

# Courts and the Judicial Process

## **I. Courts as public policy makers.**

**A. Activism as restraint, 1890-1930s**

**B. Activism as initiative, post-World War II**

## **II. Post-war changes in the legal landscape.**

**A. The law explosion**

**B. Growth in number of lawyers**

**C. Caseload growth in federal courts**

**D. Growth in number of courts and judges**

## **III. The new legalism.**

**A. Reinvention of court doctrines**

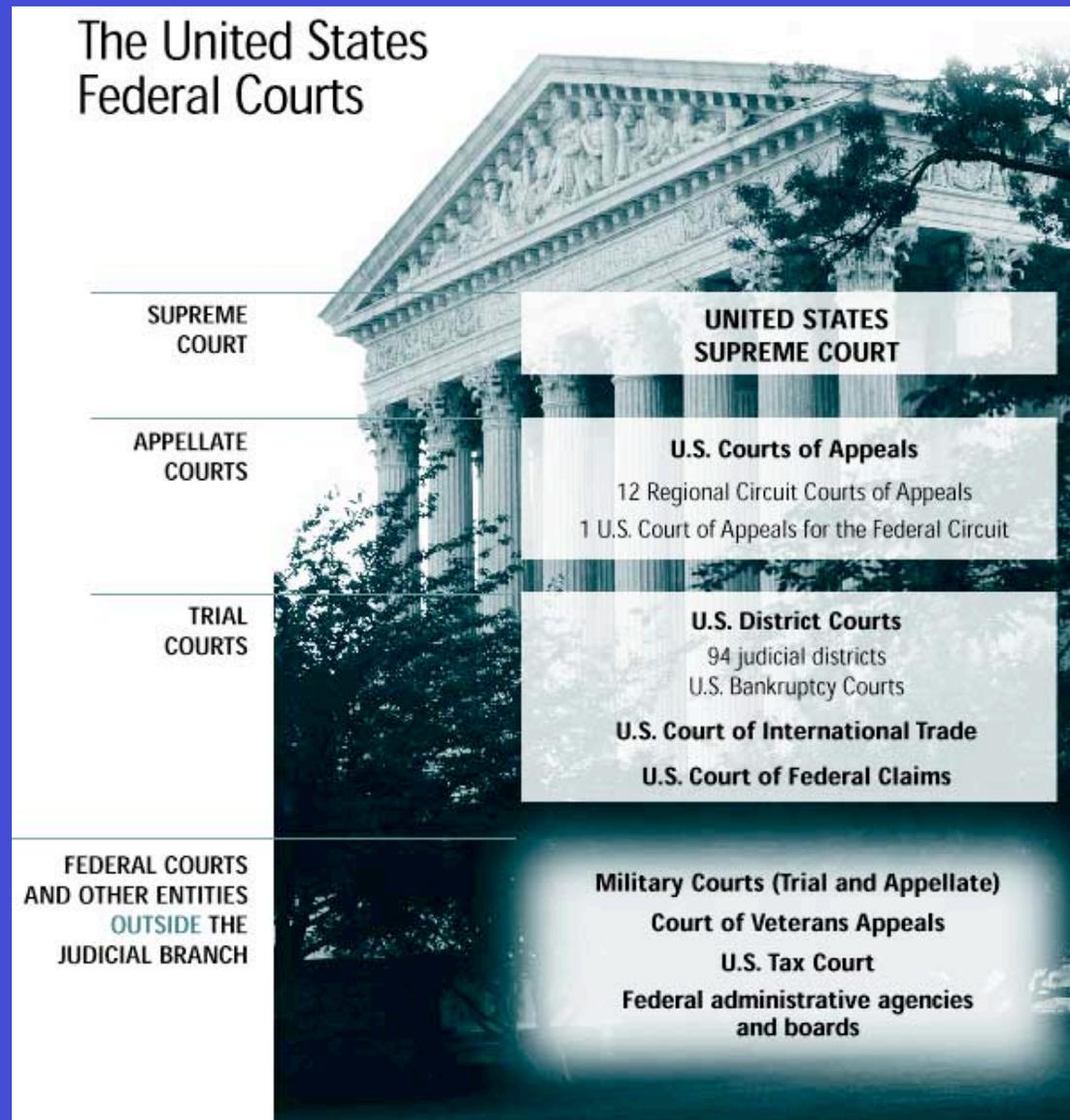
**B. Easier access to court for potential litigants**

