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RECHT BERATUNG WEITERBILDUNG

Introduction to US business law

Sources of Law/US Constitution

FS 2024

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Repetition last class (I)

- > Introduction
 - > Why US business law
 - > US history
 - > Independence
 - > Confederation – Federation
 - > Enlargement (south, west)
 - > Differences south – north
 - > Civil war (1861) preserve the nation, slavery
 - > The south lost
 - > The rise of the USA
-

Repetition last class (II)

- > WWI
 - > Black Thursday 24 October 1929
 - > WWII (Pearl Harbour)
 - > End of the war
 - > Europe/Japan
 - > USA today
 - > Famous US Presidents
 - > USA and Switzerland
-

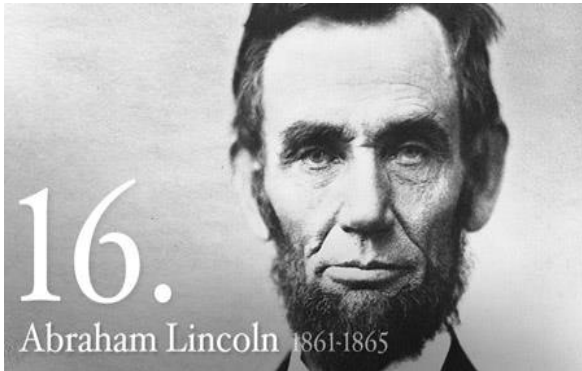
Famous US Presidents (I)

- > George Washington (1)
- > Thomas Jefferson (3)
- > Abraham Lincoln (16)
- > Franklin Delano Roosevelt (32)
- > John F. Kennedy (35)
- > Ronald Reagan ? (40)
- > Bill Clinton ? (42)
- > Barak Obama ? (44)
- > Donald Trump ? (45)



apotheosis of George Washington (rotunda)

Famous US Presidents (II)



Abraham Lincoln



Famous US Presidents (III)

Gettysburgh Address

„Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation, so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we can not dedicate...we can not consecrate...we can not hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.“

Short video on the history of the USA (comic based on gun control supporters view!)

<https://www.youtube.com/watch?v=IGYFRzf2Xww>

Two Sister Republics – USA/CH (I)

- > USA and Switzerland
- > Confederation
 - > Mutual influence
- > Federation
 - > Mutual influence*
 - > John Adams (esp. Cantons in CH are not pure democracies as everywhere)
 - > James Madison (CH confederation too weak)
- > Calvin – democratic church, natural law
- > Swiss settlements (new Berne, new Glarus, etc.)
- > Albert Gallatin – financial secretary (father of the Dollar)
- > General Sutter (California), Frank Buchser (painter)
- P. Widmer, Der Einfluss der Schweiz auf die Amerikanische Verfassung von 1787 in
Droishammer, p. 94ff.

Two Sister Republics – USA/CH (II)

- > Emigration waves also out of Switzerland (1840)
 - > Communities paid to make them leave
- > Alabama affaire – Geneva settlement (USA/British) – UNO
- > About 1 Mio. US-citizens with Swiss background today
- > Famous Americans with Swiss roots:
 - > Chevrolet, Ammann, Yul Brynner, Warren Burger, Einstein, Eisenhower, Bobby Fischer, Rickenbacher, Tommy Hilfiger, Hoover, Cyndi Lauper, Bob Lutz, Michelle Pfeiffer, Ben Roethlisberger, Meryl Streep, Zellweger, Sen. Portman, Karl Bürkli etc.



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1. Sources of Law

Sources of law

1. US Constitution (Art. VI) and the laws and treaties adopted there upon
„Supreme law of the land“
 2. State law (constitution and legislation)
 3. Municipal law
 4. Common law
as long as not inconsistent with US Constitution
or statutory law
-

Common law

- > Common law is both a set of legal rules and system of analysis
 - > Origin: Medieval English royal courts
 - > A basket of principles to resolve disputes
 - > From natural law, logic, customs, previous decisions, statute (by the courts)
 - > Previous cases added to common law
 - > Precedents binding for similar cases
 - > Try to „distinguish“!
 - > „Judge made law“ – judges are highly regarded
-

