



Virginia Governors School

Digital media & communications law



UNIT 1 Introduction

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Contemplation of Justice, US Supreme Court. By Matt Wade, Wikimedia Commons

Introductions



Klaatu, barada nikto

Bill Kovarik, RU professor, instructor for this class, seen here with friend Klaatu at the Seattle museum of science fiction.

Undergrad: VCU

Masters: Univ South Carolina

Worked for AP, daily newspapers in Charleston, Baltimore.

PhD University of Maryland 1994.

Post-doc study media law Oxford.

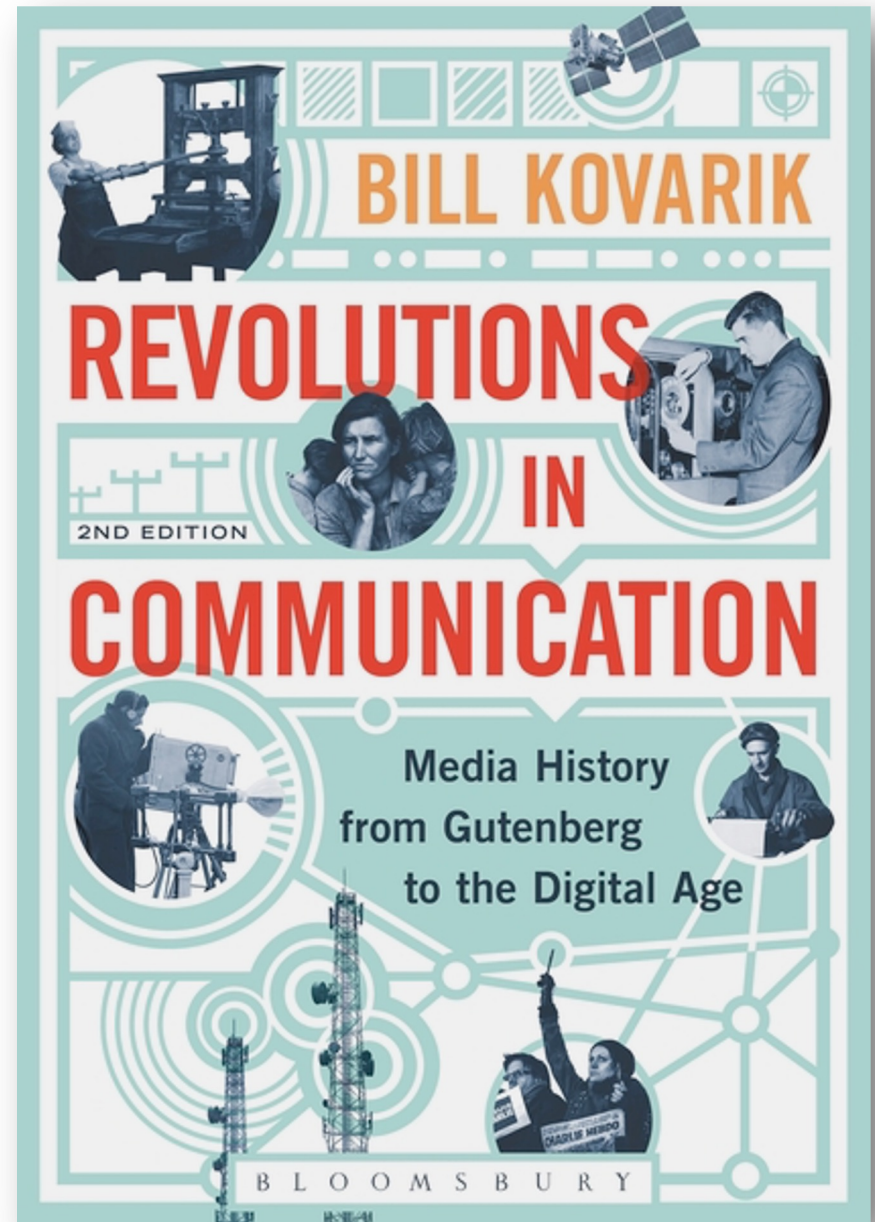
**Instructor's
textbook
2nd edition 2016**

Website:

www.revolutionsincommunication.com

Law website:

www.revolutionsincommunication.com/law





Class introductions

Roll call

- Where are you from?
- What is your career path?
- Which recent First Amendment cases do you think are important?