**C. Courts' growing roles in public policy making**

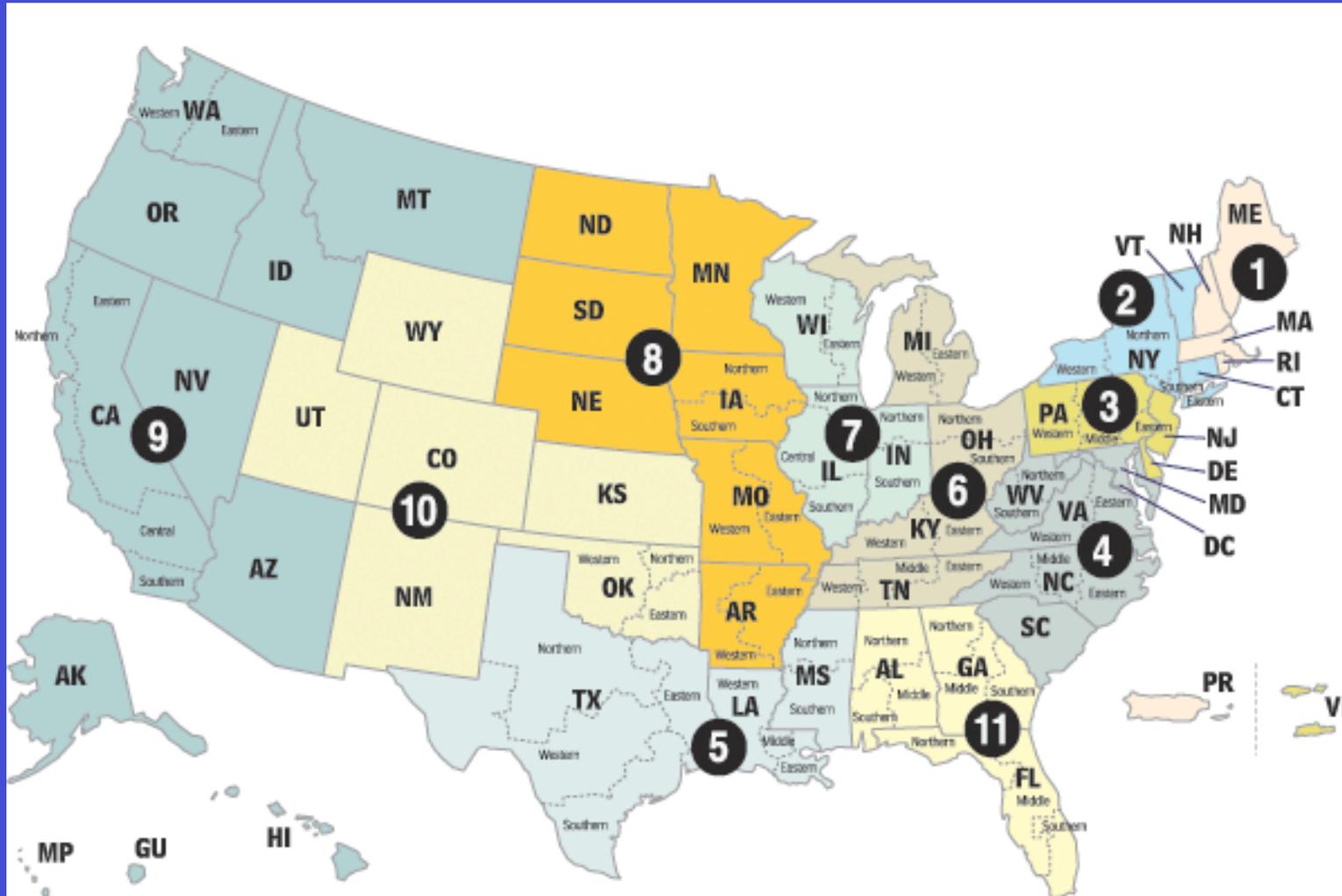
## **IV. Impacts and problems.