Americanization of common law

- > Most of the states have common law tradition
 - > Although differing from each other
 - > Private law = state law
 - > Only end of 19th century started to harmonize
 - > process not yet finalized
 - > Common law was „Americanized“
 - > Dynamic rather than static
 - > Corresponding to the developments in society and economy
 - > Discrimination (slavery etc.)
 - > Statutory law = expansion of federal regulations (Constitution!)
-

Case: Pierson v. Post

- > 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)
(http://en.wikipedia.org/wiki/Pierson_v._Post)

 - > Ruling
 - > No precedent
 - > Are there general principles (ancient writers like Justinian, Grotius, Puffendorf, etc.)
 - > Court defined common law principle
 - > Here: chase was not sufficient
 - > Pierson did not have to pay damages
-



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2. Declaration of Independence

Declaration of Independence

- > „American Revolution“
 - > 1776 Declaration of Independence (Thomas Jefferson)
 - > Creation of a Confederation (Swiss model)
 - > justified the independence of the United States by listing colonial grievances against King George III, and by asserting certain natural and legal rights, including a right of revolution.
 - > considered to be a major statement on human rights, particularly 2. sentence:
 - > “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”.
 - > This has been called "one of the best-known sentences in the English language"
-

Declaration of Independence (1776) (I)



In Congress, July 4, 1776, the unanimous Declaration of the thirteen united States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[...]

Link to the full transcript:

<https://www.archives.gov/founding-docs/declaration-transcript>

Signing Declaration of Independence



Philadelphia





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3. Confederation

First «Constitution»

- > Articles of Confederation
 - > agreement among the 13 founding states
 - > a confederation of sovereign states
 - > the weak government created by the Articles became a matter of concern
 - > On March 4, 1789, the Articles were replaced with the U.S. Constitution



Articles of Confederation (I)

- > Division of power: Under the Articles, the states retained sovereignty over all governmental functions not specifically relinquished to the national government.
 - > The individual articles set the rules for current and future operations of the United States government. It was made capable of making war and peace, negotiating diplomatic and commercial agreements with foreign countries, and deciding disputes between the states, including their additional and contested western territories.
 - > Article XIII stipulated that "their provisions shall be inviolably observed by every state" and "the Union shall be perpetual".
 - > John Dickinson and Benjamin Franklin's handwritten drafts of the Articles of Confederation are housed at the National Archives in Washington, DC.
-

Articles of Confederation (II)

- > The Articles were created by delegates from the states in the Second Continental Congress out of a need to have "a plan of confederacy for securing the freedom, sovereignty, and independence of the United States."
- > After the war, nationalists, especially those who had been active in the Continental Army, complained that the Articles were too weak for an effective government.
- > There were no (real) president, no executive agencies, no judiciary and no tax base. The absence of a tax base meant that there was no way to pay off state and national debts from the war years except by requesting money from the states, which seldom arrived.

Articles of Confederation (III)

- > The following list contains short summaries of each of the 13 articles.
- > Establishes the name of the confederation with these words: "The Style of this confederacy shall be 'The United States of America.'"
- > Asserts the sovereignty of each state, except for the specific powers delegated to the confederation government, i.e. "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated."
- > Not being sovereign, it does not call the United States of America a "nation" or "government," but instead says, "The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."

Articles of Confederation (IV)

- > But to instill a national feeling, "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union," it establishes equal treatment and freedom of movement for the free inhabitants of each state to pass unhindered between the states, excluding "paupers, vagabonds, and fugitives from justice." All these people are entitled to equal rights established by the state into which he travels. If a crime is committed in one state and the perpetrator flees to another state, he will be extradited to and tried in the state in which the crime was committed.
- > Allocates one vote in the Congress of the Confederation (the "United States in Congress Assembled") to each state, which is entitled to a delegation of between two and seven members. Members of Congress are appointed by state legislatures. Also, individuals may not serve more than three out of any six years.