This short course covers ...

- Structure of Constitutional law
- The US First Amendment
- Prior restraint censorship
- Libel and Privacy
- Traditional vs digital media law
- Legal debate / moot court

And we only have a week!

A full Comm law course would cover...



1st Amendment
Constitutional law,
Libel, privacy, censorship
(content issues)

**Media
regulation**
advertising
content,
broadcasting
structure,
competition law

**Entertainment
law,** copyright,
business contracts
(structural issues)



Today's talk

US First Amendment

International standards of freedom

Structuring democracy

Principles of democracy

How lawsuits work

Distinguishing media law

And intro to prior restraint



US Constitution, 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.



Questions:

Religion is first and second. Why? Are these two different concepts?

Does “Congress shall make no law...” mean that states can make laws that abridge freedom? Why or why not?

Where did this language come from? And what did it influence?



Virginia Declaration of Rights

Freedom of speech and of the press; right peaceably to assemble, and to petition. *That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right ...*



Virginia Declaration of Rights Section 12 (also in modern Constitution)

... that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.



Declaration of rights of man and citizen

The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.



United Nations Declaration of Human Rights, Article 19

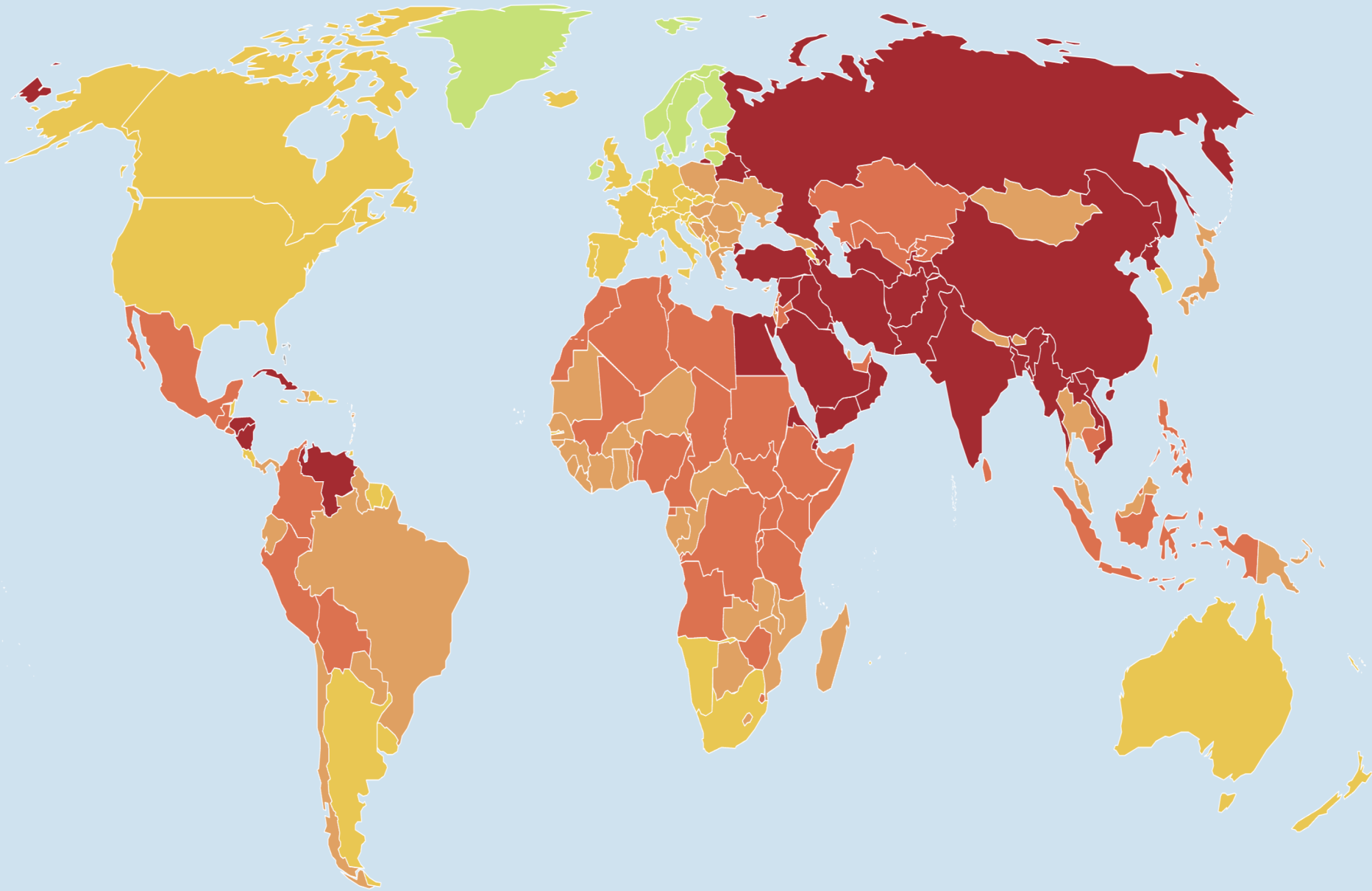
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.