**



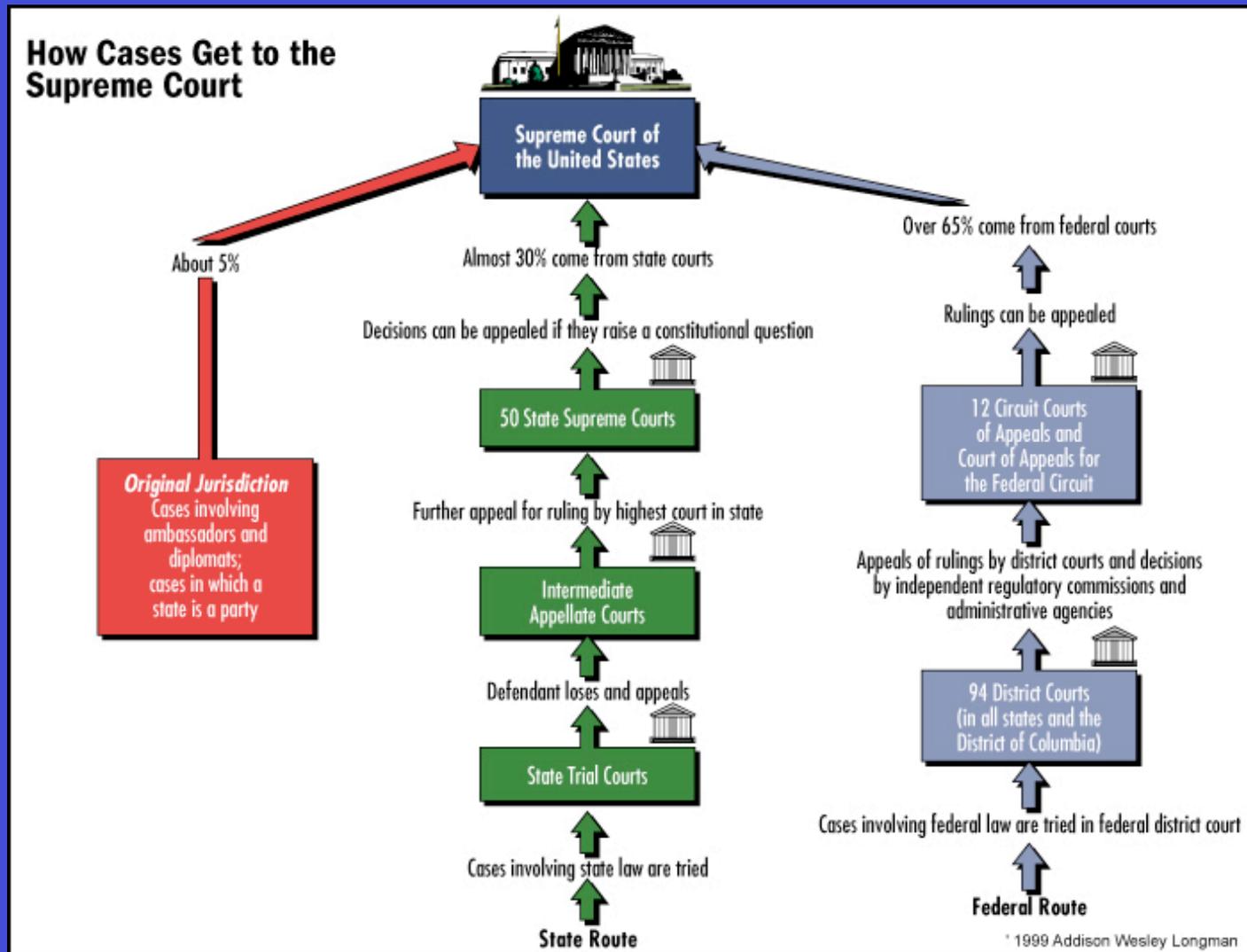
# The Federal Court Structure



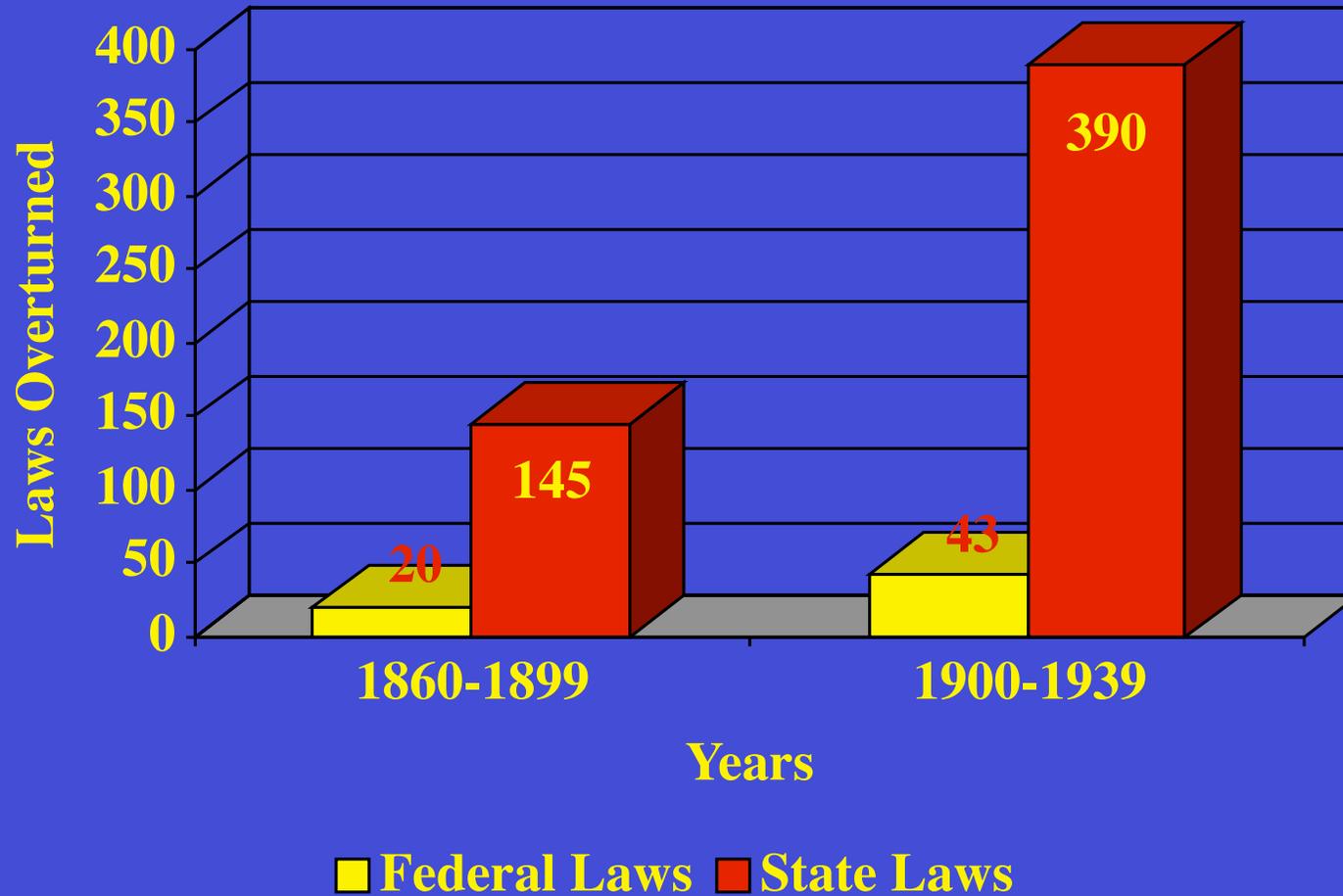
# The Federal District and Appeals Courts