Articles of Confederation (V)

- > Only the central government is allowed to conduct foreign political or commercial relations and to declare war. No state or official may accept foreign gifts or titles, and granting any title of nobility is forbidden to all. States are restrained from forming sub-national groups. No state may tax or interfere with treaty stipulations already proposed. No state may engage in war, without permission of Congress, unless invaded or that is imminent on the frontier; no state may maintain a peace-time standing army or navy, unless infested by pirates, but every State is required to keep ready, a well-regulated (meaning well trained), disciplined, and equipped militia, with sufficient public stores of a due number of field pieces, tents, a proper quantity of arms, ammunition and camp equipage.
- > Whenever an army is raised for common defense, colonels and military ranks below colonel will be named by the state legislatures.
- > Expenditures by the United States of America will be paid by funds raised by state legislatures, and apportioned to the states based on the real property values of each.

Articles of Confederation (VI)

- > Defines the sole and exclusive right and power of the United States in Congress assembled to determine peace and war; to exchange ambassadors; to enter into treaties and alliances, with some provisos; to establish rules for deciding all cases of captures or prizes on land or water; to grant letters of marque and reprisal (documents authorizing privateers) in times of peace; to appoint courts for the trial of pirates and crimes committed on the high seas; to establish courts for appeals in all cases of captures, but no member of Congress may be appointed a judge; to set weights and measures (including coins), and for Congress to serve as a final court for disputes between states.
- > "The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite."

Articles of Confederation (VII)

- > If "Canada" (as the British-held [Province of Quebec](#) was also known) accedes to this confederation, it will be admitted.^[13]
- > Reaffirms that the Confederation accepts war debt incurred by Congress before the existence of the Articles.
- > Declares that the Articles are perpetual, and can only be altered by approval of Congress with ratification by all the state legislatures.

Articles of Confederation (VIII)

- > On January 21, 1786, the Virginia Legislature, following [James Madison's](#) recommendation, invited all the states to send delegates to Annapolis, Maryland to discuss ways to reduce interstate conflict. At what came to be known as the [Annapolis Convention](#), the few state delegates in attendance endorsed a motion that called for all states to meet in [Philadelphia](#) in May 1787 to discuss ways to improve the Articles of Confederation in a "Grand Convention."
- > Although the states' representatives to the [Constitutional Convention](#) in Philadelphia were only authorized to amend the Articles, the representatives held secret, closed-door sessions and wrote a new constitution. The new Constitution gave much more power to the central government, but characterization of the result is disputed. The general goal of the authors was to get close to a [republic](#) as defined by the philosophers of the [Age of Enlightenment](#), while trying to address the many difficulties of the interstate relationships.

Video - circumstances



<http://www.youtube.com/watch?v=J5NosqRkq3s>



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4. Federal Constitution of 1789

We the People

of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article 1

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years Residence in the United States, and who, when elected, shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and chosen Electors shall be chosen every second Year, and each State shall have at least one Representative, and each Elector shall be made the Elector of a certain Number of Representatives, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and including Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress, and thereafter every tenth Year, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and each Elector shall be made the Elector of a certain Number of Representatives, which shall not exceed three.

Representatives and chosen Electors shall be chosen every second Year, and each State shall have at least one Representative, and each Elector shall be made the Elector of a certain Number of Representatives, which shall not exceed three.

When vacancies happen in the Representation from any State, the Electors in that State shall fill the Vacancies by electing new Representatives.

Section 3. The Electors in each State shall have one Vote.

Section 4. Immediately after they shall be assembled in Congress of the first Meeting, they shall be divided into equal Lots, and the Electors in each State shall have one Vote.

Section 5. The Electors in each State shall have one Vote.

Section 6. The Electors in each State shall have one Vote.

Section 7. The Electors in each State shall have one Vote.

Section 8. The Electors in each State shall have one Vote.

Section 9. The Electors in each State shall have one Vote.

Section 10. The Electors in each State shall have one Vote.

Section 11. The Electors in each State shall have one Vote.

Section 12. The Electors in each State shall have one Vote.

Section 13. The Electors in each State shall have one Vote.

Section 14. The Electors in each State shall have one Vote.

Section 15. The Electors in each State shall have one Vote.

Section 16. The Electors in each State shall have one Vote.

Section 17. The Electors in each State shall have one Vote.

Section 18. The Electors in each State shall have one Vote.

Section 19. The Electors in each State shall have one Vote.

Section 20. The Electors in each State shall have one Vote.

Section 21. The Electors in each State shall have one Vote.

