply the law

Common law/Civil law/Sharia law



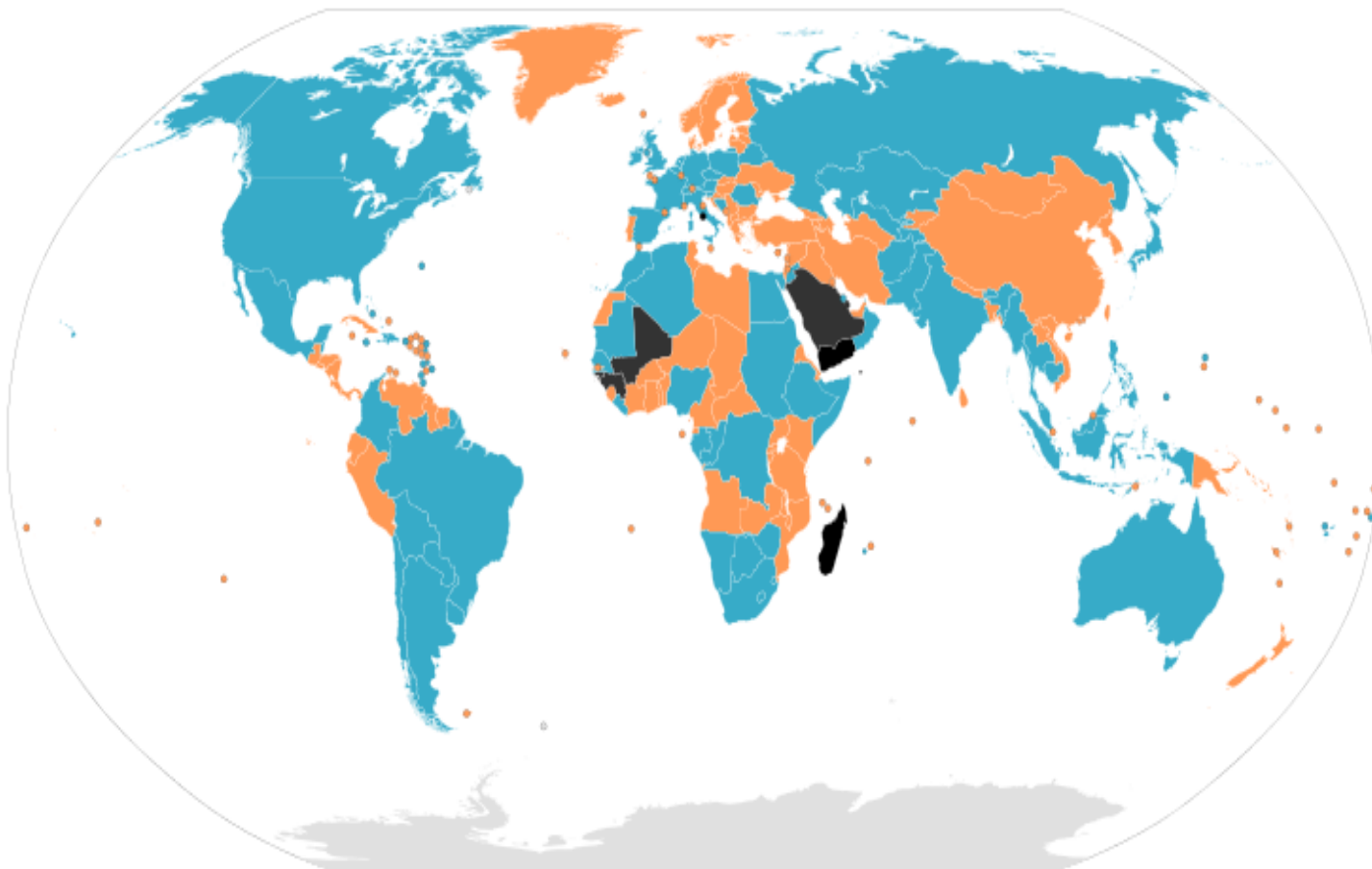
Claims about common law

- Economically more efficient
 - Competition between judges => survival of fittest
 - Judges seek most efficient solutions
- Can change with times
- Judges can create original solutions to new problems

Bicameralism

- Symmetric: two chambers have equal powers
- Asymmetric: one chamber (usually lower) more powerful
 - Advisory veto: can be overruled by absolute majority of lower house
- Congruence: represent same groups
- Incongruence: represent different groups (eg, one chamber for population, other for ethnicity, regions) – often result of different electoral laws (eg, PR in lower, plurality in upper)
- Strong bicameralism = symmetric & incongruent. Why?