# How Cases Get to the Supreme Court



# The Supreme Court Gets Active, 1900-1939

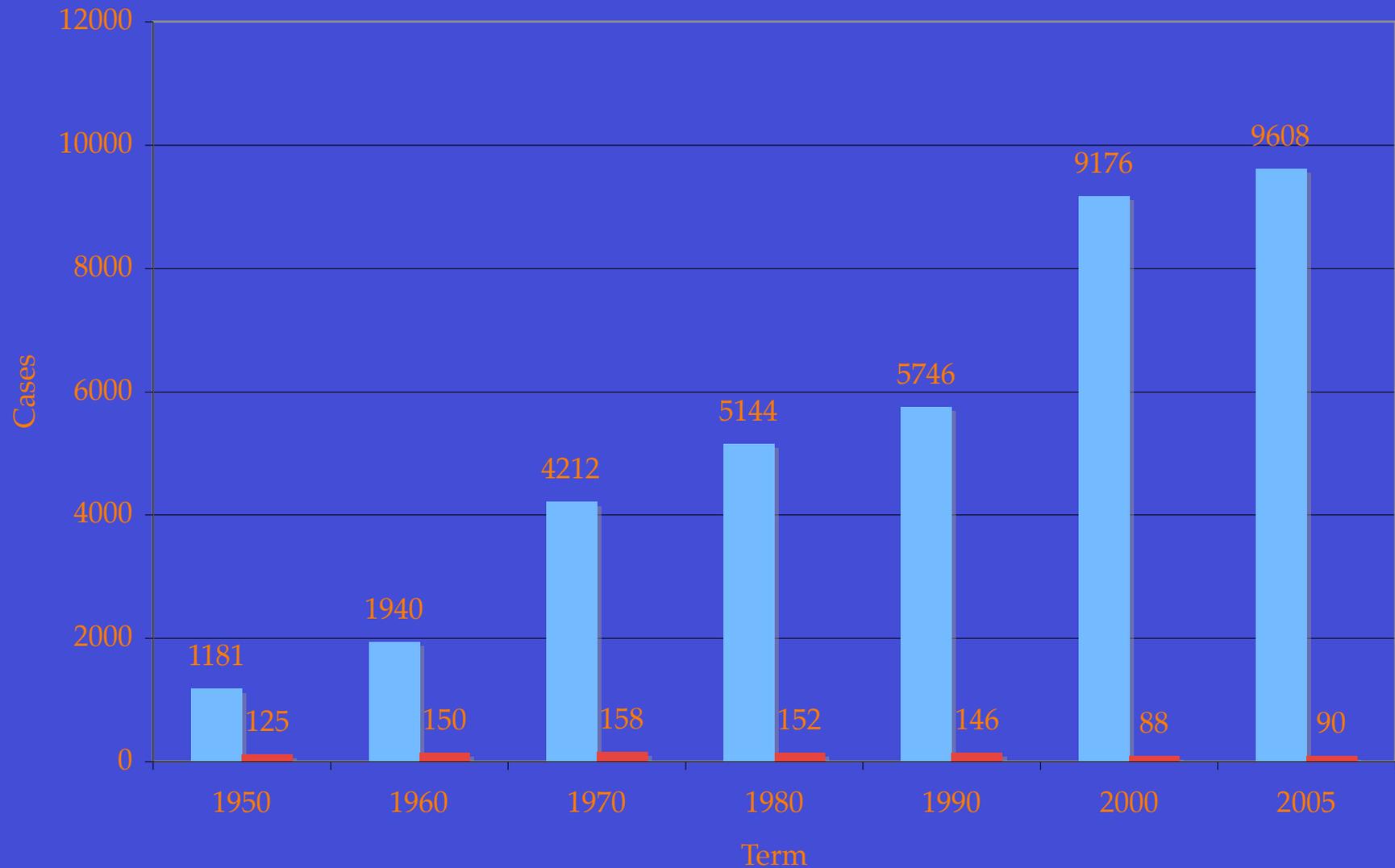


## Growth in Number of Lawyers After World War II

- **1940: 180,000 lawyers in a population of 132 million (Ratio: 1 lawyer for every 733 people)**
  - Compare to 1890; ratio was 1 lawyer for every 739 people.
- **GI Bill (1944)**
- **Growth in number of law students**
  - 1940: 37,000 law students
  - 2007: 149,000 law students
- **Changes in women's lives**
  - 1940: 690 women attending accredited law schools
  - 1980: 41,000 women in accredited law schools
  - 2007: 66,000 female law students (44% of total)
- **By 2007:**
  - Law schools producing 44,000 new lawyers each year
  - Number of lawyers exceeds 1,000,000
  - Lawyers per 100,000 people (1990):
    - U. S. :        281            England:        82
    - Germany: 111            Japan:         11