Adoption of the new US Constitution

- > The US Constitution was written in 1787 during the Philadelphia Convention. After ratification in eleven states, in 1789 its elected officers of government assembled in New York City, replacing the earlier 1781 Articles of Confederation
- > Following its establishment, the original Constitution has been amended twenty-seven times. The meaning of the Constitution is interpreted and extended by judicial review in the federal courts.
- > Two alternative plans were developed in Convention. The nationalist majority, soon to be called “Federalists”, put forth the Virginia Plan, a consolidated government based on proportional representation among the states by population. The “old patriots”, later called “Anti-Federalists”, advocated the New Jersey Plan, a purely federal proposal, based on providing each state with equal representation. The Connecticut Compromise allowed for both plans to work together.
- > ~~The Federalist Papers provided background and justification for the~~
Constitution.

Confederation - Federation

- > Confederation was not enough
 - > States were competing against each other
 - > No common goals, currency, foreign policy, etc
 - > Reunion to improve Confederation
 - > But instead created Federation
 - > a new model of governance
 - > Based on European sources and experiences
 - > U.a. Montesquieu, Lock, etc.
 - > with own American inventions
 - > F.e. President instead of King
 - > Learned „Founding Fathers“
-

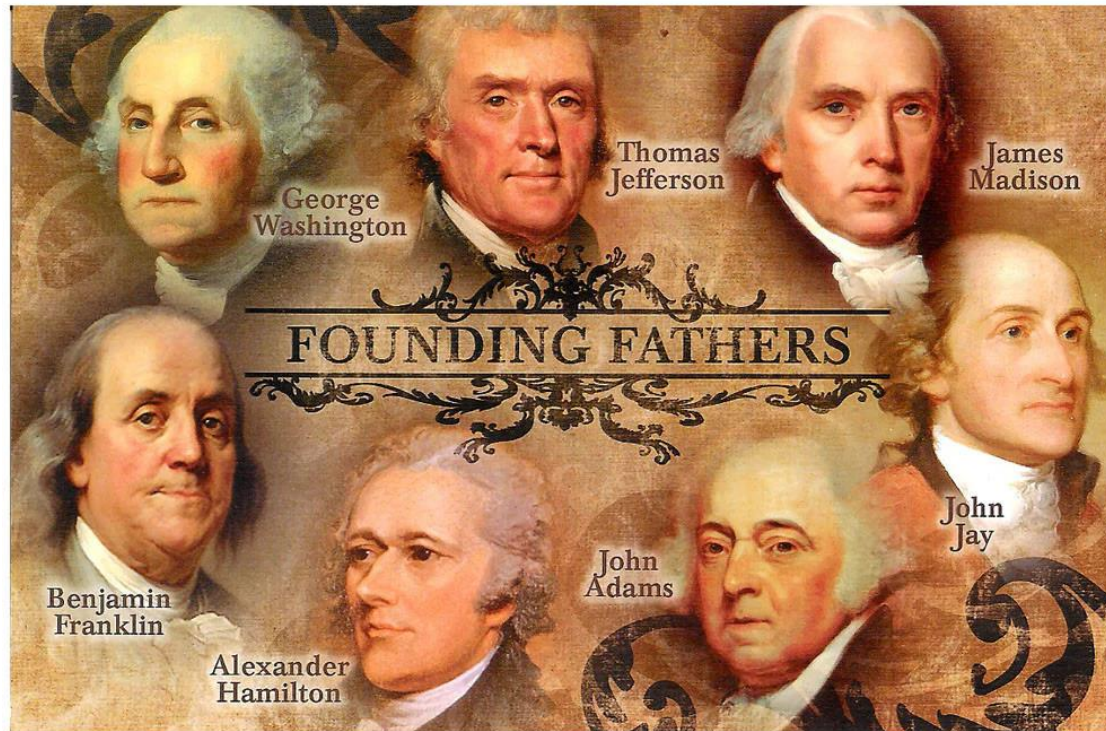
US Constitution – something completely new!

- > Historian Forrest McDonald, using the ideas of James Madison from *Federalist* 39, describes the change this way: “The constitutional reallocation of powers created a new form of government, unprecedented under the sun. Every previous national authority either had been centralized or else had been a confederation of sovereign states. The new American system was neither one nor the other; it was a mixture of both.”