*The European Convention for the
Protection of Human Rights and
Fundamental Freedoms, Article 10*

*Everyone has the right to freedom of
expression. This right shall include
freedom to hold opinions and to receive
and impart information and ideas
without interference by public authority
and regardless of frontiers...*

RSF.org World Press Freedom Index 2023





But wait ...

Russia: “*The freedom of mass communication shall be guaranteed. Censorship shall be banned...*”

This short class will focus on content rather than structural issues.

China: “*Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.*”



Let's just take a moment here ...

Are the governments of Russia & China democracies?

Why would authoritarians use the language of democracy?

And if so, why not others, like the government of Saudi Arabia?

Is it important to consider the people separately from their governments?



US is # 45 in press freedom

- President Biden -- improvements to government accountability and transparency.
- Many of the underlying, chronic issues remain unaddressed – including the disappearance of local news, the polarization of the media and the weakening of journalism and democracy caused by digital platforms and social networks.

Saudi Arabia is # 170 / 180

- No free media, political parties or unions
- Journalists and citizens routinely jailed and often executed without trial for any criticism
- Jamal Khashoggi assassination one of many
- Blasphemy, insulting religion, "inciting chaos", "jeopardizing national unity" and "undermining the image and reputation of the king and the state" are typical charges in secret Saudi courts.
- RSF calls Saudi Arabia a "predator of press freedom."

China is 179 / 180

- Hundreds of journalists imprisoned
- Repression of Hong Kong media
- Deaths of dissidents and journalists in prison: Kunchok Jinpa, Liu Xiaobo, a Nobel peace laureate, Yang Tongyan and others
- Secret trials and forced confessions
- Google, Apple, & satellite companies, forced to submit to state censorship
- RSF calls China a “predator of press freedom.”



Why is this important?

- Can't understand law in a vacuum
- The US is not always the best in terms of press freedom, but it's very far from the worst
- Americans ratify the spirit of the laws every day; the letter of the law is necessary but not enough to guarantee freedom.