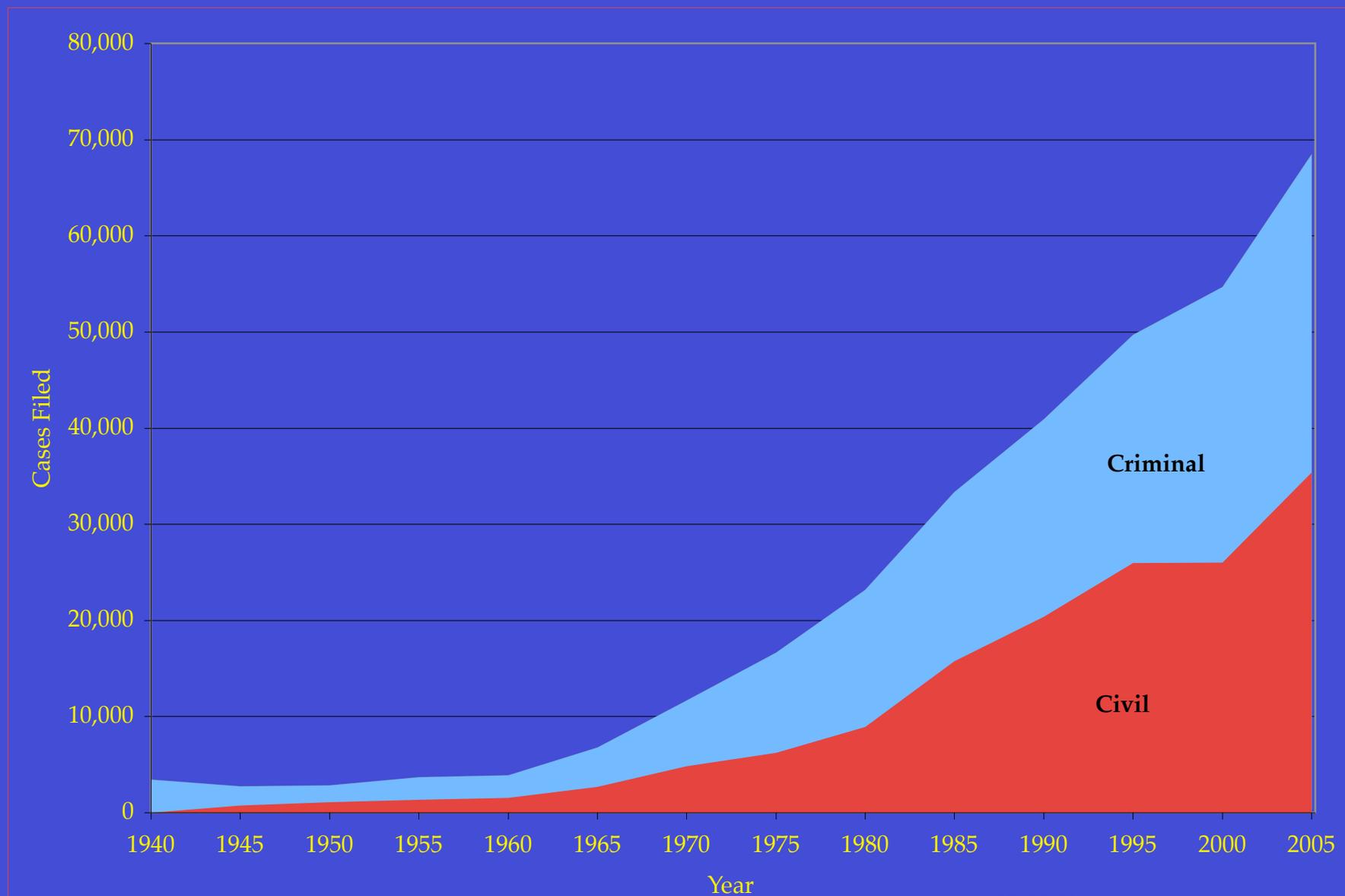
# The Supreme Court Caseload, 1950-2005



■ Cases Filed ■ Cases Argued

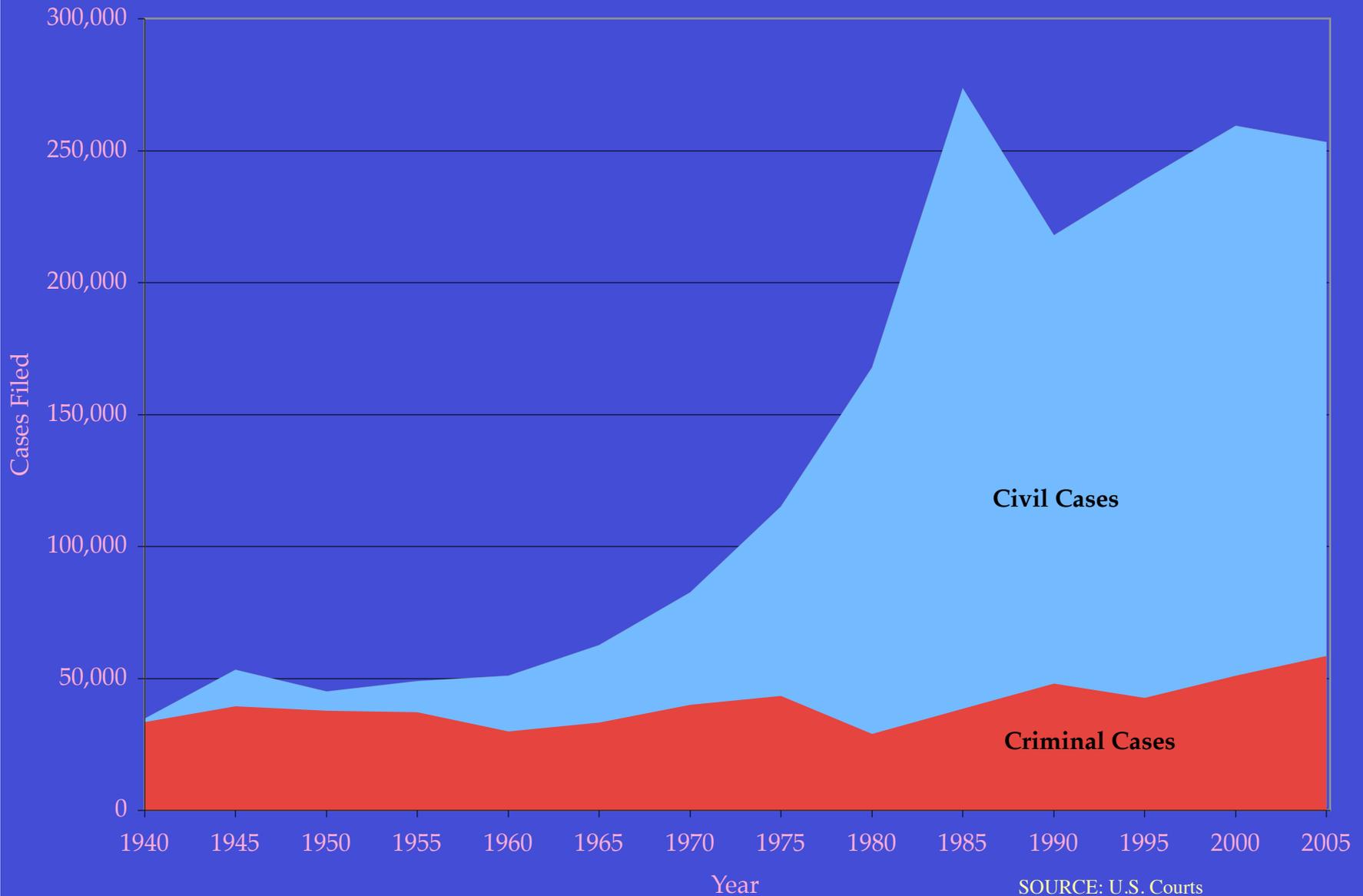
SOURCE: U.S. Courts  
(<http://www.uscourts.gov/caseloadstatistics.html>);  
Statistical Abstracts

# Appeals Court Cases Filed, 1940-2005



SOURCE: U.S. Courts  
(<http://www.uscourts.gov/caseloadstatistics.html>);  
Statistical Abstracts