Founding Fathers of the USA

- > **George Washington** (1732-1799, general, political leader, statesman, «Father of the country»)
 - > **Thomas Jefferson** (1743-1826, lawyer, diplomat, architect, philosopher, 3rd President, author of the declaration of independence, Louisiana purchase)
 - > **Alexander Hamilton** (1755-1804, legal scholar, military commander, banker, first secretary of treasury, leader for constitutional change, Federalist papers, musical)
 - > **John Adams** (1735-1826, 2nd President, leader of the American revolution)
 - > **John Jay** (1745-1829, first Chief Justice, Federalist Paper)
 - > **James Madison** (1751-1836, 4th President, father of the Constitution, Federalist Paper)
 - > **Benjamin Franklin** (1706-1790, printer, philosopher, scientist, founder of Penn, against slavery)
-
- > etc.

Founding Fathers



US Constitution (I)

- > Preamble
 - > Art. I – Legislative Branch
 - > Art. II – Executive Branch
 - > Art. III – Judicial Branch
 - > Art. IV – Relations of the States
 - > Art. V – Amending the Constitution
 - > Art. VI – National Debts
 - > Art. VII – Ratifying the Constitution
-

Legislative – Art. I

- > Specific powers in constitution
 - > F.e. war, interstate commerce, tax, etc.
 - > Regulation (necessary & proper) – weak scrutiny by courts
- > Shared power with states
- > States can regulate if completely internal
- > States can not discriminate
- > Dormant commerce clause (interstate commerce)
 - > Weak scrutiny when state law affects interstate commerce if law pursues a legitimate state interest, overweighting burden on commerce
 - > If there is no less-burdensome mean

Executive – Art. II

- > Foreign affairs
- > Commander in chief of armed forces
- > Domestic (pardons, appointment of federal offices)
- > Power to carry out law, not to make law
- > Veto (2/3 in each house)
- > Appointment of federal officers
- > Impeachment (House 2/3, Senat 2/3)
 - > Reasons (treason, bribery, high crimes, misdemeanors)
- > Immunity (civil, executive privilege)
 - > Nixon case (immunity subordinate to need evidence in criminal trial)

Judiciary – Art. III

- > Federal courts
- > Supreme court
 - > Original jurisdiction
 - > Appellate jurisdiction
- > Supremacy clause
 - > State courts must follow federal law
- > Non-judiciable cases (political questions esp. Foreign affairs)
- > Constitutional review
 - > Marbury v. Madison

Art. IV - VII

- > Art. IV – Relations of the States
 - > Art. V – Amending the Constitution
 - > Art. VI – National Debts
 - > Art. VII – Ratifying the Constitution
-

Declaration of Independence - US Constitution

- > They work together
 - > Although 11 years apart
 - > Declaration = purpose, goals of USA
 - > Constitution = bylaws (Statuten)
-

Bill of Rights

- > The Constitution has been amended 27 times since 1789.
- > In 1789, James Madison proposed twelve amendments to the First Congress. Congress approved these amendments as a block in September 1789 and eleven states had ratified ten of them by the end of 1791.
- > These ten amendments are known collectively as the United States Bill of Rights
- > Much of the initial resistance to the Constitution came, not from those opposed to strengthening the federal union, but from statesmen who felt that the rights of individuals must be specifically spelled out.

27 Amendments

- > Amendments to the Constitution subsequent to the Bill of Rights cover a wide range of subjects.
- > One of the most far-reaching is the fourteenth, ratified in 1868, which establishes a clear and simple definition of citizenship and guarantees equal treatment under the law.
- > Other amendments have limited the judicial power of the national government; changed the method of electing the president; forbidden slavery; protected the right to vote; extended the congressional power to levy taxes to individual incomes; and instituted the direct election of U.S. senators.
- > The most recent amendments include the twenty-second, limiting the president to two terms in office;
- > The twenty-third, granting citizens of the District of Columbia the right to vote for the President and the Vice President;
- > ~~The twenty-sixth, lowering the voting age to 18~~

US Constitution (2)