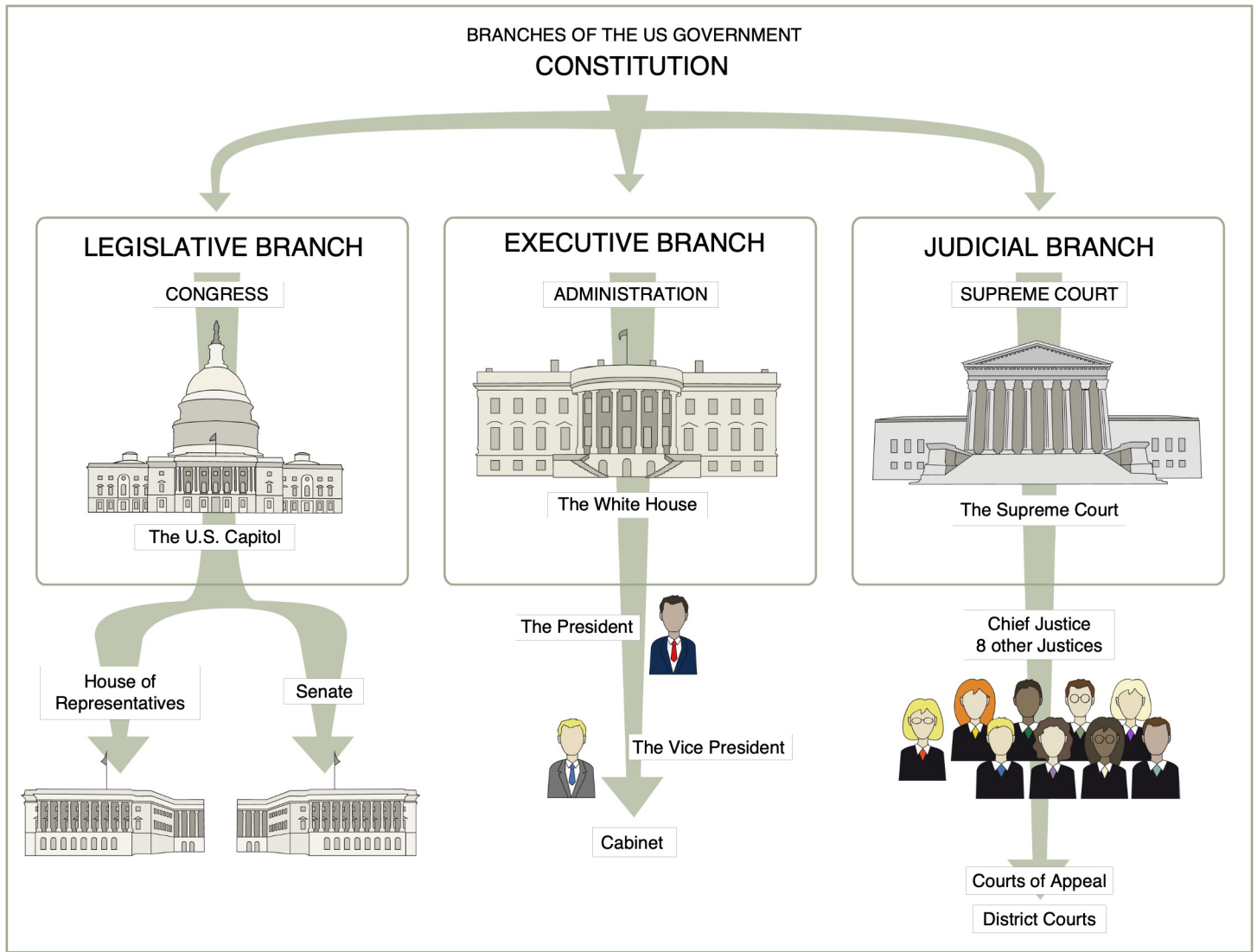
Structures of Democracy

The US, Europe, much of Asia & Africa, and most of Latin America is partly or completely free.

Freedom requires structure and compromise

How does that work?

Structure of US government



Sources of law

Three branches of government give us five sources of law:

- Constitutional
- Statutory (from Congress/ legislatures)
- Executive (from agencies like FCC)
- Judicial (Common law from courts)
 - Also Equity law (divorce, probate...)

Federal vs state systems

States have upper and lower division courts
(in Va, circuit vs district court)