# District Court Cases Filed, 1940-2005



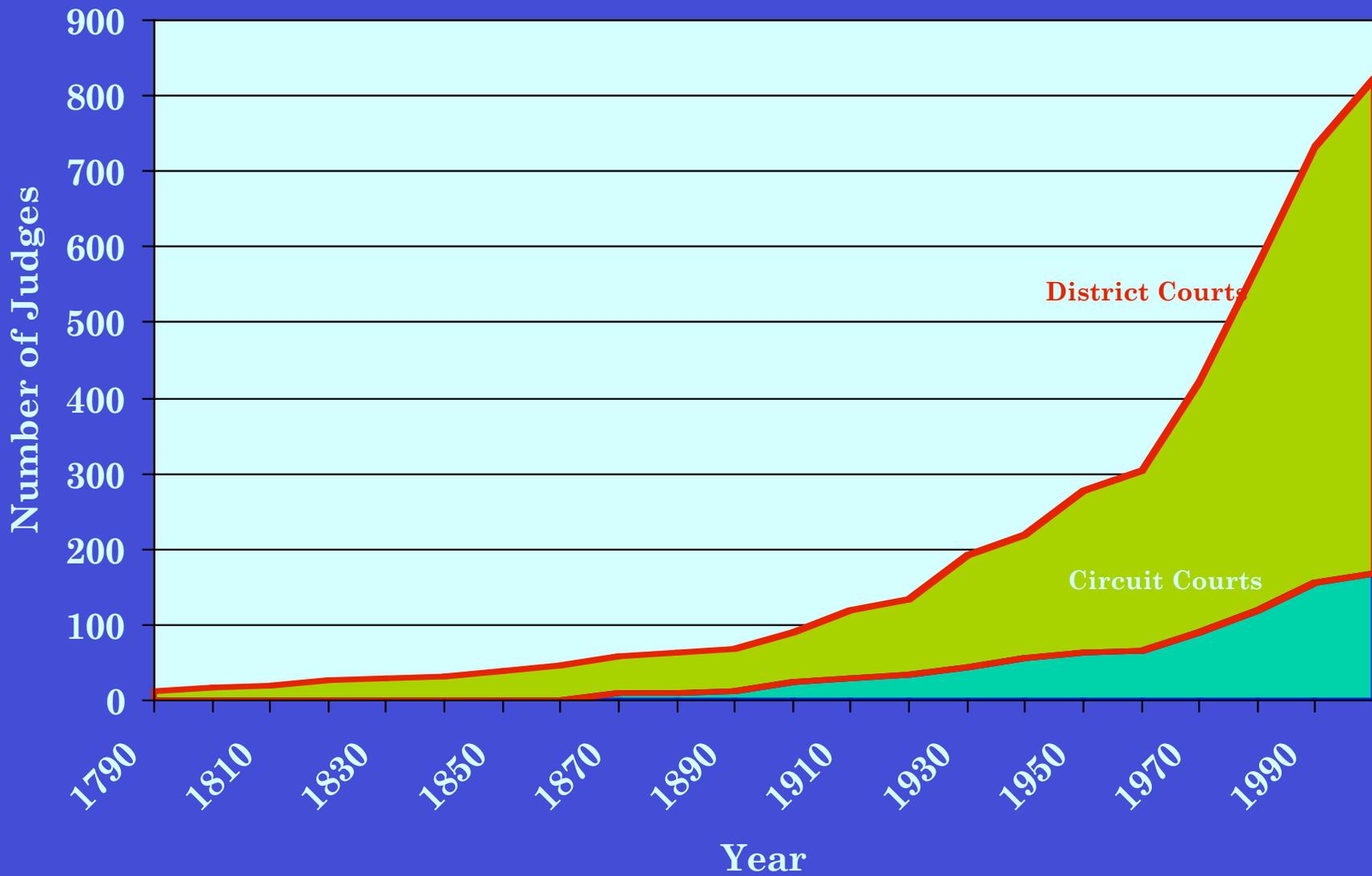
SOURCE: U.S. Courts  
(<http://www.uscourts.gov/caseloadstatistics.html>);  
Statistical Abstracts

## Why the growth in cases in federal court?

- Increase in crime is not the explanation
- Growing personal wealth permitted more people to hire lawyers and sue
- Change in the court doctrine of “justiciability”
- New legislation creating new rights, and new opportunities to sue for court protection of those rights.
  - Civil rights cases:
    - 1960: 200 cases
    - 1980: 25,341 cases



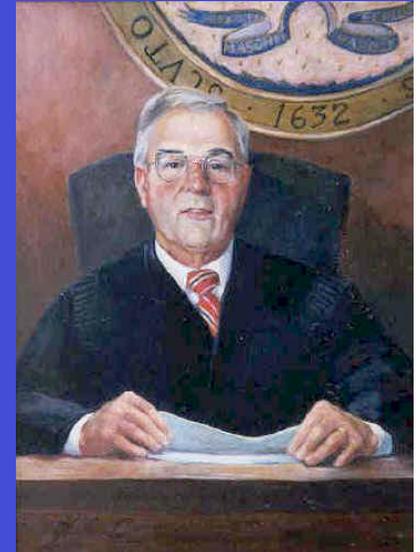
# Growth in Number of Federal Judges, 1790-2000



SOURCE: *Statistical Abstract of the United States; Historical Statistics of the United States*

# Changing Patterns of Judicial Selection

- **Senatorial Courtesy**
  - District Court judges chosen by senators of the president's party
  - Selection of appeals court judges rotated among senators of president's party
  - Confirmation was routine; Senate deferred to president's nominees
  
- **Centralized White House Selection**
  - President controls most selections with advice from the Office of Legal Counsel in the Justice Department
  - Growing partisan battles over confirmation



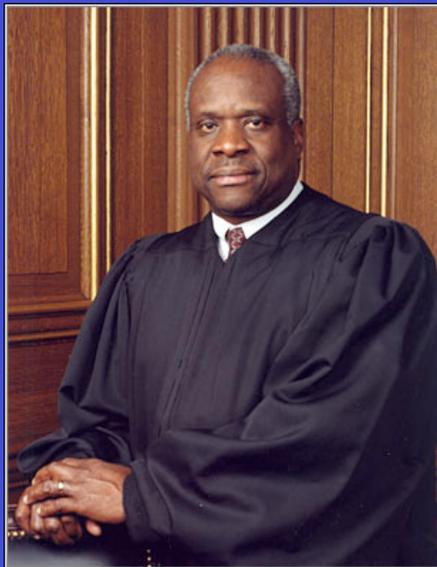
# Judicial Confirmation Battles



Abe Fortas, 1968



Robert Bork, 1987



Clarence Thomas, 1991



Bush Nominees, 2002



Harriet Miers, 2005

# Changing Backgrounds of Supreme Court Justices

## Of the 87 Justices appointed before 1950:

- 7 served in the Continental Congress
- 16 served in the House of Representatives
- 14 served in the Senate
- 27 served in the Cabinet
- 5 were state governors
- 1 had been president of the United States

## Changes after 1950:

- Last justice to have served in the House was Fred Vinson who died in 1953
- Last former Senator to serve on the Court was Hugo Black who retired in 1971
- Last member of a president's cabinet to serve on the Court was Tom Clark who retired in 1966
- Last justice to have been a governor was Earl Warren who retired in 1969.