Amendments

- > 1-10 Amendment - Bill of Rights (1791)
 - > 1: Freedom of speech, press, assembly (important)
 - > 2: right to bear arms
 - > 3: Housing of soldiers
 - > 4: Search and arrest warrants
 - > 5: rights in criminal cases (important)
 - > 6: rights to a fair trial
-

US Constitution (3)

Amendments

- > 7: rights in civil cases
 - > 8: bails, fines and punishments
 - > 9: Rights retained by the people
 - > 10: powers retained by the states and the people
 - > 11: lawsuits against states (1798)
 - > 12: election of the President and Vice-President (1804)
 - > 13: Abolition of slavery (1865)
-

US Constitution (4) Amendments

- > 14: civil rights (1868) (important)
 - > 15: black suffrage (1870)
 - > 16: income taxes (1913)
 - > 17: direct election of senators (1913)
 - > 18: prohibition of liquor (1919)
 - > 19: woman suffrage (1920)
 - > 20: terms of the President and Congress (1933)
-

US Constitution (5)

Amendments

- > 21: repeal of prohibition (1933)
 - > 22: limitation of Presidents to 2 terms (1951)
 - > 23: suffrage in the District of Columbia (1961)
 - > 24: poll taxes (1964)
 - > 25: Presidential disability and succession (1967)
 - > 26: suffrage for eighteen-year-olds
 - > 27: Congressional salaries (1992)
 - > Proposed 1789
-

2 Fundamental Principles to limit the power of federal Government

- > The US constitution (1789) was a direct answer to dissatisfaction with the British colonial government
 - > Therefore, directed toward limiting the powers of (federal) government rather than enhancing them
 - > 2 fundamental principles
 - > Federalism
 - > Separation of powers
-