Circuit courts handle large criminal and civil cases

District courts handle traffic, small claims, etc

State appeals courts lead to state supreme courts

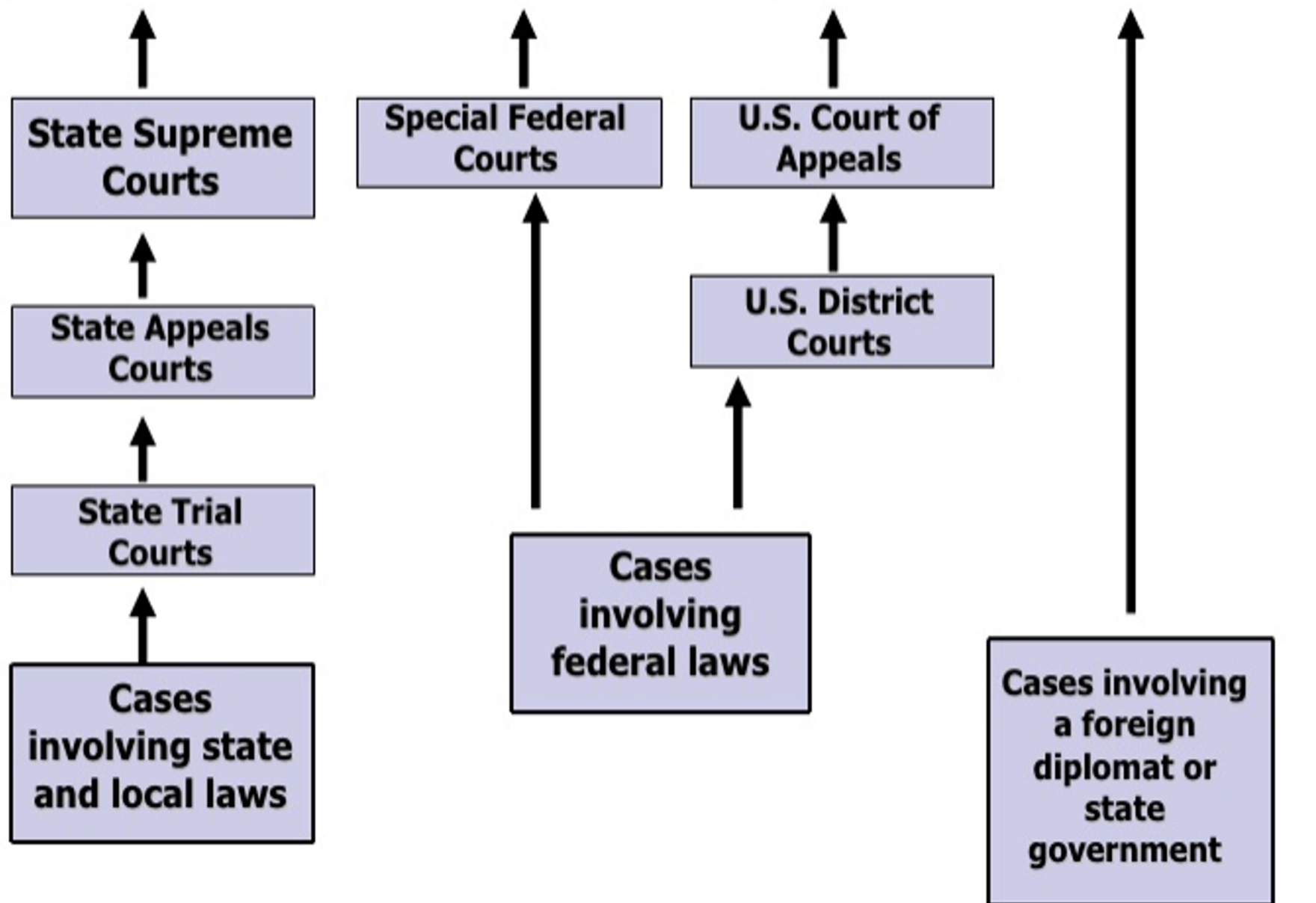
Federal courts – trial, appeals courts for federal laws

Federal courts also try cases with participants
from different states (diversity jurisdiction)

Federal verdicts may be appealed through federal
appeals courts and then to the US Supreme Court

The US Supreme Court also hears cases appeals
from state supreme courts

The United States Supreme Court



**United States
Supreme Court**

Guam

Puerto Rico

Virgin Islands

Federal Circuit

D.C.