*So, not since 1971 has there been a justice who was ever a member of Congress, a governor, or a cabinet secretary.*

# Supreme Court Membership, 1954



| <i>Justice</i>            | <i>Background</i>  |
|---------------------------|--|
| <i>Hugo Black</i>         | U.S. Senator   |
| <i>Harold H. Burton</i>   | State legislator; Mayor of Cleveland; U.S. Senator   |
| <i>Tom Clark</i>          | U.S. Attorney General  |
| <i>William O. Douglas</i> | Chairman, Securities and Exchange Commission   |
| <i>Felix Frankfurter</i>  | Professor, Harvard Law School; Assistant U.S. Attorney; Labor “trouble shooter” for Woodrow Wilson                               |
| <i>Robert Jackson</i>     | Counsel, IRS; Special Counsel, SEC; Assistant Attorney General; Solicitor General; U.S. Attorney General                         |
| <i>Sherman Minton</i>     | U.S. Senator   |
| <i>Stanley Reed</i>       | State legislator; Counsel to the Federal Farm Board; General Counsel, Reconstruction Finance Corporation; U.S. Solicitor General |
| <i>Earl Warren</i>        | Governor, California; 1948 Republican candidate for Vice President; State attorney general and prosecutor                        |

Source: Congressional Quarterly, *Guide to the U.S. Supreme Court* (Washington, DC: Congressional Quarterly, Inc., 1979)

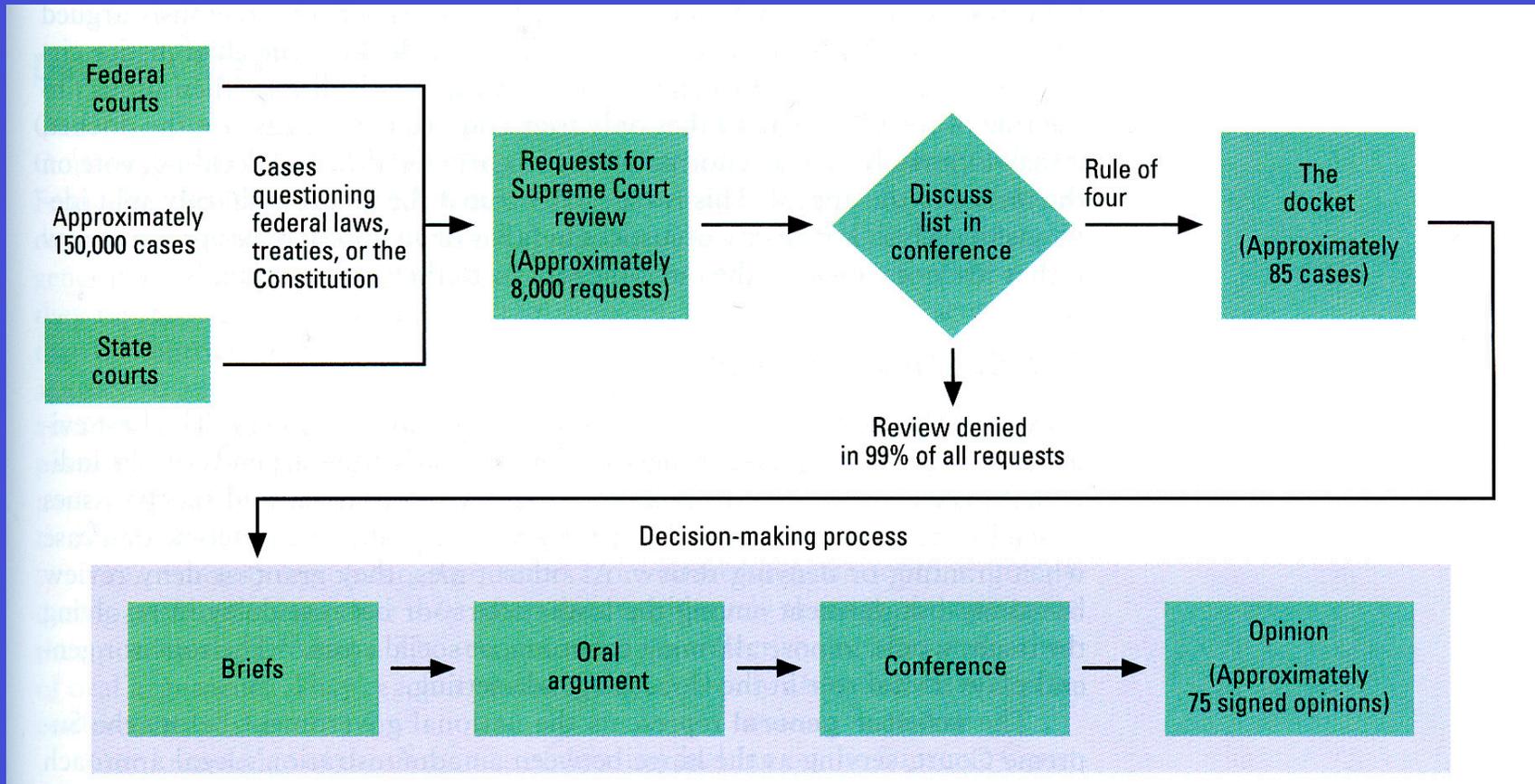
# Supreme Court Membership, 2008

| <i>Justice</i>             | <i>Background</i>  |
|----------------------------|--|
| <i>Stephen Breyer</i>      | Federal judge, U.S. Court of Appeals; congressional staff member   |
| <i>Ruth Bader Ginsburg</i> | Federal judge, U.S. Court of Appeals   |
| <i>Anthony Kennedy</i>     | Federal judge, U.S. Court of Appeals   |
| <i>Samuel Alito</i>        | Federal judge, U.S. Court of Appeals   |
| <i>John Roberts</i>        | Federal judge, U.S. Court of Appeals; Associate Counsel to Ronald Reagan   |
| <i>Antonin Scalia</i>      | Federal judge, U.S. Court of Appeals; Chair, Administrative Conference of U.S.; Office of Legal Counsel, U.S. Justice Department |
| <i>David Souter</i>        | Federal judge, U.S. Court of Appeals; Attorney General of New Hampshire  |
| <i>John P. Stevens</i>     | Federal judge, U.S. Court of Appeals   |
| <i>Clarence Thomas</i>     | Federal judge, U.S. Court of Appeals; Assistant Secretary, U.S. Department of Education; Chair, EEOC                             |

SOURCE: *Congressional Quarterly Weekly Reports*.