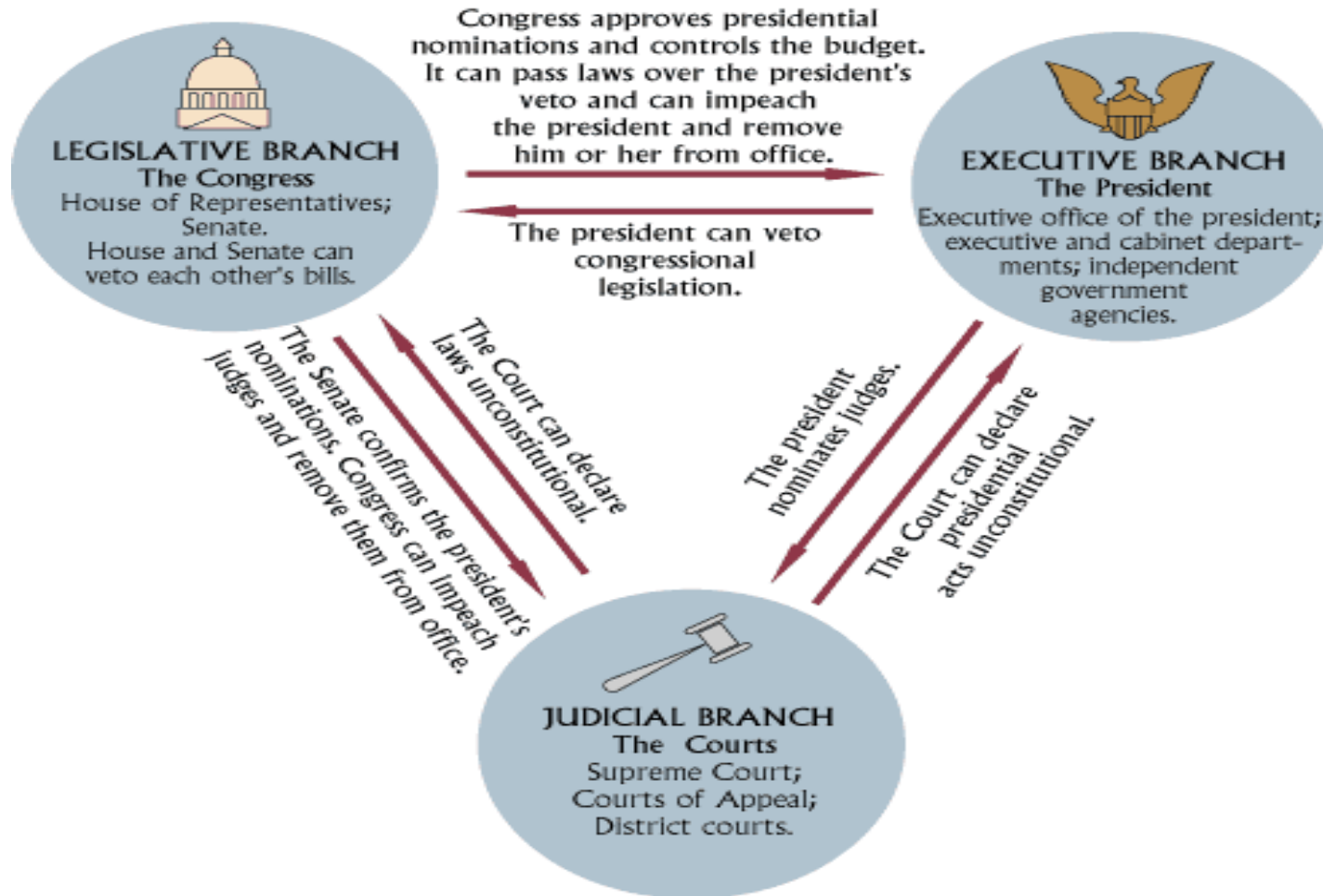
Federalism

- > Limiting governmental power by fragmenting it
 - > Enumerated powers
 - > Art. 1 Section 8, 9 and 10 USC
 - > State vs. Federal government
 - > Balance of powers
-