Armed Forces

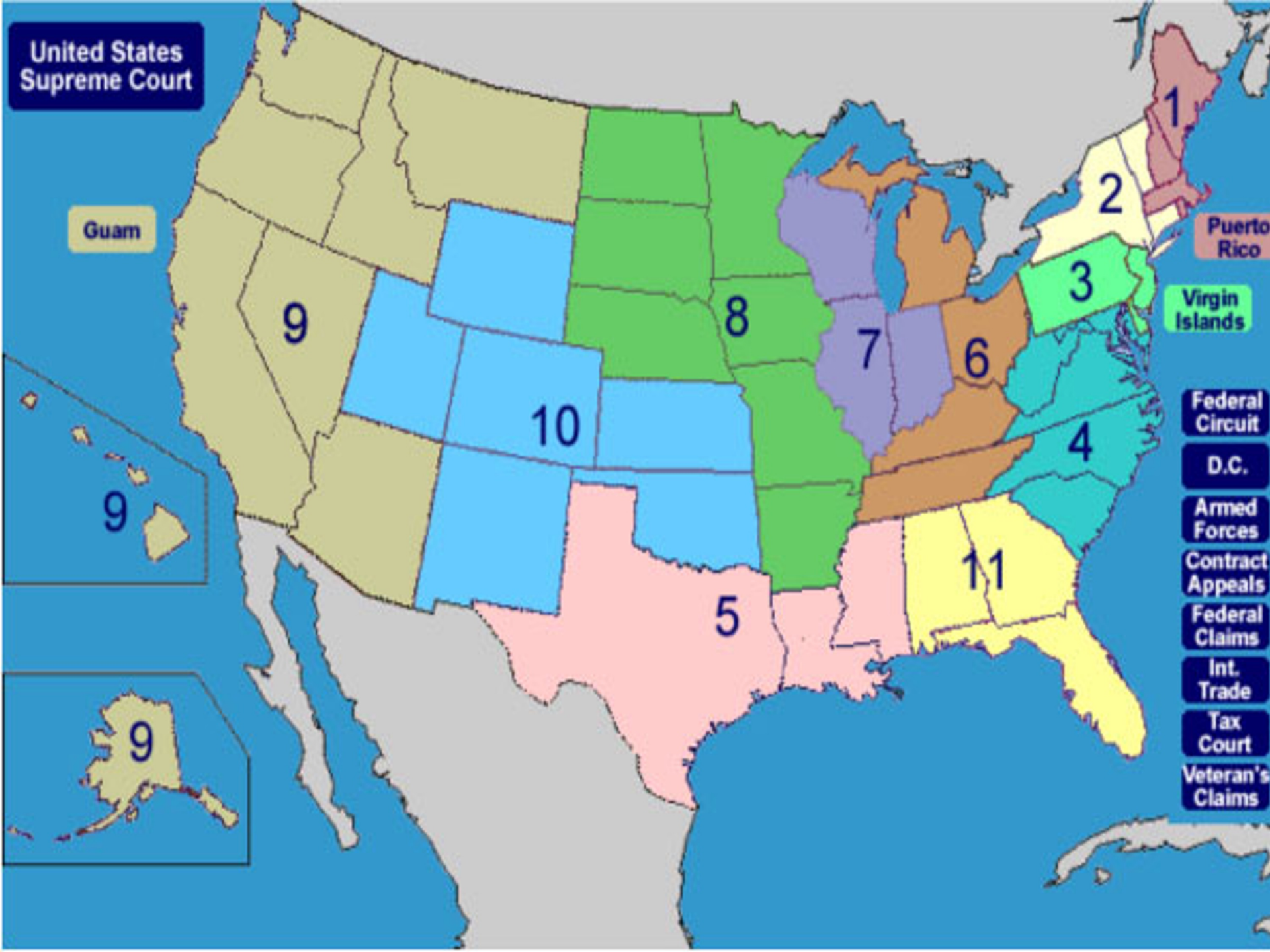
Contract Appeals

Federal Claims

Int. Trade

Tax Court

Veteran's Claims





Principles of Democracy

Behind the structures there are certain fundamental principles.

This is a very general introduction to principles, legal terms, concepts and doctrines.

You're probably familiar with many of them ...

Principles

- **Natural rights** – “Inalienable” rights we inherit at birth aren’t “given” by the government. Only be limited by Due Process
- **Popular Sovereignty** – Power derives from the consent of the governed.
- **Marketplace of ideas** -- Truth will always (or at least usually) win if allowed free and fair competition in the marketplace of ideas.