## Supreme Court Decision Making

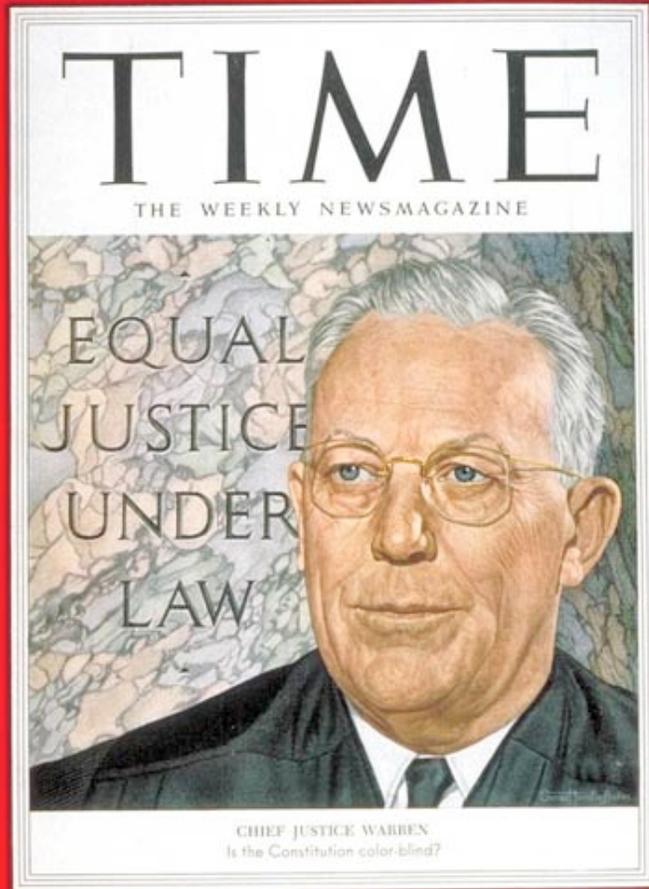


SOURCE: Kenneth Janda et al., *The Challenge of Democracy* (Houghton Mifflin, 2008), p. 435.

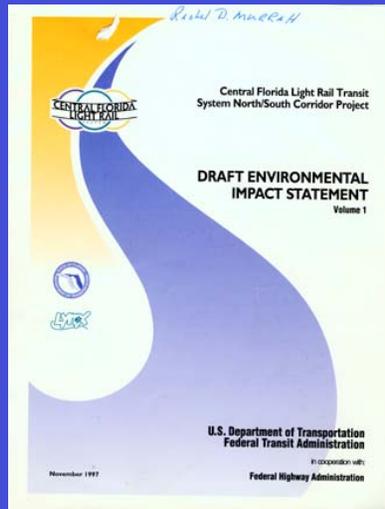
# Traditional Limits on Access to Federal Courts

- Courts would only hear genuine cases in law and equity (no hypotheticals or advisory opinions)
  - With litigants who had standing to sue
  - On matters that clearly fell within a court's jurisdiction
  - Where courts could provide genuine remedies (justiciability)
- Courts would not hear cases that were moot
- Courts would not deal with “political questions”
- Federal courts would not hear cases involving state law that had not yet been resolved in state courts (“ripeness”)

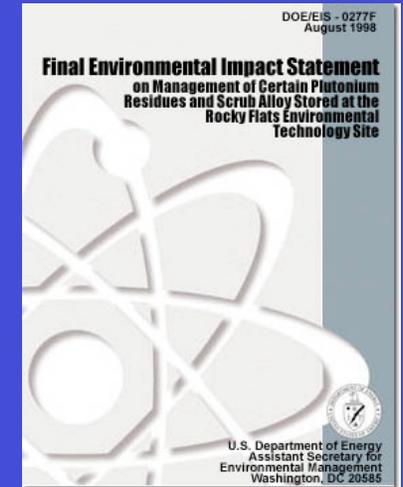
# The Warren Court



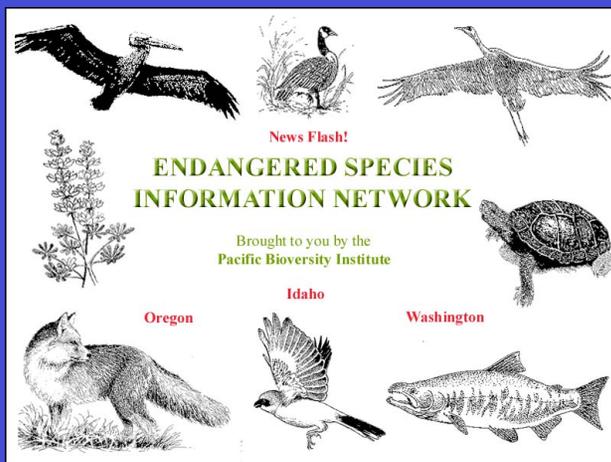
# Courts and Environmental Policy



- **National Environmental Policy Act (1969)**
  - Environmental Impact Statements



- **Endangered Species Act (1973)**



## Courts as Policy Makers: Some Concerns

- Court decisions often contravene public opinion.
- Policy making by courts raises questions about accountability and responsibility.
- The expanding court role in policy making contributes to irresponsibility among elected officials.
- Courts provide little basis or support for collective action.
- Judicial policy making diminishes the energy that goes into popular mobilization.
- Policies grow more complex, but most judges are generalists not specialists.