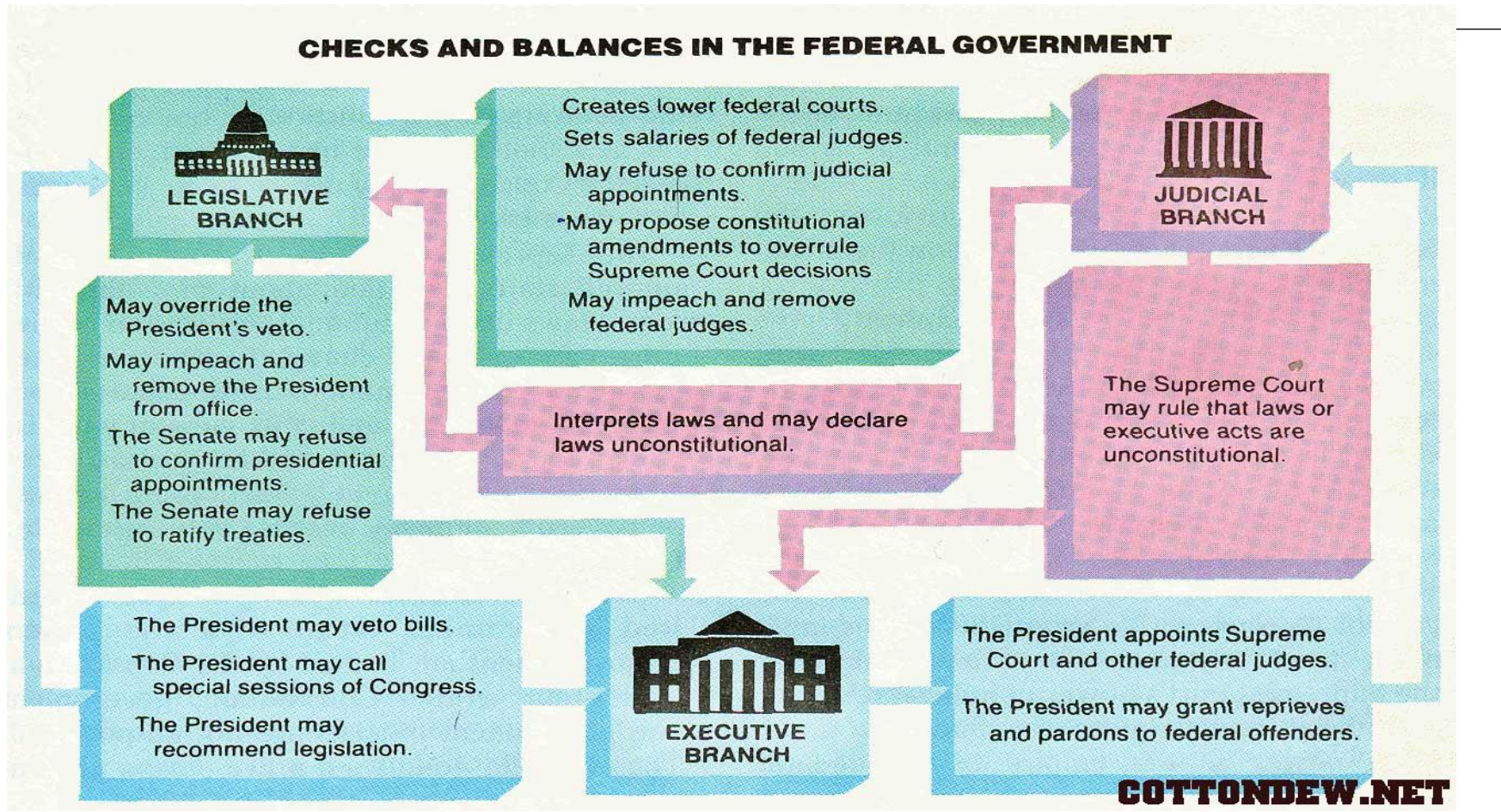
Separation of powers

- > Separation of powers and checks and balances
 - > Limiting the authority of each branch of Federal government to act without the concurrence of the others
 - > 3 branches
 - > Congress
 - > President
 - > Supreme Court
-

Checks and balances



Checks and balances



Congressional powers

- > Art. 1, Section 8 USC
 - > 18 clauses
 - > Commerce clause (clause 3)
 - > Wide interpretation (impact on interstate trade)
 - > Necessary and proper clause (clause 18)
 - > Wide interpretation
 - > Supremacy Clause (Art. VI, Section 2)
 - > Art. VI, Section 2 USC
-

Powers of the President

- > Art. II USC
 - > The executive branch
 - > Commander in Chief
 - > Treaty, Judges (Senate)
 - > State of the Union
 - > Etc.
-

Third branch – the federal Courts

- > Art. III USC
 - > US Supreme Court and inferior Courts
 - > 12 Courts of Appeal
 - > District Courts
 - > Jurisdiction
-

How Supreme Court became supreme

> Marbury v. Madison (1803)

> Facts:

- > Marbury got appointed by the outgoing Secretary of State John Marshall as justice of peace in DC
 - > Republicans v. Federalists
 - > The new secretary of State James Madison did not deliver the already signed and sealed document, based on a statutory act
 - > Marbury applied directly to the Supreme Court as provided by the Judiciary Act of 1789
 - > Chief Justice was John Marshall (!) - Bad luck!
-

How Supreme Court became supreme (2)

- > Constitution is the fundamental law of the land
 - > In cases of conflict between it and a statute, „an Act of the Legislature repugnant to the Constitution is void“
 - > Moreover, „it is emphatically the province and duty of the judicial department to say what the law is“.
 - > Judicial review is exercised not only by the SC but also by the lower federal courts and the state courts.
 - > Actions of the executive branches of government as well as those of Congress and the state legislature are subject to judicial review!
-

Other important case

- > U.S. v. Nixon (1974)
 - > Criminal trial against Nixon aides
 - > Tapes of White House conversations
 - > Nixon: separation of powers
 - > Court: no, Marbury v. Madison
 - > No general immunity for Presidents
 - > Court can decide what is needed
 - > Balancing White House confidentiality v. evidence in a pending criminal trial
-

Criticism of the Constitution

- > In the 1840-1860: because it protected slavery
- > In the early twentieth century, when the Supreme Court routinely struck down state laws limiting what sort of work contract women could make as unconstitutional, the Constitution was criticized for being such a seemingly inflexible document that it put the government at call of big business.
- > More recent criticism has often been academic and limited to particular features: whether it makes sense to give “Wyoming the same number of votes as California, which has roughly seventy times the population”.
- > Power sharing - Role of the Courts
- > Elections
- > Etc.

Next time

Donald Trump / Impeachment etc

Thank you – see you next week!