Bicameralism around the world



Design issues

- Lower designed to be responsive to people
 - Larger, shorter terms, complete renewal
- Upper designed to be more deliberative, less rash, more professionalized
 - Smaller, longer terms, staggered elections
 - Sometimes upper not directly elected – appointed by state legislatures or executive
- Varieties of intercameral conflict resolution
 - Navette/shuttle system (stopping rules = # of rounds, common session, lower house decisive, conference committee)
 - Conference committee

For bicameralism

- Prevent tyranny of majority: different groups get veto
- Reduce potential for tyranny of individual leader (ie, agenda setting)
- Limit policy change, lock in status quo = stability
- Greater representation – more groups get a say
- Quality control
 - discover mistakes, 2 heads better than 1
 - reduce corruption due to collusion
 - delay legislation – safety in sober thoughts

Against bicameralism

- Overrepresentation: Sometimes created as refuge for elites or other groups
 - Often rural groups overrepresented: France has chamber of agriculture
- Expense: more representatives, more elections, more administration
- Danger of deadlock and delay

Degree of overrepresentation

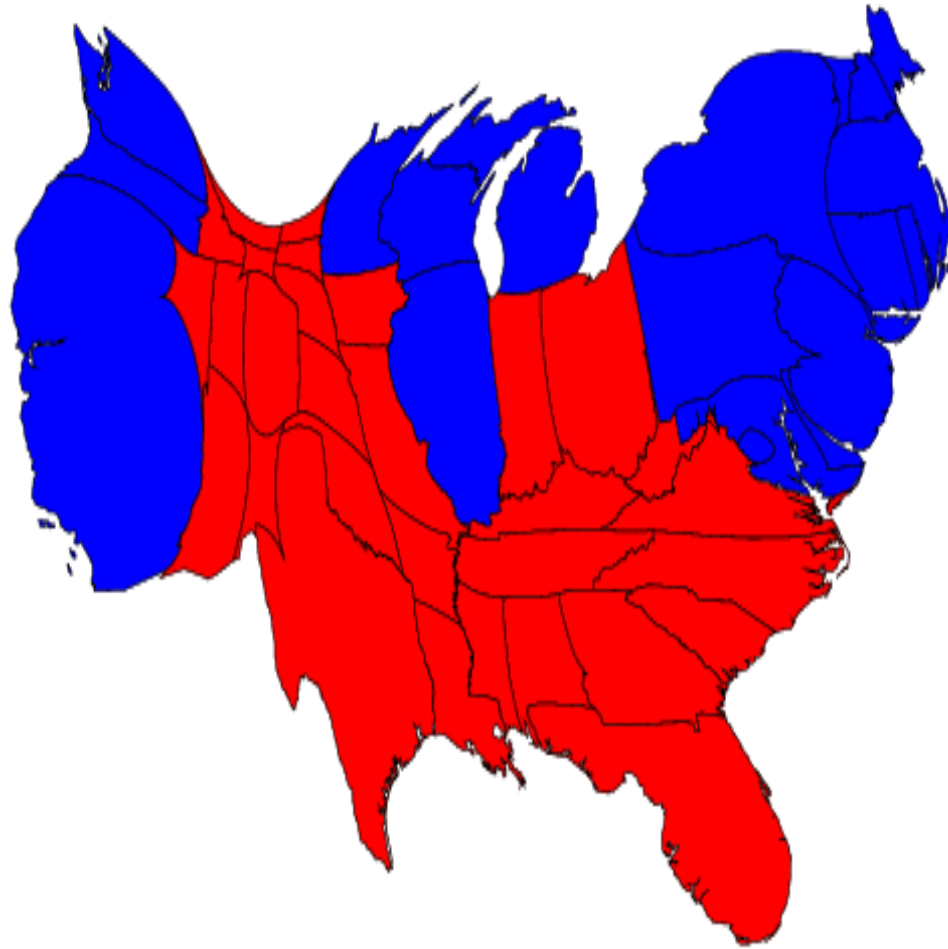
TABLE 5 *Malapportionment in Upper Chambers*