Principles (2)

- **Constitutionality** – This requires that a law is in harmony with the US Constitution.
- **Equal Justice under law** -- This is an ancient concept and one of the most important and hard-fought ideas in human history. The principle is that no one, not even a king — is above the law.
- **Due Process** of law -- Respect for individual rights during any legal procedure.

Structure of government

- **Separation of powers** – In the US, three branches of government.
- **Federal supremacy** – Federal regulations, laws or court decisions are more important than state or local laws.
- **Incorporation** – Bill of rights applied to state and local laws via 14th Amendment (reinforcing federal supremacy).
- **Common carrier / Public accommodations** – Via 14th Amendment, requires non-discrimination in most aspects of public life.

Legal doctrines

- **State Action** – Constitutional law applies mostly to government actions, not private actions. Ex: Yahoo v Prager.
- **Compelled speech** – The government cannot force orthodoxy on the people. Ex: WVa v Barnett
- **Preferred position** – Court decisions preferentially protect the First Amendment position in a case.
- **Content discrimination** – Laws that restrict specific content are more suspect than content-neutral laws and require more scrutiny

Content discrimination doctrine

- **Scrutiny** When courts review laws that curtail free speech, one of the first concerns is to determine the level of scrutiny (or **burden of proof test**)
 - **Content specific – strict scrutiny**
 - A law must a) be necessary; b) advance a compelling government interest; c) harm First Amendment rights as little as possible (least restrictive / not overly broad)
 - **Content neutral – intermediate scrutiny**
 - Law must a) be within power of gov't; b) advance a government interest; c) Unrelated to suppression of free speech; d) narrowly tailored not overly broad e) leave open alternative options for communication
 - **Routine regulation – rational basis review**



The course of a lawsuit

Let's follow a hypothetical case to get an idea of procedure and terminology



Ms Smith thinks that something Ms Jones has done is wrong or illegal.

She consults an attorney and files an initial complaint in the local circuit (superior) court. The complaint is served on Ms Jones by a deputy other court official.

Ms Jones consults a different attorney and files a response to Smith's initial complaint.



Lawsuit: Smith v Jones



The initial complaint is called Smith v Jones. It is filed in the office of the clerk of the circuit court and accepted on the docket.

Attorneys start discovery process; preliminary motions are filed (motion to dismiss, demurrer, change of venue)

Trial date is set; a jury is empaneled (voir dire)

Trial is held, judge instructs jury, evidence weighed, verdict given.
Smith wins

Lawsuit: Smith v Jones 2



Appeal: Jones sues Smith

Now the suit is called Jones v Smith

Appeals court reads briefs, hears oral arguments, Jones wins, appeals court remands case to lower court

But Smith appeals to the Supreme Court

Lawsuit: Smith v Jones 3



Another Appeal

Now the suit is called Smith v Jones again

The Supreme Court grants certiorari, reads the briefs, hears oral arguments, and later issues an opinion in the case.

Jones wins again. Smith has nowhere else to go.

There are several dissenting opinions issued by judges who think Smith should have won. But Smith v Jones is now an established precedent. The dissents may influence future opinions.



Distinguishing media law

- **Civil law** (not usually criminal)
- **Content issues** – Constitutional law
- **Structural issues** – Regs (FCC, FDA, FTC) and competition law (antitrust) (Justice Department)



Distinguishing media law

- Media law emerges from a large and complex historical tradition of the struggle for religious and political freedom.
- Tests applied in media law content cases give a strong "preferred position" to individual freedom of speech as protected by the First Amendment.
- Content-specific tests are subjected to a higher level of scrutiny than content neutral tests.

Distinguishing media law

- Content issues
 - Usually between a plaintiff and a respondent.
 - Usually involve Constitutional law and common law (precedent-setting cases).
- Prior restraint, libel, invasion of privacy, and obscenity are content issues tried in civil courts
- This short class will focus mainly on content rather than structural issues (copyright and competition laws.

Next: Prior restraint censorship