Country	MAL_{UC}	Federal	Country	MAL_{UC}	Federal
1 Argentina	0.4852	Yes	14 S. Africa	0.2261	Yes
2 Brazil	0.4039	Yes	15 Poland	0.2029	
3 Bolivia	0.3805		16 Japan	0.1224	
4 Dominican Rep.	0.3787		17 India	0.0747	Yes
5 USA	0.3642	Yes	18 Romania	0.0592	
6 Switzerland	0.3448	Yes	19 Austria	0.0301	Yes
7 Russia	0.3346	Yes	20 Italy	0.0292	
8 Venezuela	0.3265	Yes	21 Czech Rep.	0.0257	
9 Chile	0.3106		22 Colombia	0.0000	
10 Australia	0.2962	Yes	23 Paraguay	0.0000	
11 Spain	0.2853	Yes	24 Uruguay	0.0000	
12 Germany	0.2440	Yes	25 Netherlands	0.0000	
13 Mexico	0.2300	Yes			

An example from the US

- Twenty smallest states by population have a population of 31.6 million or 11% of total
 - WY, VT, Alaska, ND, SD, Del, Mont, RI, Haw, NH, Maine, ID, Neb, WV, NM, NV, Ut, Ark, Kan, Miss, Iowa
- Together they elect 40 of 100 senators who can block any law
- California's population is 33.9 million and elects 2 senators
- By comparison, blacks in US make up around 11% of population

US states weighted by population

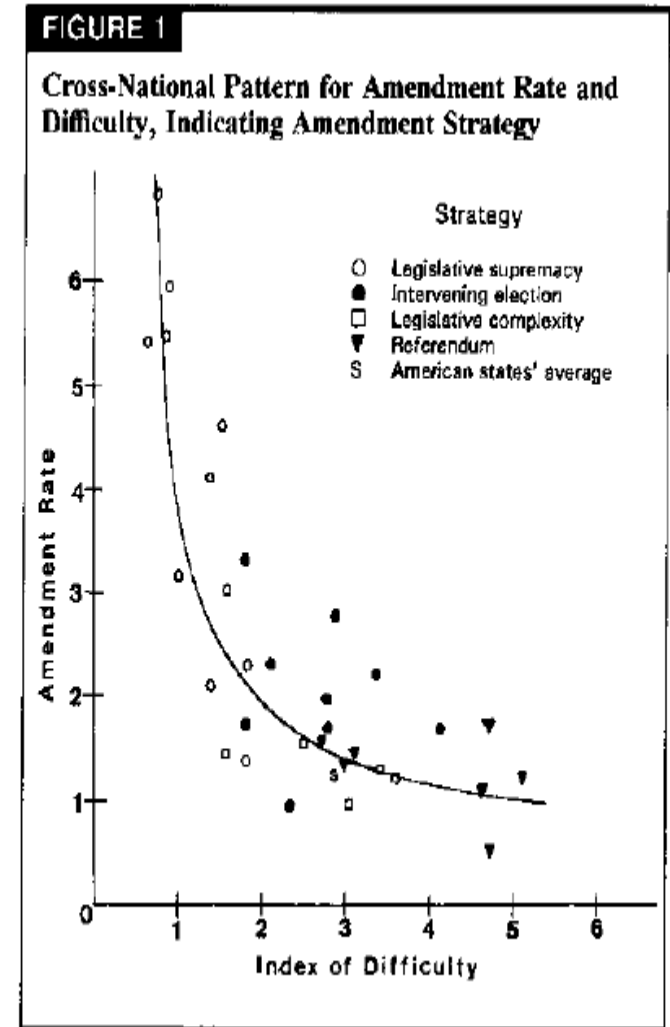


Where recommended?

- Usually associated with federalism
- Often weaker in unitary – seen as redundant
- Issues of fairness – if incongruent, then not one man, one vote
 - Can you justify extra representation for certain groups?
- Can poor nations afford the extra expense, conflict?
- May depend on status quo: good or bad
- Consider whether complicates separation of powers too much in presidentialism
- Consider whether particular groups need added representation – ethnicities, regions; how strong are their identities?

Constitutional amendment procedures

- Rigid = difficult to amend
- Flexible = easy to amend
- Types of procedures
 - Legislative supremacy
 - Size of majority: 3/5, 2/3, 3/4...
 - Referendum
 - Intervening election
 - Federal units – eg, 2/3 of regions



Some propositions about amendment

- More difficult to amend => lower amendment rate
- Longer constitution => higher amendment rate
- Very high or low amendment rates => constitutional replacement
- If low amendment rate and long duration => system finds other means of constitutional change (eg, judicial review)